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Volume 2

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STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HAROLD GENE COLLINS

A Member of the State Bar

No. 87-O-13132

Filed January 22, 1992

SUMMARY

Respondent stipulated to professional misconduct in 14 matters over a six-year period. He admitted to a pattern of accepting employment, performing some service, failing to take action at an important point in each case, not communicating with the client thereafter and, finally, ceasing all performance on behalf of the client. In eight instances, the clients' causes of action were lost due to respondent's inaction. Respondent failed to account for and refund over $17,000 in unearned fees and costs in nine matters and misappropriated most of the funds advanced for costs.

The hearing judge found that respondent had been cooperative in the disciplinary proceeding and his misdeeds did not involve moral turpitude. In aggravation, the judge concluded that respondent disregarded his duties to clients after becoming aware of his difficulties, had not made significant restitution to clients when he was financially able to do so, and was likely to repeat his misconduct. The hearing judge recommended a five-year stayed suspension with actual suspension for two years and until respondent showed restitution and rehabilitation under standard 1.4(c)(ii). (Ronald G. Dean, Judge Pro Tempore.)

The State Bar examiner requested review, seeking respondent's disbarment. The review department modified the decision to find that respondent's overall misconduct involved moral turpitude. After reviewing comparable Supreme Court decisions concerning a pattern of wrongdoing, and considering the extent of respondent's misconduct, the harm to his clients, and the lack of strong extenuating circumstances and sustained rehabilitation, the review department recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Teresa J. Schmid

For Respondent: H. Gene Collins, 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-c] **204.20 Culpability—Intent Requirement**
221.00 State Bar Act—Section 6106
531 Aggravation—Pattern—Found
842.10 Standards—Failure to Communicate/Perform—Pattern—Disbarment

Even though an attorney's individual acts did not involve moral turpitude, the attorney's pattern of misconduct amounted to moral turpitude; habitual disregard of client interests, even where grossly negligent or careless rather than wilful or dishonest, constitutes moral turpitude and justifies disbarment.

[2] **151 Evidence—Stipulations**
166 Independent Review of Record

Even where the record at the hearing level consists of stipulated facts and conclusions, the review department's review is nevertheless independent, and it may adopt findings, conclusions, and a disciplinary recommendation different from those of the hearing judge.

[3] **151 Evidence—Stipulations**
169 Standard of Proof or Review—Miscellaneous
199 General Issues—Miscellaneous

Review department adopted parties' stipulated facts, noting that the Supreme Court ordinarily will hold an accused attorney to stipulated facts even in a matter arising from a stipulation as to facts and disposition.

[4] **151 Evidence—Stipulations**
162.20 Proof—Respondent's Burden
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106

Where the stipulation of the parties did not preclude a conclusion that respondent's misappropriations were acts of moral turpitude, and given the number and similarity of the matters in which respondent admitted to misappropriating trust funds, the burden shifted to respondent to rebut the conclusion that moral turpitude was involved.

[5] **151 Evidence—Stipulations**
169 Standard of Proof or Review—Miscellaneous
199 General Issues—Miscellaneous

Whether or not review department adopted parties' stipulated legal conclusions, the Supreme Court would not be bound by them in its independent review.

[6 a, b] **842.52 Standards—Failure to Communicate/Perform—Pattern—No Disbarment**

In cases involving a pattern of misconduct not primarily intentional in nature, and in which the attorney has no prior record of discipline, suspension and not disbarment is most likely to be deemed adequate to protect the public when a tragic event or similar set of circumstances contributed to and explained the attorney's misconduct, and when evidence of subsequent rehabilitation gives the court confidence that the pattern of misconduct is not likely to be repeated.

[7] **531 Aggravation—Pattern—Found**
571 Aggravation—Refusal/Inability to Account—Found
582.10 Aggravation—Harm to Client—Found
750.52 Mitigation—Rehabilitation—Declined to Find
801.45 Standards—Deviation From—Not Justified
822.10 Standards—Misappropriation—Disbarment
831.90 Standards—Moral Turpitude—Disbarment
842.10 Standards—Failure to Communicate/Perform—Pattern—Disbarment

Where respondent had engaged in a pattern of misconduct involving 14 matters spanning six of his nine years of practice, and had misappropriated over $17,000 of client funds and caused the extinction of legal claims for eight clients, and where respondent had engaged in further misconduct after he had recognized his case management difficulties, and had barely begun his rehabilitation, the fact that the parties did not stipulate that respondent engaged in acts of moral turpitude in any individual matter did not necessarily mean that his misconduct warranted less discipline than in comparable cases where disbarment was ordered.

[8] **802.30 Standards—Purposes of Sanctions**
822.10 Standards—Misappropriation—Disbarment

Discipline is imposed to protect the public, enforce professional standards and maintain public confidence in the legal profession, not to punish. Pursuant to these principles, the Supreme Court and State Bar Court are most concerned when it appears an attorney is likely to repeat very serious misconduct, and the misconduct is not excused by personal stress or dramatic misfortune, and the attorney has failed to make restitution to clients when the attorney had the means to do so.

[9] **582.10 Aggravation—Harm to Client—Found**
591 Aggravation—Indifference—Found
831.10 Standards—Moral Turpitude—Disbarment
842.10 Standards—Failure to Communicate/Perform—Pattern—Disbarment
1093 Substantive Issues re Discipline—Inadequacy

A lengthy suspension with a standard 1.4(c)(ii) showing was not adequate discipline, where respondent committed extensive misdeeds which became commonplace in respondent's practice, caused harm to a number of clients, and failed to rectify the harm.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
214.31 Section 6068(m)
221.19 Section 6106—Other Factual Basis
241.01 Section 6147
242.01 Section 6148
252.11 Rule 1-300(B) [former 3-101(B)]
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.01 Rule 3-500 [no former rule]
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)]

280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

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

Aggravation

Found

521 Multiple Acts

Mitigation

Found

710.10 No Prior Record

Found but Discounted

735.30 Candor—Bar
740.33 Good Character
745.31 Remorse/Restitution

Declined to Find

725.59 Disability/Illness
760.59 Personal/Financial Problems

Discipline

1010 Disbarment

OPINION

STOVITZ, J.:

In this original disciplinary proceeding, there is but one significant issue: whether respondent, Harold Gene Collins, should be suspended for at least two years as recommended by the State Bar Court hearing judge pro tempore (judge) or whether respondent should be disbarred as urged by the State Bar examiner in seeking our review of the judge's decision.

There is no dispute as to respondent's culpability of serious professional misconduct in fourteen matters which admittedly formed a pattern spanning six of his nine years of law practice. At the outset of the hearing below in this matter, respondent and the examiner signed a written stipulation evidencing that misconduct. The pattern revealed by the stipulation involved respondent accepting or appearing to the client to accept employment in a variety of matters, followed by his performance of some services in most matters (but no services in three matters), his failure to take action when an important development occurred in most of the cases and to communicate that action to his client and concluding with his refusal to take further steps for the client. In nine of the matters, he failed to account to his client for unearned advanced fees and costs totalling over $17,000 and in seven matters misappropriated most of the sums advanced for costs. By his own admission, at the time of the hearing below, he still owed clients in seven matters a total of $12,176 in restitution. Eight of respondent's clients lost their causes of action due to his inaction.

Influencing the judge's recommendation of suspension was the lack of any stipulation that respondent's misconduct involved moral turpitude or dishonesty. (See Bus. & Prof. Code, § 6106.)[1] The judge also concluded that respondent's acts were not venal but probably arose from a personality defect and an inadequate comprehension of the high duties of an attorney to clients. The judge also considered in mitigation, respondent's cooperation and candor with the State Bar. Notwithstanding these factors in mitigation, the judge also concluded that respondent was likely to repeat his misconduct, that he admittedly disregarded obligations to some clients after he had realized problems handling his clients' cases and he had not undertaken significant restitution by the close of the hearing below even though he appeared to be able to make that restitution.

[1a] As we shall discuss in this opinion, the Supreme Court has held repeatedly that the type of extensive misconduct to which respondent stipulated involves moral turpitude even though individual acts might not themselves involve moral turpitude. Since the fundamental purpose of attorney discipline is protection of the public, we view comparable decisions of the Supreme Court to guide us to recommend disbarment, rather than suspension, considering the extent of respondent's misconduct, the harm to his clients, the degree to which it pervaded his relatively brief time in law practice and the lack of evidence of his sustained rehabilitation.

I. THE RECORD

A. Procedural History.

The formal charges (notice to show cause) alleging 10 matters of misconduct were filed in late December of 1989 and respondent answered those charges the next month. On July 13, 1990, the parties submitted a stipulation as to facts and discipline but the judge rejected it. (Second Amended Stipulation as to Facts and Culpability (hereafter "S."), p. 2.) He requested that a second stipulation be prepared focusing on certain areas of fact and culpability.

After the judge's rejection of the first stipulation, the parties agreed to limit the stipulation to facts, mitigation and aggravation and omit stipulating to the degree of discipline. A trial on the issue of discipline took place on October 4, 1990. Respondent's testimony in explanation and mitigation was the only evidence received beyond a 41-page second amended stipulation and a number of at-

1. Unless noted otherwise, all references to sections are to the Business and Professions Code.

tached exhibits, including respondent's written statement in mitigation. The judge approved that stipulation with some relatively minor modifications.[2] The stipulation ultimately approved by the judge was one under rule 401 of the Transitional Rules of Procedure of State Bar concerning stipulations as to fact and not under the rules covering stipulations as to "facts and disposition." (Trans. Rules Proc. of State Bar, rules 405-408.) At the same time, the second amended stipulation stated in part: "D. It is understood and acknowledged by the parties that the Stipulation . . . shall bind the parties unless a judge of the State Bar Court, for good cause, rejects or relieves the parties from such binding effect." (S. p. 4.)

B. Summary of Respondent's Admitted Misconduct.

It is unnecessary to repeat here the full detail of the stipulated facts and conclusions in the 14 matters. However, understanding the essence of those stipulated facts is important when considering the decisive issue of the appropriate degree of discipline to recommend. The essential summary below, drawn from the stipulation and from the undisputed documentary evidence attached thereto, follows the order of the stipulation.

Count 1 (Mahan). Civil business defense litigation.

Mr. and Mrs. Gary Mahan, existing clients, hired respondent in November 1987 to defend business litigation pending against them in a King County, Washington, superior court. In January 1988, although not a member of the Washington State Bar Association, respondent filed a "general denial" in the King County court. (S. p. 5; attached exhs. A-C.)[3] In April 1988, opposing counsel moved and obtained an order of the Washington court striking the general denial and entering the Mahans' default. Respondent was unaware of the default and the resulting $129,051 judgment against the Mahans; and being so unaware, did not move to set it aside. Respondent stipulated that he attempted to appear in a jurisdiction in which he was not licensed (former rule 3-101(B)),[4] and failed to take reasonable steps to avoid foreseeable prejudice to the Mahans (former rule 2-111(A)). He also failed to respond promptly to all but a few of the Mahans' requests for information. (Bus. & Prof. Code, § 6068 (m).) Finally, respondent, with reckless disregard, did not act competently to keep himself aware of the status of the litigation. (Former rule 6-101(A)(2)[5]; S. pp. 5-6.)

In September 1988, when Ms. Mahan discovered the default judgment, she hired new counsel who was unsuccessful in attempting to vacate the default judgment. The Mahans ultimately filed bankruptcy and thereby discharged the judgment. (S. pp. 6-7.)

Count 2 (Ashton). Plaintiff employment discrimination.

In October 1987, Stephen Ashton, a former employee of a state agency, hired respondent to represent him. Ashton alleged that he had been the victim of race discrimination in employment. Respondent accepted the case on a contingent fee basis

2. The judge has detailed these changes on pages 7-8 of his decision filed April 18, 1991. In addition, the stipulation included respondent's admission to four "investigation" matters not charged in the original notice to show cause.

3. When filing his "general denial" in the Washington court, respondent used a standard California Judicial Council form patterned after the California Code of Civil Procedure and rule 982, California Rules of Court.

4. In each recital of a violation required to be "wilful" as a prerequisite to discipline (see Bus. & Prof. Code, § 6077), respondent admitted in the stipulation that his violation was wilful. Because this stipulation involves misconduct occurring under the Rules of Professional Conduct in effect before May 27, 1989, as well as under the rules in effect on and after that time, we shall use the term "former rule" to refer to the rules in effect before May 27, 1989, and the term "rule" to refer to those in effect on and after May 27, 1989.

5. In this and the other nine matters wherein respondent admitted to violations of rule 3-110(A) or its predecessor, former rule 6-101(A)(2), the hearing judge found from either the face of the admissions or the stipulated facts sufficient evidence that the violations met the prerequisites of the rule to be causes for discipline. (Decision pp. 7-8.) We adopt the judge's findings in this regard.

and Ashton advanced $1,500 in costs to be placed in respondent's trust account. Respondent corresponded with the agency and the Equal Employment Opportunity Commission (EEOC). In July 1988 Ashton terminated respondent's services but a month later re-hired him. In December 1988, after some delays not attributable to respondent, respondent filed suit on Ashton's behalf in San Bernardino County Superior Court. The state's demurrer to the complaint was sustained without leave to amend.[6] (S. p. 9.)

Respondent appealed the order sustaining demurrer. In May 1990 the Court of Appeal notified respondent he had appealed from a non-appealable order (Code Civ. Proc., § 904.1) and that unless he filed within 20 days proof of entry of a formal judgment on which to base a jurisdictionally proper appeal, the court would dismiss the appeal. Although respondent contacted opposing counsel to discuss the need for a judgment, he did not obtain it and the Court of Appeal dismissed Ashton's appeal. Respondent stipulated that he: failed to act diligently to perfect an appealable judgment (rule 3-110(A)) and to keep Ashton informed of the dismissal of his appeal (§ 6068 (m)), ceased activity on Ashton's appeal, effectively withdrawing without taking steps to avoid foreseeable prejudice to Ashton (rule 3-700(A)(2)) and kept the advanced costs in his trust account, misappropriating them for attorney fees (former rule 8-101(A) and rule 4-100(A)). (S. pp. 9-11.) Respondent owes Ashton $1,500 restitution, less the amount he actually expended in costs. (S. p. 47.)[7]

Count 3 (Worden). Plaintiff action against department store.

In December 1985 Beth Worden hired respondent to pursue her claim against a department store. Respondent took the case on a contingent fee basis and accepted $2,000 in costs he was to keep in trust. In mid-1987, respondent settled Worden's case for $10,000 and sent her $6,000 of that sum after deducting his attorney fee. (S. pp. 11-12.) Between August and October 1987 Worden repeatedly sought an accounting of settlement funds and costs and return of her files. In October 1987, after Worden complained to the State Bar, respondent returned her file to her. Two weeks later, he gave her an accounting showing all advanced costs were applied to fees. However, he had already kept the part of Worden's settlement he was entitled to as fees under his fee agreement. Respondent stipulated that he misappropriated the $2,000 in costs[8] (former rule 8-101(A)), failed to maintain complete records of Worden's funds, failed to promptly account to her for those funds (former rule 8-101(B)(3)), and failed to promptly deliver her unearned costs (former rule 8-101(B)(4)).[9] Respondent has yet to repay Worden the unearned costs. (S. p. 47.)

Count 4 (Lacey). Decedent's estate.

In August 1987 Robert Lacey hired respondent to handle the estate of one Randy Moore, apparently then in probate. (S. pp. 13-14.) At the time of Lacey's first meeting with respondent, he also met respondent's office manager, Susan O'Quinn. Following O'Quinn's directions, Lacey gave her $1,500 to pay a "probate fee" and another $1,000 to establish a joint trust account with O'Quinn and Lacey the signatories.[10]

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6. In correspondence to respondent two months prior to demurrer, the deputy attorney general assigned to defend the matter related to respondent the precise legal defects she identified in Ashton's civil complaint and previewed the grounds on which she was later to demur. (S., attached exh. E.)

7. An exhibit attached to the stipulation (exh. E) shows what appears to be a filing fee cash register imprint on Ashton's superior court civil complaint in the amount of $109. The hearing judge afforded respondent a method during probation of establishing proof of amounts he had expended for several clients as a credit to restitution he recommended.

8. An accounting respondent provided Worden earlier in the case showed he had used only $130 of the $2,000 in advanced costs. (S. p. 11.)

9. Page 13, line 13 of the stipulation mistakenly refers to respondent's violation of a non-existent provision, former rule 8-101(A)(4). In oral argument before us, the parties agreed that that reference should be to former rule 8-101(B)(4).

10. The stipulation does not detail the nature of this "probate fee" nor the purpose of the other $1,000 requested for the joint trust account.

Unknown to respondent (until later), O'Quinn put Lacey's $1,000 check in her personal account and misappropriated that money. Between August and November 1987 Lacey tried unsuccessfully to communicate with respondent about the probate's progress and to get an accounting of funds. O'Quinn intercepted Lacey's calls and respondent was not informed about them. In December 1987 O'Quinn left respondent's employ and Lacey's attempts to communicate with respondent were also unsuccessful. In May 1988 Lacey discharged respondent. Respondent had not, as of October 1990, accounted for Lacey's $2,500 advances nor returned Lacey's original papers. Respondent admitted his failure to: communicate reasonably with Lacey (§ 6068 (m); rule 3-500); ever initiate steps to probate the case, effectively withdrawing from employment prejudicially to Lacey (rule 3-700(A)(2); former rule 2-111(A)(2));[11] supervise O'Quinn (former rule 6-101(A)(2)); maintain in trust the $1,500, instead misappropriating it for fees to which he was not entitled (rule 4-100(A); former rule 8-101(A)); give accountings to his client and maintain complete records of Lacey's funds (rule 4-100(B)(3); former rule 8-101(B)(3)) and promptly deliver Lacey's property (rule 4-100(B)(4); former rule 8-101(B)(4)). (S. pp. 14-17.)

As of the State Bar trial in this matter, respondent had still not restored Lacey's $2,500. (S. p. 47.)

Count 5 (Clark I). Plaintiff corporate securities civil action.

In August 1985 Kenneth Clark hired respondent to sue certain people for fraud under the federal Securities Act and other causes. Clark advanced respondent $2,000 towards fees and costs. In December 1985 respondent filed suit for Clark in United States District Court, Central District of California. On respondent's motion in October 1986, the district court entered the default of one defendant. Respondent failed to cause the default judgment to be entered. In June and July 1987 respondent failed to comply with court rules to prosecute Clark's suit and, after three orders to show cause, the court dismissed it. (S. pp. 18-19; attached exh. M.)[12] Respondent stipulated that he ceased activity for Clark thereby withdrawing prejudicially to him. (Former rule 2-111(A)(2).) Meanwhile, respondent failed to communicate with Clark between October 1986 and August 1987 (§ 6068 (m)) and respondent's failure to get a judgment against one of Clark's defendants impaired Clark's ability to collect funds owed him. (S. pp. 19-20.)

Count 6 (Clark II). Plaintiff breach of contract action.

In September 1985 Clark had also hired respondent to sue a business and an individual for breach of contract. For this matter, Clark advanced respondent $500 toward attorney fees and $124 for costs. (S. p. 20.) The next month, respondent filed suit for Clark and performed services in the matter until August 1986. By that time, Clark's advance fees had been used up and respondent failed to have Clark make a necessary decision as to whether or not Clark wanted to pay the cost of taking two depositions. Between August 1986 and October 1987 respondent failed to perform any further services for Clark, failed to correspond with him and failed to formally withdraw. By such failure respondent violated former rule 2-111(A)(2)[13] and failed to act competently per former rule 6-101(A)(2). (S. pp. 20-21.)

Clark hired new counsel who was able to resolve the case in Clark's favor. (S. p. 21.)

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11. We follow the hearing judge's rejection of the stipulation's conclusion of a rule 3-700(D)(1) violation (upon withdrawal, failure to promptly return client papers) since the facts supporting it occurred prior to the effective date of the rule. (See decision p. 7.)

12. Documents attached to the parties' stipulation show that respondent was unable to effect service of New York defendants either personally or through the Secretary of State. (S., attached exh. M.)

13. At oral argument before us, the parties agreed that the reference on page 21, lines 24-25 of the stipulation to a former rule should read: "2-111(A)(2)."

Count 7 (Belz). Plaintiff corporate securities civil action.

Raymond Belz and others hired respondent in October 1985 to sue certain people for fraud under the federal Securities Act and other causes. Belz advanced respondent $1,000 for costs. One year later, respondent filed a federal district court suit for Belz and the other plaintiffs. Between February and April 1987 the district court directed respondent twice to show cause why Belz's suit should not be dismissed for failure of prosecution. In April of 1987 the court dismissed the suit. (S. pp. 22-23; attached exh. Q.)

After hiring respondent, Belz made many unsuccessful attempts to contact him. Belz's last successful contact with respondent was in May 1986, almost a year before the court dismissed Belz's case. Respondent admittedly violated section 6068 (m). (S. pp. 23-24.) Respondent failed to tell Belz that the case had been dismissed. In July 1987 respondent moved his office, notified other clients of the move, but Belz did not receive the notice. These facts, together with respondent's cessation of activity in Belz's matter amounted to a violation of former rule 2-111(A)(2). Moreover, respondent violated former rule 8-101(A) by failing to maintain in trust $676 of Belz's $1,000 cost advance, misappropriating that sum for fees contrary to respondent's fee agreement with Belz. (S. pp. 23-24.) Respondent had not made restitution of the $676. (S. p. 48.)

The stipulation does not state whether Belz and his co-plaintiffs were able to ultimately prevail against the defendants. However Belz hired another attorney who sued respondent for legal malpractice. That case was settled in Belz's favor for defense costs. (S. p. 23.)

Count 8 (Barranco). Plaintiff wrongful termination suit.

After termination from employment, Maria Barranco hired respondent in February 1988 to press legal action against her former employer. In September 1988 Barranco advanced respondent $2,500 in costs. Between November 1988 and February 1989 respondent failed to communicate with Barranco despite her many telephone calls and one visit to respondent's office at a time when he was in the office.[14] At the end of January 1989 Barranco discharged respondent and requested a cost refund. Ten days later, respondent wrote Barranco that he was ceasing all work on her case and was returning her cost advance but he did not actually return the $2,500 until April 21, 1989, after being contacted by the State Bar. Respondent stipulated that his misconduct in this matter violated former rules 2-111(A)(2), 8-101(B)(3) and 8-101(B)(4). (S. pp. 24-27.)

Respondent also admitted that he performed no substantial services for Barranco and failed to communicate with her on a regular basis in violation of section 6068 (m). Respondent was waiting for additional information from Barranco to proceed on her behalf but Barranco was unaware of the need for that information. (S. p. 26.)

Count 9 (Campbell). Plaintiff legal malpractice suit.

In June 1983, two years after respondent was admitted to the practice of law, he accepted employment from James Campbell to pursue a legal malpractice action against Campbell's former lawyers. Campbell advanced respondent $865 toward fees and costs. In May 1984 respondent filed suit for Campbell; but, except for filing a successful opposition in August 1987 to the court's motion to dismiss Campbell's suit, respondent failed to perform services. After successfully opposing the dismissal, respondent failed to move the case along because Campbell's defendant "was in bankruptcy." (S. p. 27.)

In October 1987 Campbell added respondent to the list of lawyers he was suing for legal malpractice.

14. At oral argument before us, the parties agreed that the reference on page 25, line 8 of the stipulation to "early February" was to the year 1989.

Respondent withdrew as counsel of record for Campbell on the ground of Campbell's suit against respondent, but respondent's withdrawal was not until April 1989, less than one month before the five-year statute was to run. This withdrawal was prejudicial to Campbell in violation of former rule 2-111(A)(2). (S. pp. 27-29.)

In the meantime, between January and September 1987 respondent violated section 6068 (m) since Campbell was unsuccessful in communicating with respondent despite placing at least 44 phone calls to his office and writing one certified mail letter to recover an accounting (of advanced funds) and his (Campbell's) file. (S. p. 28.) At times, during this period, Campbell was able to speak to respondent's secretary, O'Quinn, who cancelled appointments with respondent and blocked Campbell's attempts to review his file. O'Quinn also falsely told Campbell that his case was moving properly. Respondent failed to supervise O'Quinn in violation of former rule 6-101(A)(2). Respondent also admitted his failure to provide Campbell with an accounting of funds in violation of former rule 8-101(B)(3).

Count 10 (Randell). Plaintiff wrongful termination suit.

In January 1987 respondent was "consulted" but did not consider himself retained by Gladys Randell in a wrongful termination matter. Respondent had no retainer agreement with Randell and received no advance fees or costs. That month, after reviewing Randell's documents, respondent wrote a letter to a federal agency informing it of Randell's desire to sue. (S. p. 30; attached exh. U.) The next month, the EEOC wrote to respondent as to its requirements and requesting that within 10 days, Randell furnish specified information. (*Id.*; attached exh. W.) Respondent failed to inform Randell of the EEOC demand, failed to reply to the EEOC demand and failed to protect her interests or to withdraw properly, thereby prejudicing her. Respondent did not advise Randell until late June 1987 that he would not represent her, after respondent received a June 7 letter from the EEOC "cancelling [Randell's] complaint for failure to prosecute." Respondent agreed that his failures amounted to violations of section 6068 (m) and of former rules 2-111(A)(2) and 6-101(A)(2). (S. pp. 31-32.)

Not until July 11, 1987, four days after the EEOC limitations period ran, did Randell receive her file. In the meantime, Randell had unsuccessfully tried to contact respondent between January and July 1987 because she was aware of the limitation period for her claim. Respondent's staff misrepresented that Randell's case was proceeding and respondent failed to supervise his staff in violation of former rule 6-101(A)(2).

Investigation matter 89-O-14039 (West). Marriage dissolution.

In February 1988 Elvira West consulted with respondent to seek a marriage dissolution. He told her he would require advance fees and costs of $1,500. In May 1988 West hired respondent and paid the $1,500 advance.[15] A short while later, respondent told West he would file and serve a dissolution petition by August 1988. In a mid-summer 1988 meeting with West, respondent told her that his office was backlogged and he would file her petition soon. (S. p. 33.)

In October 1988, after respondent had prepared but before he had filed West's petition, the couple reconciled. West asked respondent for a refund of unearned fees. After respondent asked West to put her request in writing, she did so but between December 1988 and March 1989, respondent ignored West's five phone messages and another letter. He failed to maintain in his trust account the $1,500 for advance fees and costs, instead misappropriating the sum in violation of former rules 8-101(A), 8-101(B)(3) and 8-101(B)(4). By failing to promptly return upon withdrawal, West's papers and unearned fees, respondent violated former rules 2-111(A)(2) and 2-111(A)(3).

15. The stipulation is unclear as to whether this $1,500 was to cover only fees or both fees and costs. At oral argument, the parties agreed that this amount was to cover both fees and costs.

Investigation matter 89-O-16734 (Hill). Plaintiff wrongful termination suit.

After being terminated from employment with a Southern California city, Alexander Hill hired respondent to represent him in June 1988. Hill advanced respondent $2,500 for fees but respondent did not enter into a written retainer agreement with Hill in violation of sections 6068 (a) and 6148 (a). (Decision pp. 8-9; S. pp. 35, 37.) Respondent told Hill he would file suit for him and it would take 12 to 18 months to get a court date. Respondent failed to perform any services for Hill, thus withdrawing prejudicially in violation of former rule 2-111(A)(2) and rules 3-700(A)(2) and 3-700(D)(1).

Between August and November 1989 Hill contacted respondent five times to learn the status of his case. Respondent spoke to him once during this period, had no record of his case, later searched for Hill's file but failed to respond to his inquiry. Respondent stipulated to his violation of section 6068 (m) and rule 3-500. Although respondent received Hill's October 1989 certified letter requesting return of his documents and $2,500, respondent failed to comply until March of 1990 after a State Bar complaint had been filed. At that time, he returned Hill's $2,500. Respondent has not been able to find Hill's file or original records including tape recordings and transcripts. Respondent agreed that he had violated former rule 6-101(A)(2) and rule 3-110(A). Respondent's failure to repay Hill promptly Hill's unearned fees and failure to account for them violated former rules 8-101(B)(3) and 8-101(B)(4) and rules 4-100(B)(3) and 4-100(B)(4). (S. pp. 36-38.)

Investigation matter 89-O-16896 (Lancaster). Plaintiff wrongful termination suit.

Robert Lancaster was terminated from his job with a corporation in February 1986. One month later, he hired respondent on a contingent fee basis. Lancaster advanced respondent $3,000 for costs. Respondent gave no written retainer agreement to Lancaster in violation of sections 6068 (a) and 6147 (a). (Decision pp. 8-9; S. pp. 38, 40; attached exh. Z.) In November 1986 respondent filed a superior court suit for Lancaster.

After not communicating with Lancaster for five months (from November 1986 to April 1987), respondent had four conversations with him between June 1987 and April 1989. At each contact, respondent told Lancaster that his case was "proceeding along well." (S. p. 38.) In July 1989 Lancaster's former employer filed a motion for judgment on the pleadings, or, in the alternative, to strike portions of Lancaster's complaint. In August 1989 respondent met with Lancaster and told him he had no case based on a recent Supreme Court decision. (S. p. 39.)[16] Meanwhile, six days earlier, respondent had filed a statement of non-opposition to the defense motion, requesting 30 days leave to amend the complaint. The court granted the defense motion but allowed Lancaster 30 days to amend. Although respondent received the court order, he failed to amend his complaint. Instead, on October 26, 1989, respondent filed a dismissal with prejudice of Lancaster's entire suit. Respondent admitted his violation of rule 3-110(A).

On October 10, 1989, Lancaster requested of respondent an accounting of unused costs. Respondent promised it twice during that month but never furnished it and never refunded Lancaster's $3,000 advance. Respondent's cost ledger sheet shows no expenditures of the $3,000 cost advance (even though respondent did file a civil complaint which required a superior court filing fee). With regard to his failure

16. The Supreme Court case referred to was not identified in the record. *Foley* v. *Interactive Data Company* (1988) 47 Cal.3d 654 eliminating tort causes of action in certain wrongful termination cases was filed in December 1988, well before respondent's August 1989 conversation with Lancaster and during the time that respondent was telling Lancaster his case was proceeding well. However, in May 1989, the Supreme Court filed *Newman* v. *Emerson Radio Corp.* (1989) 48 Cal.3d 973, 976, which made the *Foley* doctrine retroactive to cases not final as of January 30, 1989. In moving for judgment on the pleadings, Lancaster's defendant relied on both *Foley* and *Newman* as well as other legal principles to defeat Lancaster's suit, such as that the suit was preempted by federal law ("ERISA") (S., attached exh. Z.) The cited wrongful termination cases did not eliminate the ability to sue for wrongful termination but limited the causes or theories which could be the basis of recovery.

to render Lancaster his requested accounting and his retention of unearned costs, respondent admitted that he violated rules 3-700(D)(1), 4-100(A), 4-100(B)(3) and 4-100(B)(4). (S. pp. 39-42, 47; attached exh. HH.)

Investigation matter 90-O-10258 (Williams). Plaintiff sex discrimination suit.

Gary Williams had been employed as an accounting supervisor by a public agency. In April 1988 he was terminated from employment. He claimed that agency management had subjected him to verbal abuse of a sexual nature, causing him to take a disability leave. On May 6, 1988, he hired respondent to represent him. Respondent agreed to file an action against the agency for sex discrimination and to represent Williams at a board hearing on unemployment benefits. Respondent and Williams entered into a fee agreement and Williams advanced $1,000 toward costs. (S. p. 42; attached exh. BB.)

Respondent failed to appear at the August 1988 unemployment hearing due to a date conflict. It was continued several times but another attorney who ultimately appeared for respondent was not successful in getting benefits for Williams. Williams appealed the denial in pro. per. and was able to get his unemployment benefits. (S. p. 42.)

In April 1989 respondent filed suit for Williams based on sex discrimination. In August 1989 defendants moved for summary judgment. Respondent reviewed the motion, discovery and law and concluded that Williams would not probably succeed. He did not oppose defendants' motion and in October 1989, judgment was entered for defendants. After entry of judgment, respondent met with Williams, told him about the judgment, advised him to "put the matter behind" him and told him that all of the $1,000 in costs had been used up. (S. p. 43.) Williams told respondent he wanted to appeal and understood that respondent would handle the appeal, conduct research to define appeal grounds and inform Williams if no appeal grounds existed. Williams repeated his instructions twice in letters to respondent sent in October and November 1989. On November 27, 1989, respondent told Williams he would not file an appeal for him because of lack of merit. This was respondent's first express statement of withdrawal from Williams's case. Respondent failed to return Williams's documents as requested, failed to provide an accounting for costs and failed to maintain in trust the $1,000 costs, misappropriating them for attorney fees.[17] Respondent did not repay Williams the unearned costs. (S. pp. 43-44.)

As a result of his misconduct in this matter, respondent admitted violating section 6068 (m) and rule 3-500 by not informing Williams of a significant development in his matter such as having filed no opposition to the summary judgment motion. Respondent also violated rules 3-110(A) and 3-700(D)(1) and the trust account rules: 4-100(A), 4-100(B)(3) and 4-100(B)(4). (S. pp. 44-46.)

C. Evidence re Mitigation and Aggravation.

In mitigation, the parties stipulated that respondent was admitted to practice law in 1981 and has no prior discipline, that he was candid and cooperative with the State Bar during formal proceedings and that he has expressed remorse and a desire to improve his office practices to better inform his clients. The parties agreed to attach respondent's written statement in mitigation, nine character reference letters and a commendation by the Board of Governors of the State Bar given respondent in 1988 for outstanding contributions to delivery of pro bono legal services. (S. p. 46; attached exh. CC.) However, the parties did not stipulate as to whether this material constituted mitigation under the Standards for Attorney Sanctions for Professional Misconduct ("stds.").

At trial, respondent also testified briefly in mitigation. His testimony was consistent with his written statement. Collectively, that evidence shows: respondent served as a police officer and deputy sheriff

17. As in the Ashton and Lancaster matters, respondent properly used a small but unstated portion of the cost advance for the court filing fees of Williams's suit.

for 17 years before becoming a lawyer. After admission to the practice of law, he went right into solo practice. Fearing not enough work, he took on an ever-increasing number of cases until, at one point, he had 180 active cases. He also had a problem with being unable to turn down clients or client requests. Many of respondent's cases required much court appearance time, thus taking him away even more from the office and communication with his many clients.

Respondent never had a business background and he began to realize he had office management problems in late 1988. At that time, he began to reduce his caseload. By the time of trial, he had reduced his caseload to 40 matters and had improved his ability to return client phone calls. Yet he reported that he still had a heavy court appearance calendar. Starting in July 1990 respondent has consulted a psychologist to help him better understand his situation. That psychologist reported noting no evidence of any personality disorder but that respondent did appear to be a "super-responsible" type who took on more than he could handle, given the limitations of his staff. Respondent never asserted any domestic, financial, drug, alcohol, health or other pressures, stresses or problems which underlay his misdeeds.

Respondent testified that he was waiting until State Bar proceedings concluded to make restitution (R.T. p. 14), but he appeared to be both able and willing to repay his clients promptly (R.T. pp. 29-30.). He had not acknowledged that he owed his clients any refunds until he reached the first (rejected) stipulation with the State Bar examiner. Respondent expressed regret and distress about the clients he harmed. He felt he did a good job for the vast majority of his clients. He acknowledged, however, that "some" clients "fell through the cracks." (R.T. p. 30.) Respondent assured the hearing judge he was doing all possible to prevent a recurrence and had plans, depending on the outcome of the matter, to associate with other lawyers in order to achieve the structured environment he knew he needed.

Respondent's nine character letters were from a mixture of sources: lawyers, clients and one law enforcement officer. None stated awareness of the nature or extent of respondent's misdeeds, most focused on his good work in recent years (1988-1990) and a few commented mostly on respondent's community service or general integrity. These letters praised respondent and those that focused on his attorney skills praised his diligence, integrity and moral character. (S., attached exh. CC.)

In aggravation, the parties stipulated that respondent's misconduct evidenced multiple acts and a pattern, that it involved mishandling of and failure to account for trust funds, that his acts caused significant harm to clients in eight of the matters resulting in loss of causes of action in each of those matters, that respondent failed to take prompt or spontaneous steps to atone by failing to make restitution in seven of the matters and that respondent failed to return Williams's files and property. (S. pp. 47-48.)

D. The Judge's Decision and Recommendation.

In his decision, the judge posed the question whether respondent was likely to repeat his misconduct and concluded that he was. (Decision pp. 10, 13.) The judge noted in part that 13 of the 14 matters involved respondent's abandonment or disregard of client interests and 10 of the matters involved trust account violations, 5 involving misappropriation of advanced costs. (*Id.*, pp. 10-11.) The judge also noted respondent's attribution of his problem to having taken on too many cases but concluded that that explanation could justify neither his misappropriation of funds nor his misconduct in 1989 and 1990 after he had realized his office management and too-heavy caseload problems. (*Id.*, pp. 11-12.)

Further, the judge observed that not until July 1990 did respondent make an effort to identify the restitution owed to clients and had not yet repaid the amounts. Respondent's character references were not considered to be an "extraordinary" showing of good character. The judge did consider significant, respondent's exemplary candor and cooperation and the lack of any finding or conclusion in the stipulation of moral turpitude. The judge concluded that respondent's actions were not venal, but that "while respondent has certainly a determination for rehabilitation, that process is barely out of infancy." (Decision p. 14.)

The judge distinguished several of the cases cited by the examiner who had sought disbarment. Concluding that "[s]trictly applied," the applicable standards would call for respondent's disbarment, the judge believed that disbarment was too harsh in light of respondent's remorse and determination for rehabilitation. Nevertheless, in view of respondent's persistent failure to make restitution and the need for a "substantial period of rehabilitation" before allowing respondent to practice law, the judge recommended suspension for five years, stayed on conditions of a like period of probation and actual suspension for two years and until respondent makes a rehabilitative showing required by standard 1.4(c)(ii). Other duties recommended included the making of restitution, participation in psychiatric or psychological counselling, completion of a course on law office management, development of a law office organization plan, and completion of the State Bar's "ethics school."

II. DISCUSSION

A. Culpability and the Appropriate Conclusion re Moral Turpitude.

Neither party contests the judge's findings and conclusions including that portion of the judge's decision pointing out the lack of any stipulated fact or conclusion of moral turpitude arising from respondent's misconduct. Before passing to the issue which is contested—the appropriate degree of discipline—we observe that the issue of discipline is obviously influenced by the appropriate findings and conclusions to be drawn from the record.

[2] Although this record rests centrally on stipulated facts and conclusions, our review is nevertheless independent. We may adopt findings, conclusions and a disciplinary recommendation different from those of the hearing judge. (Trans. Rules Proc. of State Bar, rule 453(a); see *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327, 332-333.) **[3]** On independent review as to the facts, except where noted *ante* in insignificant aspects, we have adopted those contained in the parties' second amended stipulation, noting that the Supreme Court ordinarily will hold the accused attorney to stipulated facts even in a matter arising from a stipulation as to facts and disposition.[18] (See, e.g., *Pineda* v. *State Bar* (1989) 49 Cal.3d 753, 756; *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 793-794.)

[4] We also agree with the judge's conclusions as to the 14 individual matters with one very important reservation. As to respondent's admitted misappropriations in the Ashton, Worden, Lacey, Belz, West, Lancaster and Williams matters, we believe that the record may well warrant the conclusion that those misappropriations were not merely violations of the Rules of Professional Conduct but were also acts of moral turpitude proscribed by section 6106. In the first place, in agreeing that respondent had misappropriated funds, two of the three Supreme Court opinions cited by the parties in the stipulation held that the attorney had engaged in a wilful misappropriation. (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795; *Jackson* v. *State Bar* (1979) 25 Cal.3d 398, 403-404.) The Supreme Court has stated, "There is no doubt that the wilful misappropriation of a client's funds involves moral turpitude." (*McKnight* v. *State Bar* (1991) 53 Cal.3d 1025, 1033-1034; *Bate* v. *State Bar* (1983) 34 Cal.3d 920, 923.) Second, there is no language in the stipulation which precludes a conclusion that respondent violated section 6106 and three of the original charges alleged that he had violated that section. Third, given the number of matters in which respondent admittedly misappropriated trust funds and the similarity of those misdeeds, we believe that the burden shifted to respondent to show that moral turpitude was not involved. This respondent did not do. (See *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37; *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 475.)

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18. As noted, this stipulation was only as to facts and conclusions.

19. **[5]** Whether or not we adopted the stipulated conclusions would not bind the Supreme Court in its own independent review of the record. (See *Schneider* v. *State Bar*, *supra*, 43 Cal.3d at p. 794.)

[1b] However, we need not determine whether any of respondent's *individual* acts of misconduct involved moral turpitude[19] **[5 - see fn. 19]** because his admitted *pattern* of misconduct clearly amounts to moral turpitude under our reading of Supreme Court decisions.

[1c] The Supreme Court has decided a number of similar "pattern" misconduct cases in the past. The Court has often stated that habitual disregard of client interests is ground for disbarment. "Even when such neglect is grossly negligent or careless, *rather than wilful and dishonest*, it is an act of moral turpitude and professional misconduct justifying disbarment." (*Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 566, emphasis added; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117, and cases cited by both opinions.) Thus we must conclude that the effect of respondent's admitted misconduct in the 14 matters warrants the conclusion that respondent habitually disregarded his client's interests and therefore committed acts of moral turpitude, particularly in light of the similarity of misconduct, the frequency thereof and its admitted pattern.

B. Degree of Discipline.

In urging that we recommend respondent's disbarment, the examiner points to the seriousness of admitted aggravating factors surrounding respondent's misdeeds compared to the judge's recognition of the limitations of respondent's mitigation. The examiner distinguishes the cases relied on by the judge as involving either less serious misconduct or greater mitigation. We agree with the examiner's overall position and have concluded that the magnitude and severity of respondent's offenses, together with the weakness in the mitigative or rehabilitative showing as determined by the judge below warrant our recommendation of disbarment.

[6a] Our review of the record and our own research have led us to five opinions of the Supreme Court in similar "pattern-type" misconduct cases in which the attorneys had no prior record of discipline and in which intentionally dishonest acts did not form the essence of the misconduct:

In re Billings (1990) 50 Cal.3d 358 (15 matters of partial or complete abandonment of clients; one conviction of driving while intoxicated; disbarment);

Walker v. *State Bar*, *supra*, 49 Cal.3d 1107 (abandonment of entire law practice, coupled with attempted misappropriation of some clients' funds; disbarment);

Silva-Vidor v. *State Bar* (1989) 49 Cal.3d 1071 (14 matters of misconduct including 13 instances of failure to perform services, dishonest acts in four of the matters; suspension);

Pineda v. *State Bar*, *supra*, 49 Cal.3d 753 (seven matters of failure to perform services including failure to refund unearned fees in four of the matters, one matter of misrepresentation and one of misappropriation; suspension); and

Coombs v. *State Bar* (1989) 49 Cal.3d 679 (13 matters of failure to perform services with misrepresentation in four of the matters, one conviction of driving while under influence of alcohol; disbarment).

[6b] Our review of these cases has led us to conclude that when the Supreme Court has deemed suspension adequate, it has considered most significant the existence or non-existence of a tragic event or set of circumstances which altered the attorney's behavior, which could explain the attorney's misconduct followed by sufficient evidence of rehabilitation to give the court confidence that the attorney's pattern would not repeat. Also significant were the specific recommendations, respectively, of the hearing referee and former review department.

For example, in *Silva-Vidor* v. *State Bar*, *supra*, 49 Cal.3d 1071, where the Supreme Court imposed only one year of actual suspension for 14 matters of misconduct, the referee had recommended only a 30-day actual suspension and the former review department recommended a two-year actual suspension. In addition, the attorney had suffered a series of tragic personal and health calamities, had stipulated to her misconduct and had presented clear evidence of two or three years of trouble-free conduct with a great deal of her recent practice representing the disadvantaged.

In *Pineda* v. *State Bar*, *supra*, 49 Cal.3d 753, relied on by the judge, only half the number of matters were involved as in the matter we review. The referee approved a stipulation for five years stayed, and one year actual suspension. The attorney petitioned for review when told that the Supreme Court was considering greater discipline. After considering disbarment, the Court increased the actual suspension to two years. It noted the cooperation shown by Pineda's stipulation, the remorse and determination to improve his practice, the reforms he had undertaken, and that some of his misconduct happened during the breakup of his marriage.

[7] Here, we have fourteen matters of admitted misconduct spanning six of respondent's nine years of law practice. While there was no evidence of intentional acts of dishonesty, respondent has admitted misappropriating over $17,000 of advance fees or costs (mainly costs) in seven of the matters. Eight clients were harmed by extinction of their causes of action. The hearing judge noted that respondent's rehabilitation is "barely out of its infancy" (decision p. 14); and, unlike, Pineda and Silva-Vidor, here respondent committed misconduct in several matters *after* he had realized his problem of mismanagement and had taken steps to deal with it in late 1988. We believe that the judge's suspension recommendation was influenced significantly by his assumption that because the parties did not stipulate that moral turpitude was involved in any of the individual matters, this case is deserving of less discipline than comparable "pattern-offense" cases in which the Supreme Court ordered disbarment.

[8] We recommend discipline to protect the public, enforce professional standards and maintain public confidence in the legal profession, not to punish. (See *Walker* v. *State Bar*, *supra*, 49 Cal.3d at p. 1117; see also std. 1.3.) Measured by these principles, we should be most concerned, as is the Supreme Court, when it appears that an attorney is likely to repeat the very serious misconduct of which he has been found culpable. (See *Cooper* v. *State Bar* (1987) 43 Cal.3d 1016, 1029.) That is exactly what the hearing judge opined in this case. Respondent's mitigation is not of the type of dramatic misfortune or personal stress which could excuse an otherwise diligent practitioner's errors. Moreover, his cooperation and candor to the State Bar is undermined by the fact that he has yet to make amends to seven of his clients while appearing to have the resources to do so.

[9] In our view, lengthy suspension with a standard 1.4(c)(ii) showing is not adequate in this case to address respondent's extensive misdeeds which became commonplace in his law practice and which harmed a number of clients, which harm has yet to be rectified. (See *Martin* v. *State Bar* (1991) 52 Cal.3d 1055, 1065 (dis. opn. of Lucas, C.J.).) As to the protection afforded the public by a reinstatement proceeding after disbarment, see *Stanley* v. *State Bar*, *supra*, 50 Cal.3d at p. 570.

III. RECOMMENDATION

For the foregoing reasons, we recommend[20] that respondent, Harold Gene Collins, be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys in this state. We further recommend that he 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 Supreme Court's order. We also recommend that costs be awarded the State Bar.

We concur:

PEARLMAN, P.J.
NORIAN, J.

20. We note that over six weeks after this review proceeding was submitted, respondent tendered his resignation from membership in the State Bar. It has not yet been accepted by the Supreme Court which has the sole authority in this state to accept such a resignation. (See Cal. Rules of Court, rule 960(c).) Since we were close to filing our opinion at the time respondent tendered his resignation, we have decided to file this opinion for greater guidance of the parties and Supreme Court on the issue of respondent's resignation; and, if the Court accepts the resignation, for the assistance of all should respondent thereafter seek reinstatement.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT F

A Member of the State Bar

No. 87-O-15284

Filed February 4, 1992

SUMMARY

Respondent's former clients claimed that respondent had intentionally misappropriated substantial sums from a personal injury settlement and had unilaterally withheld these sums without authorization. These claims were false, but due to the mishandling of two checks by respondent's office, respondent's trust account had contained slightly less than it should have for about six weeks. The hearing judge concluded that respondent had committed a "technical misappropriation" and had not promptly refunded the unearned part of an advance fee upon termination of employment by the former clients. Finding no aggravating circumstances and favorable character testimony as a significant mitigating circumstance, the hearing judge recommended six months stayed suspension, one year probation, and 30 days actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

Respondent sought review. The review department held that she had committed a minor trust account violation, but not misappropriation, and that she had acted properly by retaining certain funds in a trust account when she faced competing demands from her clients and from a third party to whom she owed a fiduciary obligation. In addition to favorable character testimony, the review department found two other mitigating circumstances: (1) severe emotional difficulties and time constraints which had contributed to respondent's mishandling of trust funds and (2) the extraordinarily harsh effects of the disciplinary proceeding on respondent and her ability to earn a living. The review department reduced the sanction to a private reproval.

COUNSEL FOR PARTIES

For Office of Trials: Jill Sperber

For Respondent: Frank M. Pitre, 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] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
1099 Substantive Issues re Discipline—Miscellaneous
The respondent's name does not appear in an opinion imposing a private reproval, although the proceeding remains public. (Trans. Rules Proc. of State Bar, rule 615.)

[2] **280.00 Rule 4-100(A) [former 8-101(A)]**
Where a client authorized respondent to deduct attorney fees for one matter from settlement proceeds in another matter, respondent had no reason to keep the fees which were due to her in a trust account, and did not violate the trust account rules by failing to do so.

[3] **280.00 Rule 4-100(A) [former 8-101(A)]**
Absent guidelines from the State Bar, it was reasonable for respondent to keep $121.83 of personal funds in her trust account to pay for bank charges, as permitted by the trust account rules. This sum did not threaten the integrity of the clients' funds.

[4] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where a client was not yet entitled to receive settlement proceeds because the client had not signed the necessary release, respondent's eight-month delay in sending a portion of the settlement funds to the client did not violate the obligation to pay client funds promptly upon demand.

[5 a-c] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
Where respondent inadequately supervised her trust accounts over a period of several months and carelessly wrote a check which reduced the balance in a trust account slightly below the necessary amount, respondent's conduct did not amount to gross negligence, and thus did not constitute moral turpitude, but respondent did violate the rule requiring client funds to be held in trust.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
An allegation of an act of moral turpitude or dishonesty encompasses the lesser allegation of a violation of the trust account rules, where the pleading clearly raises the issue of the misuse of trust funds.

[7] **162.20 Proof—Respondent's Burden**
163 Proof of Wilfulness
204.10 Culpability—Wilfulness Requirement
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Although an attorney cannot be held responsible for every detail of office operations, the attorney violates the trust account rules if the attorney does not manage funds as required by the rules, regardless of the attorney's intent or the absence of injury to anyone. Violations resulting from serious and inexcusable lapses in office procedure may be deemed wilful despite the absence of deliberate wrongdoing. If an attorney's trust account balance drops below the necessary amount, an inference of misappropriation may be drawn. The burden then shifts to the attorney to show that office procedures were adequate.

[8] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation

Not every trust account violation rises to the level of misappropriation. Because of the serious opprobrium attaching to the term "misappropriation," the term is appropriate only when the level of misconduct rises at least to gross negligence.

[9 a-e] **141 Evidence—Relevance**
162.19 Proof—State Bar's Burden—Other/General
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
430.00 Breach of Fiduciary Duty

When an attorney withdraws from employment or the client terminates the attorney's employment, the attorney must promptly refund any unearned part of an advance fee. However, where respondent faced competing demands regarding the funds used to pay an advance fee, from a client and from a third party to whom respondent owed a fiduciary duty, respondent had a duty to retain the funds in trust until the client's entitlement to the funds was established, and therefore did not commit misconduct by declining to refund the advance fee. Respondent's motives for retaining the funds in trust were irrelevant because the issue turned on a question of law, not motivation. The State Bar had the burden of proving that the client was entitled to receive the funds.

[10] **135 Procedure—Rules of Procedure**
166 Independent Review of Record

Factual findings made by a hearing judge and resolving issues concerning testimony deserve great weight, but may be supplemented by the review department's own findings interpreting documentary evidence. (Trans. Rules Proc. of State Bar, rule 453(a).)

[11] **280.00 Rule 4-100(A) [former 8-101(A)]**
430.00 Breach of Fiduciary Duty

An attorney who receives money on behalf of a party who is not the attorney's client becomes a fiduciary to the party. Where an attorney assumes the responsibility to disburse funds as agreed by the parties in an action, the attorney owes an obligation to the party who is not the attorney's client to ensure compliance with the terms of the agreement. If there is a dispute between the client and the third party, the attorney must retain the funds in trust until the resolution of the dispute.

[12] **725.11 Mitigation—Disability/Illness—Found**

Extreme emotional and physical difficulties suffered by an attorney at the time of professional misconduct constitute a mitigating circumstance when expert testimony establishes that such difficulties were directly responsible for the misconduct.

[13] **791 Mitigation—Other—Found**

The extraordinarily harsh effect of a disciplinary proceeding on the respondent and the respondent's ability to earn a living may be taken into account in assessing the appropriate discipline. Respondent's resignation from a law firm because of concern about the effect on the firm of charges of moral turpitude (later disproved) demonstrated extreme conscientiousness.

[14 a-e] 801.30 Standards—Effect as Guidelines
801.41 Standards—Deviation From—Justified
824.53 Standards—Commingling/Trust Account—Declined to Apply
824.54 Standards—Commingling/Trust Account—Declined to Apply
1092 Substantive Issues re Discipline—Excessiveness

Where respondent inadvertently mishandled a small sum of trust funds and was unlikely to repeat her misconduct, no suspension was necessary. Although standard 2.2(b) requires at least three months actual suspension for a trust account violation, the standards are guidelines to be construed in light of decisional law. A private reproval was appropriate in light of the nature of the misconduct and the mitigating circumstances, including respondent's severe emotional difficulties, her having taken the disciplinary proceeding very seriously, and her having suffered great hardship as a consequence.

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
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)]
420.52 Misappropriation—Excusable Negligence
430.05 Breach of Fiduciary Duty

Aggravation

Declined to Find

555 Overreaching
695 Other

Mitigation

Found

740.10 Good Character

Found but Discounted

710.34 No Prior Record
725.32 Disability/Illness

Discipline

1055 Private Reproval—Without Conditions

OPINION

PEARLMAN, P.J.:

This proceeding illustrates why lawyers should have complete written fee agreements with their clients and why recordkeeping standards are necessary to provide practitioners with guidance on minimum requirements for handling trust accounts.[1] It also illustrates why it is unwise for a lawyer to avoid talking to an unhappy client, even if the lawyer thinks the client is being entirely unreasonable.

This unfortunately lengthy proceeding deals with original charges arising out of claims made against respondent[2] **[1 - see fn. 2]** by a married couple whom respondent represented and additional charges that arose out of discovery by the State Bar. The complaining witnesses asserted that respondent had intentionally misappropriated and unilaterally withheld without authorization substantial sums from a personal injury settlement. The claims were untrue and could easily been refuted short of a hearing if the complete agreement had been put in writing and signed by the clients.[3] During discovery, however, there came to light a minor problem resulting from the negligent handling of two checks by respondent's office. As a consequence, the balance in respondent's trust account fell $10.77 below the amount it should minimally have contained for a period of less than six weeks.

Upon our independent review of the record, we adopt virtually all of the hearing judge's extensive findings of fact. We also adopt most of the hearing judge's conclusions of law, including the conclusion that respondent failed to maintain all client funds in a trust account; but we reject the conclusion that respondent improperly failed to refund an advance fee. Further, we modify the conclusions with respect to mitigation and determine that respondent's sanction should be reduced to a private reproval.

FACTS

Respondent has been an active member of the State Bar of California since May 1981. (Amended decision ["decision"], p. 3.) In October 1985, Mrs. H, a legal secretary, employed respondent to represent her on a contingency basis in a personal injury matter. (*Id.* at pp. 3-4.) Although Mrs. H did not execute the written agreement prepared by respondent for such representation, she did not dispute its terms. (*Id.* at p. 4.)

At about the same time, Mrs. H asked respondent to handle a separate child custody matter involving her husband's daughter from a prior marriage. Respondent and Mrs. H discussed the fees for the handling of the child custody matter, including respondent's usual requirement of a retainer plus monthly payments. Because Mrs. H told respondent that she and her husband could not provide a retainer or make regular monthly payments, respondent offered to handle the child custody matter if Mr. and Mrs. H would make their best efforts to pay the monthly bills and if respondent could use the anticipated recovery from Mrs. H's personal injury matter to pay off any unpaid balance in the child custody matter. Mrs. H agreed and Mr. and Mrs. H employed respondent in the child custody matter. (*Id.* at pp. 4-5.)

In November 1985, respondent sent Mr. and Mrs. H a written agreement which listed only Mr. H as the client[4] and which set respondent's fee at an

1. We note that rule 4-100(C) of the new Rules of Professional Conduct adopted effective May 27, 1989, authorizes the Board of Governors to adopt such standards and that the board is currently considering a proposal for trust account recordkeeping standards to educate lawyers about their trust account recordkeeping obligations and to assist them in the operation of trust accounts.

2. **[1]** Because we impose a private reproval, respondent's name does not appear in this opinion. (Trans. Rules Proc. of State Bar, rule 615.) The proceeding, however, remains public.

3. This agreement preceded the effective date of Business and Professions Code section 6148 requiring written fee agreements.

4. Respondent testified that Mr. H was the only named party in the custody suit, but established that both husband and wife were in fact her clients; that the bills were addressed to, and paid by, both; and that her principal contact throughout the representation was the wife. Indeed, although both were listed as complaining witnesses in this proceeding, only the wife testified at the hearing below.

hourly rate, but did not mention the use of the proceeds from the recovery in Mrs. H's personal injury matter to satisfy any unpaid fees in the child custody matter. Mr. and Mrs. H did not execute the agreement for the child custody matter, nor did they make regular payments for respondent's work which she billed them for monthly. They did, however, express satisfaction with her efforts on their behalf and sent payments to respondent in December 1985 and in January, May, August, and October 1986. (*Ibid.*) In April 1986, respondent met with Mr. and Mrs. H and obtained their oral agreement that respondent could take a retainer[5] for the child custody matter out of the anticipated recovery in Mrs. H's personal injury matter. (*Id.* at pp. 5-6.) In July 1986, respondent told Ms. F, her secretary and office manager, not to attempt to collect the large outstanding bill in Mr. and Mrs. H's child custody matter because of the agreement to pay the balance owed out of anticipated recovery in the personal injury matter. (*Id.* at p. 6.)

On October 29, 1986, respondent settled Mrs. H's personal injury matter for $17,500, which was $5,000 more than the anticipated settlement amount earlier approved by Mrs. H. (Exh. 12; IV Reporter's Transcript ["R.T."] pp. 42-43; decision p. 6.) The settlement agreement required that Mrs. H execute a general release. (Exh. 12.) Respondent's office sent the $17,500 settlement check to Mrs. H for endorsement on November 17, 1986. (Decision p. 6.)

Ms. F and Mrs. H had two telephone conversations between October 30 and November 28, 1986, about the distribution of the settlement from the personal injury matter. In the first conversation, Mrs. H challenged the intended deduction of overdue fees in the child custody matter, asserting that she considered Mr. H to be solely responsible for such fees. (*Id.* at pp. 6-7.) When Ms. F informed respondent about the first telephone conversation, respondent became upset. Respondent asked Ms. F to remind Mrs. H of their agreement permitting respondent to deduct the fees and to tell Mrs. H that respondent did not want to talk with Mrs. H. (*Id.* at p. 7.)

In the second telephone conversation, Ms. F told Mrs. H what respondent had asked. Ms. F stated that no prior attempt had been made to collect the fees owed in the child custody matter because of the agreement. When Mrs. H asked to speak with respondent, Ms. F said that respondent did not want to talk with her. Ms. F explained that if Mrs. H disagreed about the deduction of the fees in the child custody matter from the recovery in the personal injury matter, she could refuse to sign the check and could come to the office to talk directly with respondent. At the end of the conversation, Mrs. H said, "Okay, go ahead and distribute it." Mrs. H added that she would endorse the settlement check and would like respondent to distribute the funds as quickly as possible. (*Id.* at pp. 7-8.)

On November 28, 1986, respondent deposited Mrs. H's endorsed settlement check for $17,500 into a new client trust account which respondent opened with Bank X. (*Id.* at p. 8.) On December 9, 1986, respondent distributed Mrs. H's personal injury settlement. Respondent sent Mrs. H a letter carefully explaining the distribution, enclosing two checks. One check covered costs paid directly by Mrs. H in the personal injury matter. The other check covered the balance remaining after the deduction of all costs in the personal injury matter, respondent's one-third contingency fee in the personal injury matter, the unpaid amount owed by Mr. and Mrs. H in the child custody matter, and a retainer ($500.00) for future work on the child custody matter as agreed by Mr. and Mrs. H and respondent in April 1986. Respondent's letter enclosed a release of the insurance company and stated that Mrs. H had to execute the release before negotiating the two checks. The letter also stated that respondent would refund the $500 retainer if Mrs. H sent a signed form for substitution of attorneys. (Exhs. 14, BB; decision pp. 8-10.) The hearing judge found that Mrs. H never objected in writing to the distribution of the personal injury settlement. (Decision p. 10.) In fact, she never communicated any retraction, oral or written, of the

5. Although the record consistently refers to the agreement between respondent and Mr. and Mrs. H for a retainer, it is clear that they intended the term "retainer" to denote an advance on fees rather than a true retainer paid solely for the purpose of ensuring the attorney's availability for the child custody matter. Like the hearing judge and the parties, we will use the term "retainer" to denote the $500 advance on fees authorized by Mr. and Mrs. H.

authorization she gave by telephone to distribute the funds. Instead, Mrs. H negotiated the checks; however, she did not execute the release. (Exhs. 18, RR; decision p. 12.) Respondent dismissed the lawsuit.

On January 30, 1987, the insurance company involved in Mrs. H's personal injury matter wrote to respondent to request the executed release and a copy of the dismissal. (Exh. EE.) On February 9, 1987, respondent wrote to Mrs. H and reminded her that she should have executed the release prior to negotiating the checks sent in the letter of December 9, 1986. Respondent enclosed a new release in the letter of February 9, 1987, and asked Mrs. H to execute the release and to return it in the envelope provided. In addition, respondent stated that she took the fact that Mr. and Mrs. H had not sent a substitution of attorneys in the child custody matter to mean that they wanted her to continue to represent them. (Exh. FF.)

On February 26, 1987, Mr. H wrote to respondent enclosing a substitution of attorney and asked respondent to sign and return it as soon as possible. Also, he requested a refund of the $500 retainer for the child custody matter to his wife. (Exh. 5.) The very next day Mr. and Mrs. H filed a complaint against respondent with the State Bar falsely claiming that respondent had acted without authorization in deducting the fees in the child custody matter from the recovery in the personal injury matter and that respondent had failed to return the $500 retainer despite repeated requests. (Decision p. 11.)

On March 9, 1987, the insurance company again wrote to respondent to request Mrs. H's executed release. (Exh. GG.) On March 10, 1987, respondent signed the substitution of attorney which Mr. H had sent on February 27. (Decision p. 12.) She did not, however, immediately return it to Mr. H.[6] On March 23, 1987, Mr. H again wrote to respondent. Among other things, he asked her to respond to his earlier letter and promptly to sign and return the substitution of attorney. (Exh. 6.)

On April 14, 1987, respondent replied to Mr. H's letter. She forwarded the signed substitution of attorney, acknowledged that Mr. H had requested the refund of the $500 retainer, but noted that he had not mentioned respondent's request for the executed release from Mrs. H in the personal injury matter. Respondent requested that the signed release be forwarded to her at Mr. and Mrs. H's earliest convenience to avoid problems regarding the personal injury settlement. Respondent asked Mr. H to call her office if some problem prevented the furnishing of the signed release. (Exh. H; IV R.T. pp. 93-94.)

Respondent closed her law office at the end of May 1987 and on June 1, 1987, began working for a law firm. On June 25, 1987, Mr. H again wrote to respondent. Among other things, he once more requested the return of the $500 retainer. (Exh. 7.) On August 4, 1987, after being contacted by a State Bar investigator, respondent refunded the $500 to Mr. H. (Exh. II.)

THE PROCEEDINGS BELOW

A notice to show cause was filed on September 12, 1989. Through discovery, the State Bar obtained respondent's trust account records. It then observed a $10.77 shortfall in her trust account for several weeks in 1987 and amended the notice to show cause on January 30, 1990. The amended notice alleged that respondent had wilfully violated sections 6068 (a), 6103, and 6106 of the Business and Professions Code and former rules 2-111(A)(3), 8-101(A)(2), and 8-101(B)(4) of the Rules of Professional Conduct.[7]

A six-day trial occurred in April and May 1990. A decision was filed on December 19, 1990, and an amended decision on February 12, 1991. In the amended decision, the hearing judge rejected all but two of the allegations against respondent. Conclud-

6. As discussed in mitigation, *post*, respondent was preoccupied with her father's terminal illness at this time. Her father was in and out of the hospital during this period until his death in early April 1987 and respondent ran her father's business in addition to her own practice through May 1987.

7. All further references to "sections" are to the Business and Professions Code. Unless otherwise noted, all further references to "rules" or "former rules" are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

ing that respondent had violated former rules 8-101(A) and 2-111(A)(3), the judge recommended a sanction of six months suspension, stayed, and one year's probation, subject to various conditions. The probation conditions included actual suspension for 30 days and until respondent pays interest at the legal rate on the $500 retainer from February 26 to August 4, 1987 (i.e., from the date when Mr. and Mrs. H terminated respondent's services to the date when respondent refunded the $500 retainer).

On January 14, 1991, the current examiner was substituted for the original examiner. On March 4, 1991, respondent requested review on the grounds that the record did not support the judge's findings of fact and that the recommended discipline was excessive.

DISCUSSION

We must independently review the record and may adopt findings, conclusions, and a recommendation at variance with the hearing department. (Trans. Rules Proc. of State Bar, rule 453(a).) We agree with the hearing judge's conclusions that respondent did not violate sections 6068 (a) and 6103. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815). We also agree that there was no violation of section 6106. (See, e.g., *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317.) Nor, as discussed below, was there proof of violation of former rules 8-101(A)(2) and 8-101(B)(4).

No Violation of Former Rule 8-101(A)(2)

[2] The amended notice to show cause alleged that respondent violated former rule 8-101(A)(2) because she did not retain in her trust account the fees which were due to her for her work on the child custody matter. The hearing judge concluded that Mrs. H authorized respondent to deduct fees from the personal injury settlement and thus respondent had no reason to keep the fees in the trust account. (Decision p. 30.)

[3] The amended notice also alleged that respondent violated former rule 8-101(A)(2) because she kept $121.83 of her personal funds in her trust account from December 1986 through April 1987. Respondent testified that she kept the funds in her trust account to pay for bank charges, particularly because she was planning to order new checks which came in a leather binder and cost $50 to $60. (*Id.* at p. 31.) As the hearing judge observed, former rule 8-101(A) (now rule 4-100(A)(1)) permitted an attorney to keep in a client trust account reasonably sufficient funds to cover bank charges. The hearing judge concluded that the $121.83 was not unreasonable, absent guidelines from the State Bar, and did not threaten the integrity of the clients' funds. (Decision pp. 31-32, citing *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916-917.) We agree.

No Violation of Former Rule 8-101(B)(4)

The amended notice to show cause also alleged that respondent violated former rule 8-101(B)(4) because she did not promptly return the $500 advance fee for further work on the child custody matter. The hearing judge concluded that former rule 8-101(B)(4) does not apply to an advanced fee, and that respondent had been properly charged for the unreturned advanced fee under former rule 2-111(A)(3).

[4] We agree that there was no rule 8-101(B)(4) violation here, but for a different reason. Rule 8-101(B)(4) requires prompt payment of funds the client is entitled to receive. The settlement funds received by respondent were all subject to rule 8-101(B)(4) and respondent was therefore properly charged with a violation of that rule as well as rule 2-111(A)(3). Respondent sent the client certain funds in December of 1986 and distributed the rest according to her transmittal letter, pointing out to the client that the client's entitlement to all such funds was predicated on her signing of the release. Since the client never signed the release, the December 1986 distribution was premature. Indeed, the client was still not entitled under the settlement agreement to receive the remaining $500 in August of 1987 although as time wore on, there might have been a basis for concluding that the opposing party waived the requirement of a release in addition to the dismissal of the lawsuit.

Violation of Former Rule 8-101(A)

[5a] We also adopt the hearing judge's conclu-

sion that respondent did violate former rule 8-101(A). **[6]** Although the amended notice to show cause did not allege that respondent violated former rule 8-101(A), it charged respondent with failing to maintain the balance held on behalf of Mr. and Mrs. H in respondent's trust account and alleged a violation of section 6106. (Amended notice to show cause, p. 3.) An allegation of a section 6106 violation encompasses the lesser allegation of a former rule 8-101(A) violation where, as here, the pleading clearly raises the issue of misuse of trust funds. (*Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at p. 321.)

In this regard, the evidence showed that on September 30, 1986, respondent's secretary mistakenly deposited a $500 check for a case unrelated to Mr. and Mrs. H's matters into respondent's operating account at Bank X. The check was written by client S on behalf of client R and should have been deposited into respondent's then existing trust account rather than into respondent's operating account. (Decision p. 12; II R.T. pp. 183-185, 188-196; exhs. AB, YY.) Ms. F was responsible for making deposits into the operating account and respondent did not inspect the checks which went into the operating account. (II R.T. pp. 185-185, 192.) At the disciplinary proceeding, respondent could not recall specifically which bank she was using for her trust account in September 1986. (III R.T. p. 43.) This misdeposit was the first of a series of events which eventually caused the balance in respondent's new trust account at Bank X to fall below the necessary amount. (Decision p. 23.)

Respondent's then husband (a lawyer with bookkeeping experience) normally reconciled respondent's trust account bank statements with respondent's trust account check register on a monthly basis from November 1985 to June 1987. (*Id.* at p. 13.) Yet neither he nor anyone else reconciled the client account records against the trust account transactions. Thus, the $500 misdeposit on September 30, 1986, remained undetected. (*Id.* at p. 27.) At the disciplinary proceeding, respondent testified that she annually reconciled her bank records with all her client bills. Under detailed questioning, however, respondent admitted that she performed no such reconciliation at the end of 1986. Thus, she did not detect the $500 misdeposit on September 30, 1986. (*Id.* at p. 28.)

As indicated above, respondent opened her new trust account with the settlement check from Mrs. H's personal injury suit. As of December 31, 1986, the total balance in respondent's new trust account at Bank X was $624.35. This balance represented the $500 retainer for future work on the child custody case plus cost reimbursement which she kept to cover bank charges ($121.83) and interest on the account ($2.52). The balance remained $624.35 through April 30, 1987. (Exh. 18; summary of pretrial conference ["summary"], stipulations 24 and 25, p. 3; decision p. 10.) On May 18, 1987, respondent deposited $250 from client R into this trust account. This was the second deposit into the new account at Bank X. (Exh. 18; summary, stipulation 26, p. 3.) On May 19, 1987, respondent wrote a check drawn on that account to client S for $385.12. Although respondent did not realize it at the time, this check reduced the balance in the trust account to $489.23 when it cleared on May 27, 1987. (Exh. 18; summary, stipulations 27 and 28, p. 3.)

The hearing judge found that when respondent wrote the $385.12 check to client S on May 19, 1987, it was obvious from the face of the check register that the new trust account did not contain any deposit on behalf of client S. Further, the hearing judge concluded that it should have been patently obvious that the balance would dip below the $500 which respondent had received as a retainer from Mr. and Mrs. H. (Decision pp. 28-29; exh. RR p. 3.)

From May 27, 1987, to July 3, 1987, the balance in respondent's trust account remained $489.23, slightly less than the $500 which respondent should have kept in it until Mrs. H signed the release. On July 3, 1987, a $4,807.45 deposit from another matter raised the balance in the account to $5,296.68. (Exh. 18.) None of the $500 which Ms. F had misdeposited into respondent's operating account was ever transferred to the new client trust account. (Exhs. 18, RR.) Respondent never determined on her own that a trust account problem had ever occurred. She realized this for the first time when reviewing the trust account records in connection with her deposition in this case.

The hearing judge concluded that, although respondent acted in good faith, respondent committed a technical misappropriation in violation of former rule 8-101(A) because she negligently failed to keep in her trust account the entire $500 held for Mr. and Mrs. H. (Decision p. 30; see also *id.* at pp. 27-29.)

Respondent asserts that the hearing judge ignored "a critical distinction" between a situation in which the attorney "does the act" resulting in misuse of trust funds and a situation in which such misuse results "from the actions of a member of the attorney's support staff." Respondent acknowledges that the former situation requires no showing of wrongful intent, bad faith, or damage for the imposition of discipline. Relying on *Palomo* v. *State Bar* (1984) 36 Cal.3d 785 and *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, respondent argues that culpability must rest on a finding of gross negligence in supervising support staff. Further, respondent contends that the misdeposit of the $500 check in September of 1986 and the subsequent events resulting in a trust account balance of $489.23 from late May to early July 1987 did not amount to such gross negligence.

[7] "Attorneys cannot be held responsible for every detail of office operations." (*Palomo* v. *State Bar*, *supra*, 36 Cal.3d at p. 795, citing *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d at p. 857.) Nevertheless, an attorney violates former rule 8-101 if the attorney fails to manage funds as required by the rule, regardless of the attorney's intent or the absence of injury to anyone. (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 976; *Alberton* v. *State Bar* (1984) 37 Cal.3d 1, 13, cert. den. (1985) 470 U.S. 1007; *Doyle* v. *State Bar* (1982) 32 Cal.3d 12.) If "serious and inexcusable lapses in office procedure" result in fiduciary violations, such violations "may be deemed 'wilful' for disciplinary purposes" in the absence of deliberate wrongdoing. (*Palomo* v. *State Bar*, *supra*, 36 Cal.3d at p. 795; see also *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37.) Once the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn. (*Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474.) The burden then shifts to the respondent to show that the office procedures she had in place were adequate.

[5b] Although respondent's supervisory omissions did not amount to the gross negligence of the attorneys in *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, *Giovanazzi* v. *State Bar*, *supra*, 28 Cal.3d 465, and *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d 847, neither did respondent's trust account balance fall below the required amount solely because of an error by support staff. As the hearing judge correctly observed, Ms. F's September 1986 misdeposit into respondent's operating account of the $500 check was only the first step leading to the eventual shortfall in respondent's new trust account. The misdeposit remained undetected because neither respondent nor her former husband reconciled the client account records against the trust account transactions. Respondent never testified that she made any arrangements at all to transfer funds from her old trust account to the new trust account, which was opened on November 28, 1986. At the end of 1986, respondent did not discover the misdeposit because she did not perform her annual reconciliation of bank records with client bills.

[5c] As the hearing judge recognized, it was obvious from the face of the check register when respondent wrote the check to client S on May 19, 1987, that the balance in the trust account would fall below the $500 which respondent had retained in trust from Mrs. H's settlement funds. Respondent violated former rule 8-101(A) because the shortfall in her new trust account resulted from her inadequate supervision of her trust accounts over a period of several months, culminating in her careless writing of the $385.12 check on May 19, 1987.

[8] The hearing judge referred to respondent's violation of former rule 8-101(A) as a "technical misappropriation." (Decision pp. 27, 28, 37, 38, 39.) Not all trust account violations rise to the level of misappropriation. Indeed, standard 2.2, Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) (hereafter "standards"), distinguishes between trust account violations that do not amount to wilful misappropriation and those that do. Because serious opprobrium commonly attaches to the term "misappropriation" and because we deem such opprobrium to be appropriate only when the level of misconduct rises to at

least gross negligence—which was not found here—we do not consider the term applicable to respondent's rule violation.

No Violation of Former Rule 2-111(A)(3)

[9a] Pursuant to former rule 2-111(A)(3), an attorney who withdraws from employment must promptly refund any unearned part of an advance fee. The same duty applies when a client terminates the employment of an attorney. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 365; see also *Academy of California Optometrists, Inc.* v. *Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006.)

Respondent explained at trial that she kept the $500 to encourage Mrs. H to sign and return the release as required by the terms of the personal injury settlement agreement because she was concerned over the possibility of a motion for compliance with the terms of the settlement and felt the $500, as part of the $17,500 settlement, should not be disbursed without compliance. (IV R.T. pp. 94-96.)

The hearing judge did not find respondent's explanation credible. Although the hearing judge acknowledged that respondent had written to Mr. and Mrs. H after each inquiry from the insurance company and had asked for the release to be signed and returned, the hearing judge observed that respondent had not specifically told them that she was holding the retainer because of Mrs. H's failure to sign and return the release. Also, the hearing judge stated that the deteriorating relationship between respondent and Mr. and Mrs. H partly affected respondent's failure to return the $500. (Decision pp. 35-36.)The hearing judge concluded that respondent had a duty promptly to refund the $500 retainer after Mr. H sent her a letter on February 26, 1987, requesting that she sign the substitution of attorney and return the retainer. Because respondent failed to refund the $500 until August 4, 1987, the hearing judge determined that she wilfully violated former rule 2-111(A)(3). (*Id.* at pp. 32-33.)

Respondent argues that competing interests to the $500 justified her keeping the retainer in her trust account. Respondent points to the fact that for months she had repeatedly asked Mrs. H to sign and return the release, as required by the settlement agreement, and had given her word to the insurance company that the release would be forthcoming. (See exhs. EE, FF; IV R.T. pp. 94-96.)

[10] Factual findings made by a hearing judge and resolving issues concerning testimony deserve great weight. (Trans. Rules Proc. of State Bar, rule 453(a); *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 724, reconsideration den. and sub. opn. filed Dec. 9, 1991, 1 Cal. State Bar Ct. Rptr. 732; *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 274.) However, on this issue the hearing judge was interpreting a written document—the April 1987 letter. That letter could have been written more clearly, but it also invited the clients to call if they had any question. The clients did not do so. There was no evidence that Mrs. H misunderstood her duty to sign the release. In writing to Mrs. H in December 1986, respondent had already unequivocally conditioned Mrs. H's entitlement to *any* settlement funds, including the $500, on the signing of the release. Mrs. H testified that as a legal secretary she had dealt with releases as part of her job and had also previously executed one as a plaintiff settling a prior lawsuit. We therefore supplement the hearing judge's findings with our own finding that, taking all of her correspondence to the client on this subject together, respondent did condition the refund of the $500 retainer upon the return of the signed release.

[9b] We do not disturb the hearing judge's finding with respect to respondent's motivation, but conclude that the issue turns on a question of law, not motivation. We accept respondent's argument that she was legally obligated to keep the $500 in trust when faced with the competing demand of the H's and the insurance company. **[11a]** An attorney who receives money on behalf of a party who is not the attorney's client becomes a fiduciary to the party. (*Crooks* v. *State Bar* (1970) 3 Cal.3d 346, 355, quoting *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156.) When an attorney assumes the responsibility to disburse funds as agreed by the parties in an action, the attorney owes an obligation to the party who is not the attorney's client to ensure compliance with the terms of the agreement. (*Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 979; see also *Sternlieb* v.

State Bar, *supra*, 52 Cal.3d 317, 330, fn. 7; *Wasmann* v. *Seidenberg* (1988) 202 Cal.App.3d 752, 755-757; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 470.)

[9c] In March 1987, respondent found herself in a dilemma. On the one hand, former rule 2-111(A)(3) required respondent promptly to refund all advanced fees to which Mr. and Mrs. H were entitled when she ceased to represent them in the child custody matter. On the other hand, she had an obligation to the insurance company to ensure that the $500, which constituted the remainder of the $17,500 settlement in Mrs. H's personal injury matter, was not disbursed until compliance with all of the terms of the settlement agreement by Mrs. H, who had ignored repeated requests from respondent to return the signed release.

[11b] In this regard, former rule 8-101(A)(2) (now rule 4-100(A)(2)) is instructive. Pursuant to that rule, an attorney must retain funds in trust when the attorney's right to the funds is disputed by the client. The funds are required to be kept in trust until the resolution of the dispute. The rule also applies to obligations to third parties. (See, e.g., *Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 979.)

[9d] We therefore find that regardless of her motives for doing so, respondent took the appropriate course. She kept the $500 in her trust account and again reminded Mr. H, in her letter of April 14, 1987, that Mrs. H's signed release in the personal injury matter should be sent to her as soon as possible. Such conduct appropriately balanced respondent's competing duties to Mr. and Mrs. H and to the opposing party and its insurance company.

[9e] Thereafter, no release was ever signed, nor was there evidence of any further contact with the insurance company. Respondent's failure in the ensuing three months to take any affirmative steps to resolve the issue, while not commendable, did not violate former rule 2-111(A)(3). The client had it within her own power to execute the necessary document and simply failed to do so. The State Bar had the burden of proving that the client was entitled to receive the funds. The client's compliance with the settlement agreement was not established, nor was evidence offered to establish waiver of the required release by the opposing party in the lawsuit.[8]

DISCIPLINE

No Aggravating Circumstances

The hearing judge concluded that the current proceeding presented no aggravating circumstances. (Decision p. 33.) Without challenging any of the factual findings of the hearing judge, the examiner argues that the fact that respondent took "the lion's share" of the personal injury settlement is an aggravating factor. The examiner concedes that the hearing judge was entitled to find, as she did, based on the evidence presented at the hearing, that the client agreed to pay and that the respondent earned all of the fees that were paid her. Except for a minor quibble regarding paralegal and law clerk charges, the clients expressed no dissatisfaction with the monthly bills for respondent's services in the child custody matter and indicated they were pleased with her work on their behalf. In the personal injury case, her efforts were similarly satisfactory—the recovery was found to be almost one and one-half times the amount the client was willing to accept. Not only does respondent's ultimate collection of both fees at the same time fail to show an aggravating circumstance, it shows the great accommodation respondent was willing to make for a client unable to keep up monthly payments.

Mitigating Circumstances

We adopt the hearing judge's conclusion that, in view of respondent's relatively short period of law practice, her lack of a prior disciplinary record was not a strong mitigating factor. (*Ibid.*; cf. *Kelly* v. *State*

8. We do not consider that respondent acted culpably in ultimately refunding the $500 retainer to the H's on August 4, 1987, without obtaining consent of the opposing party. By this time, respondent was under pressure from the State Bar to make the refund and she clearly did so in response to such pressure.

Bar (1988) 45 Cal.3d 649, 658.) On the other hand, the hearing judge considered significant, as do we, the testimony from respondent's seven character witnesses. (Decision p. 37; standard 1.2(e)(vi)). Respondent's character witnesses included two retired judges, a former opposing counsel, a former co-counsel, a friend, a former client, and an attorney in the community. These witnesses knew about the allegations against respondent, as well as the hearing judge's tentative culpability determinations, and uniformly attested to respondent's honesty, truthfulness, integrity, skill, and dedication as a lawyer. (Decision p. 37.)

The hearing judge acknowledged that the illness and death of respondent's father, to whom she was very close, undoubtedly affected respondent during the time of her dealings with Mr. and Mrs. H. (Decision p. 36.) **[12]** Pursuant to standard 1.2(e)(iv), extreme emotional and physical difficulties suffered by an attorney at the time of professional misconduct constitute a mitigating circumstance when expert testimony establishes that such difficulties were directly responsible for the misconduct. (See, e.g., *Porter* v. *State Bar* (1990) 52 Cal.3d 518.) In the current proceeding, in addition to respondent's testimony, respondent's family doctor and a doctor friend testified that respondent suffered extreme emotional stress from the time of her father's first hospitalization in the middle of February 1987.

Respondent learned in October 1986 that her father was ill. From December 1986 through her father's death on April 8, 1987, respondent worked extremely long hours not only to continue her practice of law, but also to run her father's business. Between the middle of February 1987 and the beginning of April 1987, her father was hospitalized three times. During his hospitalizations, she visited him each day, sometimes several times a day. Even after her father's death, respondent ran her father's business to prepare it for sale and spent time winding up her father's affairs. (Decision pp. 34-35.)

The hearing judge concluded that respondent had failed to demonstrate a sufficient causal nexus between such extraordinary demands and respondent's violation of former rule 8-101(A). (*Id.* at p. 36.) We agree that no causal nexus was demonstrated between such difficulties and the lapses in handling the trust account in the fall of 1986 which resulted in the violation of former rule 8-101(A). We conclude, however, that the severe time constraints and emotional difficulties which respondent suffered after her father's illness became acute until she ceased her independent practice at the end of May 1987 contributed to the violation of former rule 8-101(A), particularly respondent's careless writing of the $385.12 check to client S on May 19, 1987. It was undisputed that respondent's running of two businesses for 15 to 16 hours per day and her preoccupation with her father's terminal illness greatly diminished the time and attention she would have otherwise paid to the manner in which she managed her trust account during this period of time.

[13] Another factor we take into account in assessing the appropriate discipline is the extraordinarily harsh effect of the disciplinary proceeding on respondent and her ability to earn an income. (See, e.g., *In re Chira* (1986) 42 Cal.3d 904, 907, 909 [no actual suspension ordered in part because respondent's criminal conviction had a devastating impact on him and his ability to practice law].) Having closed her law office, respondent worked for a firm from June 1987 through December 1989. The hearing judge found that respondent resigned from the firm precisely because of her concern about the effect on the firm of charges of moral turpitude in the current disciplinary proceeding—serious charges which were later disproved. Respondent's resignation from the firm while these proceedings were pending demonstrates extreme conscientiousness on behalf of the firm and its clients. According to papers submitted by her counsel on review, respondent thereafter suffered severe economic hardship culminating in bankruptcy.

Discipline

[14a] Even if there were no mitigating factors here, there appears little need for any suspension as a sanction to protect the public, the courts, and the legal profession, to maintain high professional standards, and to preserve public confidence. (Standard 1.3.) Respondent's rule violation was inadvertent, involved a small sum, and is unlikely to be repeated.

In *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, the attorney gave the office manager "no supervision, *never* instructed her on trust account requirements and procedures, and *never* examined either her records or the bank statements for any of the office accounts." (*Id.* at p. 796, original emphasis.) Such pervasive carelessness amounted to "gross negligence involving serious violations of an attorney's duty to oversee client funds entrusted to his care, and to keep detailed records and accounts thereof." (*Ibid.*) The attorney's omissions caused a four-month delay in notifying a client of the arrival of funds due to the client and resulted in commingling. (*Ibid.*) The Supreme Court ordered a sanction of one year's stayed suspension, with probation. (*Id.* at pp. 790, 798.)

In *Vaughn* v. *State Bar*, an attorney's trust account fell below the required balance at least 12 times during a 20-month period. (*Vaughn* v. *State Bar*, *supra*, 6 Cal.3d at pp. 852-853.) The attorney commingled funds and kept trust fund cash in an envelope in his home. (*Id.* at pp. 853-855.) He did not know that he had received some funds because of inefficient office procedures and "chaotic records." The Supreme Court found the attorney culpable of gross negligence amounting to moral turpitude and imposed a public reproval. (*Id.* at pp. 855-856, 859.)

Both *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, and *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d 847 were decided before the State Bar adopted standards for the degree of attorney discipline. **[14b]** Standard 2.2(b) provides that a violation of former rule 8-101(A) which does not involve the wilful misappropriation of entrusted funds or property must result in at least three months actual suspension, regardless of mitigating circumstances. The hearing judge found the minimum called for by standard 2.2(b) inappropriate to these facts. We agree. The standards are guidelines which must be construed in light of decisional law. (*Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1100; *Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221-222; *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11; *Gary* v. *State Bar* (1988) 44 Cal.3d 820, 828; *Greenbaum* v. *State Bar* (1987) 43 Cal.3d 543, 550.)

[14c] The nature of the violation is very important to the propriety of suspension as opposed to reproval. In *Dudugjian* v. *State Bar*, which the California Supreme Court issued shortly after the hearing judge's amended decision, two attorneys—Dudugjian and Holliday—were found to have violated former rule 8-101(A) by depositing a settlement check into their general account instead of their trust account and to have violated former rule 8-101(B)(4) by subsequently refusing to honor their client's demand for the funds. The former volunteer review department, relying on standard 2.2(b), recommended that Dudugjian be suspended for two years, stayed, conditioned on 90 days actual suspension and restitution. It recommended that Holliday receive one year of stayed suspension conditioned on 30 days actual suspension and joint restitution with Dudugjian. (*Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d at pp. 1099-1100.)

Before their violation of former rules 8-101(A) and 8-101(B)(4), Holliday and Dudugjian had practiced law with no prior record of discipline for approximately seven and one-half years. In reducing the recommended discipline for both attorneys to public reprovals, the Supreme Court stated that the attorneys "honestly believed that the [clients] had given them permission to retain the settlement funds." In addition, the Court stressed that the attorneys "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.)

We find similar in many respects the facts underlying the private reproval we issued in *In the Matter of Respondent E*, *supra*, 1 Cal. State Bar Ct. Rptr. 716, eight months after the hearing judge's amended decision in this case. In *In the Matter of Respondent E*, culpability rested solely on the attorney's failure to act promptly to redress inadvertent commingling of trust funds with operating funds in violation of former rule 8-101(A). The record contained clear and convincing evidence of no aggravation and of extensive mitigation, including long years of the practice of law with no prior disciplinary record, substantial pro bono activities and community involvement, and testimony from a great number of character witnesses about the attorney's impeccable honesty and reliability. (*In the*

Matter of Respondent E, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 729-730.)

The same hearing judge presided over the trial of respondent E as presided below and recommended greater discipline in that case than for this respondent. We consider respondent, like respondent E, to deserve less discipline than received by Holliday and Dudugjian. **[14d]** Unlike Holliday and Dudugjian, respondent suffered from severe emotional difficulties which partially mitigated her misconduct. She also has taken the current disciplinary proceeding very seriously, suffered great hardship as a consequence, and is extremely unlikely to ever repeat the inattentiveness to her trust account which occurred here.

[14e] For the reasons stated above, we therefore impose a private reproval. As we suggested at the beginning of this opinion, we believe that respondent is representative of many attorneys in this state who would benefit from improved guidelines for the handling of trust funds. We encourage the Board of Governors of the State Bar to proceed expeditiously in formulating appropriate standards.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HEROICO M. AGUILUZ

A Member of the State Bar

No. 86-O-12145

Filed February 13, 1992; as modified, June 4, 1992

SUMMARY

Respondent was hired to represent the owners of a residential care home in a dispute with a state licensing agency. He filed a response to the agency's charges and secured two continuances of the administrative hearing, but then withdrew his appearance before the agency and abandoned his clients. Thereafter, respondent denied to his clients that he had withdrawn as their counsel, and refused to give them their files until they paid him additional fees and signed a substitution of attorney form. The hearing judge recommended that respondent be suspended for one year, stayed, with two years probation and restitution, but no actual suspension from practice. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent requested review, arguing that procedural errors made in the proceeding below had denied him a fair hearing. He also contended that the record did not support the culpability findings, that no aggravating circumstances were established, and that, if culpability were found, the appropriate discipline should be an admonition or a private reproval. The State Bar examiner urged adoption of the hearing judge's findings, conclusions and recommended discipline.

The review department rejected respondent's procedural challenges and adopted nearly all of the factual and culpability determinations made by the hearing judge. However, it modified the findings in aggravation and augmented the findings in mitigation. After reweighing these considerations, it adopted the hearing judge's recommended discipline, but added probation conditions requiring that respondent attend State Bar ethics school and complete a law office management course.

COUNSEL FOR PARTIES

For Office of Trials: Dane C. Dauphine

For Respondent: Heroico M. Aguiluz, 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] **102.10 Procedure—Improper Prosecutorial Conduct—Reopening**
102.30 Procedure—Improper Prosecutorial Conduct—Pretrial
135 Procedure—Rules of Procedure

A disciplinary proceeding was not barred under rule 511, Transitional Rules of Procedure of the State Bar, even though a letter was sent from the Los Angeles office of the State Bar ostensibly closing the case, where there remained a separate open, active investigative file in the San Francisco office. The closure of the Los Angeles investigation did not serve to extinguish the open investigation by the San Francisco office.

[2] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
119 Procedure—Other Pretrial Matters
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden

In order to establish a denial of a fair trial because of delay between the making of a complaint to the State Bar and the filing of a formal notice to show cause, an attorney must show specific instances of actual prejudice from the delay. Where information in support of respondent's claim of prejudice was available and known to respondent at the time of respondent's motion to dismiss before the hearing judge, but was not set forth in support of the motion, respondent could not improve on review the record he had the opportunity to make in the hearing department.

[3] **103 Procedure—Disqualification/Bias of Judge**
169 Standard of Proof or Review—Miscellaneous

The party making a claim of judicial bias must show that a person in possession of all the relevant facts would reasonably conclude that the hearing judge was biased or prejudiced against that party. The standard is an objective one and the partisan views of the litigants do not control.

[4] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial

A hearing judge may question witnesses in order to elicit or clarify testimony and test credibility, but may not, in so doing, become an advocate for one of the parties. Where the judge's treatment of witnesses on both sides was evenhanded and did not overstep the judge's factfinding role, there was no evidence of prejudice or bias.

[5] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
167 Abuse of Discretion

A hearing judge's denial of respondent's request to remove and copy exhibits already admitted into evidence, due to concern for the integrity of the record, was not improper, and did not show bias. Moreover, by failing to seek relief before the hearing judge after being denied access to the exhibits by the State Bar Court clerk's office, respondent waived his right to raise the issue before the review department.

[6 a-c] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
165 Adequacy of Hearing Decision

A variance between the hearing judge's tentative findings on culpability from the bench, and the judge's detailed written findings of fact and conclusions of law, did not demonstrate bias. The ultimate written decision controlled, and where it was supported by the evidence, the judge's remarks in summing up the evidence were not a basis for reversal.

[7 a, b] **103 Procedure—Disqualification/Bias of Judge**
119 Procedure—Other Pretrial Matters

The failure of the hearing judge to rule on respondent's motion to dismiss until after the hearing did not result from bias, but from respondent's filing of the motion less than a week prior to the hearing.

[8] **120 Procedure—Conduct of Trial**
136 Procedure—Rules of Practice
165 Adequacy of Hearing Decision

A hearing judge's announcement of tentative findings on culpability from the bench may be necessary due to the bifurcated nature of State Bar Court proceedings coupled with the desire to avoid an extra day of hearing. (Rules 1250, 1260, Provisional Rules of Practice.)

[9 a-c] **148 Evidence—Witnesses**
162.90 Quantum of Proof—Miscellaneous
165 Adequacy of Hearing Decision
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]

Where the hearing judge found the complaining witness worthy of belief on the crucial factual issues, and that witness's testimony was bolstered by other evidence in the record, and respondent's contrary contention that he had been discharged by his clients was not corroborated by documents that ordinarily would have been prepared by an attorney upon discharge, the hearing judge's conclusion that respondent abandoned his clients without notifying them was supported by the record, even though the complaining witness's testimony was not uniformly reliable regarding exact details.

[10] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
214.30 State Bar Act—Section 6068(m)
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
410.00 Failure to Communicate

For a failure to communicate with a client which occurred prior to the enactment of the statute requiring such communication, grounds for discipline remain under the common law doctrine underlying this duty. However, where the information the attorney most significantly failed to convey was notice of the attorney's withdrawal from representation, the attorney's conduct violated former the rule against prejudicial withdrawal, and finding culpability of a common law failure to communicate would be unnecessarily duplicative.

[11] **195 Discipline in Other Jurisdictions**
710.33 Mitigation—No Prior Record—Found but Discounted
710.39 Mitigation—No Prior Record—Found but Discounted
Seven years of law practice in California prior to respondent's misconduct was worth only slight weight in mitigation. Respondent's additional years in practice in a foreign jurisdiction were not shown by clear and convincing evidence to be mitigating because the record lacked information on the similarities and differences between the attorney discipline systems in the United States and the foreign jurisdiction.

[12] **765.10 Mitigation—Pro Bono Work—Found**
Respondent's leadership in minority bar associations, service as a delegate to the State Bar Conference of Delegates, and post-misconduct service as a municipal court judge pro tempore constituted mitigating circumstances.

[13] **543.90 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
760.12 Mitigation—Personal/Financial Problems—Found
Severe emotional problems which can be related to the misconduct at issue can be considered to have a mitigating weight. Respondent's misrepresentations to his clients, made two days after the funeral of his murdered son, while not excusable, were tempered in their otherwise aggravating effect by respondent's emotional stress, and the hearing judge should have given such stress more weight in mitigation.

[14] **625.10 Aggravation—Lack of Remorse—Declined to Find**
735.50 Mitigation—Candor—Bar—Declined to Find
802.69 Standards—Appropriate Sanction—Generally
1099 Substantive Issues re Discipline—Miscellaneous
Respondent's inconsistent responses to State Bar investigators precluded a finding in mitigation that respondent was cooperative with the State Bar. However, respondent's behavior while acting as his own counsel during the disciplinary proceeding, which was consistent with an honest, if mistaken, belief in his own innocence, did not demonstrate an intent to hinder or mislead the court. A respondent is not required to acquiesce in the findings and conclusions of the State Bar Court, but the respondent's attitude toward the disciplinary process and amenability in conforming to the Rules of Professional Conduct are proper issues for the court's review, particularly in determining appropriate discipline.

[15] **171 Discipline—Restitution**
Requirement that attorney who abandoned clients make restitution of amount paid by clients to successor counsel was imposed in furtherance of attorney's rehabilitation.

[16] **173 Discipline—Ethics Exam/Ethics School**
174 Discipline—Office Management/Trust Account Auditing
Respondent who did not fully appreciate fundamental office practices which would alleviate any future misunderstanding with a client concerning crucial decisions, status of litigation, fee disputes or withdrawal from representation was required to attend State Bar ethics school and complete a law office management course.

ADDITIONAL ANALYSIS

Culpability

Found

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
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]

Aggravation

Found

582.10 Harm to Client
621 Lack of Remorse

Discipline

1013.06 Stayed Suspension—1 Year
1017.08 Probation—2 Years

Probation Conditions

1021 Restitution
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management

OPINION

STOVITZ, J.:

This disciplinary proceeding arose largely because respondent, Heroico M. Aguiluz, failed to resolve a dispute with his clients in an ethically acceptable manner; and instead withdrew from employment in a way prejudicial to his clients' interests, abandoning their case and keeping their file.

Before us, respondent seeks review of a decision of a State Bar Court hearing judge recommending that respondent be suspended from the practice of law for one year, stayed, on conditions of a two-year probation. The judge recommended no actual suspension.

This case involves respondent's representation between December 1985 and April 1986 of Aurora and Charles Macawile, the owners of a residential care home for the elderly in Modesto. The Macawiles' state license was temporarily suspended in November 1985 based on an accusation filed by the state Department of Social Services (hereafter "DSS"). The hearing judge found that after respondent filed a response requesting a hearing and thereafter successfully secured two continuances of the hearing on the temporary suspension, respondent withdrew his appearance before the DSS and abandoned his clients, contrary to former rules 6-101(A)(2) and 2-111(A)(2).[1] Thereafter he denied to his clients that he had withdrawn, but refused to return the Macawiles' records until they paid him additional fees and signed a substitution of counsel, contrary to former rule 2-111(A)(2). The hearing judge dismissed charges that respondent had failed to return unearned fees, contrary to former rule 2-111(A)(3), and had violated Business and Professions Code sections 6068 (a) and 6103.[2] (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815.)

Respondent requested review, asserting procedural and substantive errors in the proceedings below. He contends he was denied a fair hearing because of the bias of the hearing judge; his due process rights were violated by the four-year interval between complaint and filing of notice to show cause; the disciplinary proceedings were barred by a procedural rule; the record did not support the culpability findings; and no aggravating circumstances were established. Respondent argues, in the alternative, that if culpability were found, the appropriate discipline should be reduced to an admonition or, at most, a private reproval. The examiner urges us to adopt the hearing judge's findings, conclusions and recommended discipline.

After independently reviewing the record, we reject respondent's procedural challenges and adopt almost all the findings of fact and culpability determinations of the hearing judge. However, we temper the findings of aggravation and augment the findings of mitigation to reflect the evidence submitted by respondent. After reweighing these considerations, we believe the recommended period of stayed suspension with conditions, including restitution, a law office management course and the California Professional Responsibility Examination, is warranted.

I. FACTS

The Macawiles owned and operated a residential care home in Modesto called Willow Tree Lodge. Their state operating license was temporarily suspended by DSS by order dated November 18, 1985, based on serious charges set forth in a 22-page accusation, alleging improper care and treatment and, in some cases, physical and verbal abuse of the residents, substandard living conditions, and noncompliance with state requirements as to employment of residential staff. (Exhs. L, M.)[3] The Macawiles retained respondent[4] on November 22, 1985, to de-

1. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar in effect from January 1, 1975, to May 26, 1989.

2. Unless noted otherwise, all references to sections are to those of the Business and Professions Code.

3. At the disciplinary hearing, respondent offered and the hearing judge admitted exhibits numbered A through MM. We correct the hearing judge's decision to so reflect.

4. Respondent was admitted to practice in the Philippines in about 1970 and California in 1978. He has no prior discipline.

fend the charges and paid him $3,000 of a $5,000 advance on fees. Respondent's agreement called for a billing rate of $100 per hour. (Exh. A.) On November 29, 1985, respondent filed a one-page defense to the accusation (exh. C), which triggered a requirement that a hearing be held on the temporary suspension within 30 days. Requests for discovery were exchanged by the parties and the hearing was set for December 27, 1985. (Exhs. D, N.)

Respondent arranged to meet with his clients at his South San Francisco office[5] on December 19, 1985, just prior to their departure to Hawaii for the Christmas holidays, to obtain records and other information from them and for payment of the remaining $2,000 of his advanced fees. The Macawiles and their son, George, arrived at respondent's office, but respondent did not appear for the meeting. The Macawiles left information concerning employees of the Willow Tree Lodge and other possible witnesses (exh. E), along with Aurora Macawile's handwritten responses to the charges in the accusation (exh. AA), with respondent's office staff, but did not leave the remaining $2,000 in advanced fees.

Prior to December 24, 1985, respondent sought to postpone the December 27 hearing and the continuance was denied. Respondent's son was murdered on December 23, 1985; and, in light of that tragedy, the administrative law judge granted respondent a continuance of the hearing until January 2, 1986. When the Macawiles returned from Hawaii on December 26, they called respondent's office and learned from his answering service of the death of his son. Respondent spoke to the Macawiles on December 27 and told them the hearing had been postponed and promised to advise them of any further proceedings. On December 30, 1985, Charles Macawile was served with a subpoena returnable at the administrative hearing in Modesto on January 2, 1986 (exh. R) for the logbook from the facility which allegedly contained accounts of incidents there, and received notice of the date and place of the administrative hearing. (Exh. 8.) The Macawiles prepared to appear at the administrative hearing on January 2 in Modesto, although they had not heard further from respondent.

On January 2, 1986, respondent called the Macawiles from Los Angeles International Airport and told them the hearing had again been postponed, which was not the case. Respondent then flew to San Francisco and called the office of DSS's attorney, Paula Mazuski. In the meantime, because neither respondent nor his clients had appeared at the Modesto hearing, Mazuski called respondent's Los Angeles office and was told that respondent was on his way to Sacramento for the hearing, traveling via San Francisco, but was believed to be delayed because of weather. (Exh. 11, p. 2; R.T. p. 19.) The administrative law judge continued the proceedings until the afternoon to permit Mazuski to contact respondent again. (Exh. 11, pp. 2-3.) She reached respondent at his South San Francisco office and he told her he was not at the hearing because he had never received the amended notice with the location of the hearing, was not prepared to try the case that day, and wanted a continuance until February. (Exh. 11, pp. 3-4; R.T. pp. 19-20.) Mazuski told him that he had to talk to the administrative law judge. In a second call to respondent after lunch, Mazuski refused to stipulate to a further postponement of the matter without a waiver of the 30-day hearing requirement and advised respondent that the earliest hearing date available was in March. (Exh. 11, pp. 4-5; R.T. pp. 21-22.) Respondent agreed to the waiver of the hearing requirement and the January 2 hearing was adjourned.

Respondent met with Aurora and George Macawile on February 21, 1986, to review respondent's work on the case and to discuss a superior court action filed by DSS in late January 1986 to enforce a subpoena DSS had served on Charles Macawile in December 1985 for a logbook maintained at the facility. The superior court action was to be heard on February 25, but the Macawiles had yet to be served with the motion to compel.[6]

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5. Respondent also maintained an office in Los Angeles.

6. The Macawiles had not produced the logbook in discovery and had resisted DSS's informal attempts to enforce its subpoena. After filing its enforcement action in superior court, DSS was unable to serve a copy of the complaint on the Macawiles and the matter was never heard in superior court.

The Macawiles and respondent presented different versions of the events at the meeting. The Macawiles testified that they were dissatisfied with respondent's work and decided it was in their best interest, given the time that had passed since their facility had been closed, to settle the matter with DDS and not try to reopen the facility. (R.T. pp. 111, 227-228.) Respondent wanted to go forward with the hearing, but was unsuccessful in persuading his clients. They instructed him to contact DSS to reach a settlement in the case and asked for an accounting of respondent's time as billed against the $3,000 advance. Respondent demanded the outstanding $2,000 that the Macawiles were to pay in December under the fee agreement, but they refused to advance any further funds without first receiving an accounting, which respondent then promised to provide.

In contrast, respondent maintained that the Macawiles remained resistant to cooperation with DSS and had wanted him to continue with the case for a fixed fee of $5,000, which respondent rejected as unreasonable given the anticipated length of the DSS hearing. (R.T. pp. 408-411, 415-418.) According to respondent, the Macawiles decided to represent themselves. They discharged respondent and, in response, he attempted to get Mrs. Macawile to sign a substitution of attorney and to pay the remainder of his $2,000 advance, which he saw as a true retainer. Mrs. Macawile refused to sign the substitution form and wanted an accounting of respondent's time, which respondent agreed to provide. However, respondent was adamant at the disciplinary proceeding that he considered himself to be the Macawiles' attorney until a substitution form was filed. (R.T. pp. 427, 475-476.)

Respondent left Los Angeles on February 22 to travel to Chicago, Washington, D.C., and Manila. He did not return to the United States until March 20, 1986. During his absence, respondent's office received correspondence from John Spittler, the deputy attorney general handing the discovery matter in superior court, reciting a February 21 telephone conversation he had had with respondent in which Spittler refused to agree to a postponement of the "administrative hearing." The hearing judge concluded that Spittler was referring to the April 1 hearing on the temporary suspension of the Macawiles' license. Respondent maintains that the conversation concerned postponing the discovery proceeding in superior court scheduled for February 25, claiming he did not know his clients had not been served. (R.T. pp. 404-410.) Spittler sent another letter dated March 4, 1986, in which he iterated the state's opposition to any continuance of the hearing date, and criticized respondent for failing to cooperate with discovery requests and for his clients' avoidance of service of process on the order to show cause in the superior court proceeding. In response, respondent instructed his staff to contact the Attorney General's office and advise them that the Macawiles were refusing to cooperate with respondent and that he "will withdraw" from the matter. (R.T. pp. 431, 472-474; exh. LL.)

Spittler contacted Mazuski about respondent's "withdrawal" and she telephoned respondent's office. Mazuski was told by respondent's administrative assistant, Lucille Penalosa, that respondent was no longer representing the Macawiles, but had been unable to execute a substitution of counsel before he left for the Philippines. Mazuski called Mrs. Macawile, advised her of respondent's call to the Attorney General's office on March 10, 1986, withdrawing respondent's appearance and Mazuski's subsequent call and conversation with Ms. Penalosa and asked Macawile if respondent was still representing her. Macawile told Mazuski that she had been in touch with respondent's office that same day, but was not told by respondent's staff that she was no longer being represented. Mazuski asked her to confirm that understanding with respondent's office. Mazuski confirmed her conversation in a letter to Mr. and Mrs. Macawile dated March 12, 1986. (Exh. 7.)

Upset by Mazuski's call, Mrs. Macawile called respondent's office at least four times in March 1986, leaving messages for Lucille Penalosa each time, but did not receive a return call. On March 17, 1986, she contacted Mazuski and said she was now acting without an attorney and wanted to know her options at that time. In a detailed letter dated March 18, 1986, Mazuski outlined the alternatives available to the Macawiles with regard to defending the license revocation charges. (Exh. 9.) The next day Mrs. Macawile consulted a Modesto attorney, Philip Pimentel, for help on her case.

In March 1986, Mr. and Mrs. Macawile went to respondent's South San Francisco office to try and see him. The date and circumstances of this meeting were exhaustively explored at the hearing. Mrs. Macawile maintained that the meeting occurred on March 20, 1986. (R.T. pp. 237, 336-337.) Respondent denied categorically that any such meeting took place. He testified and his travel documents show that he reentered the United States in Los Angeles on March 20, 1986. (R.T. pp. 422-423; exh. HH.) According to Mrs. Macawile and her son, respondent denied that he had formally withdrawn as their attorney, balked at giving them the accounting they had requested or their file and records without their execution of a substitution of attorney form, and when they refused, ordered them out of his office with the threat of calling the police.

The Macawiles called Pimentel on March 21 (exh. EE) and retained him as their counsel in the DSS case. The case was settled with withdrawal of the notice of defense on March 26, 1986, and the license was formally revoked in May 1986. (Exhs. 10, EE; R.T. p. 75.) Pimentel charged the Macawiles $567.[7] (Exh. EE.)

II. PROCEDURAL ISSUES

A. Respondent's Claim That the Proceeding Is Barred

Respondent has asserted a number of procedural challenges to the disciplinary proceedings, most of which can be disposed of concisely. **[1a]** First, he claims that the proceedings are barred by rule 511 of the Transitional Rules of Procedure of the State Bar,[8] which provides that once the Office of Investigation or Office of Trials determines not to institute formal proceedings, no future disciplinary action may be filed based on the same facts. There are exceptions to the rule, including for discovery of new or additional evidence, good cause, as determined at the discretion of the Director of Investigations or Director of Trials or if the Complainants' Grievance Panel orders continuation of the original action.

Respondent bases his claim under rule 511 on a letter written by Duane D. Dade, special investigator assigned to the State Bar's Los Angeles Office of Investigation, to Aurora Macawile on September 9, 1987, advising her that there were insufficient grounds for discipline and giving her information on the fee arbitration program of the Los Angeles County Bar Association.[9] (Resp. motion, exh. E.) The Los Angeles office originally investigated the Macawile complaint file in April 1986. However, the investigation was transferred to the San Francisco Office of Investigations in June 1987 and a new file was opened since the original investigation file could not be located. (State Bar response to motion to dismiss, declaration of San Francisco State Bar investigator Laura Triantafyllos.) In response to a letter from the State Bar, Mrs. Macawile provided additional information to the San Francisco Office of Investigations on June 5, 1987, to help them reconstruct the file (exh. X) and the State Bar sought a response from respondent by letter dated August 3, 1987. (Resp. motion, exh. D.) The new investigator spoke to respondent by

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7. The hearing judge found that the Macawiles paid $700 for Pimentel's services based on Mrs. Macawile's testimony approximating the cost of those services, and, as a condition of discipline, ordered restitution in that amount. The bill from Pimentel dated June 19, 1986, reflected a charge of $567 for hours billed to the Macawiles with an outstanding balance of $267. Mrs. Macawile testified that she paid Pimentel's bill in full. From our review of the record, we amend the hearing judge's decision to reflect clients' payment to Pimentel of $567 rather than $700.

8. Rule 511 reads as follows: "The decision of the Office of Investigation or Office of Trial Counsel that a formal proceeding shall not be instituted is a bar to further proceedings against the member based upon the same alleged facts. This rule shall not apply when there is new or additional evidence, or, upon a showing of good cause at the discretion of the Director, Office of Investigation, or the Director, Office of Trial Counsel, or, if further proceedings are ordered by the Complainants' Grievance Panel under rules 513 et seq. of these rules."

9. There is no allegation that Dade did not have the authority under rule 511 to act for the Office of Investigation to close a case. (Compare *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 125 [former rule 511, which required closure of case by examiner, does not prohibit further proceedings in case closed by investigator, where investigator was without authority under rules to close case for purposes of barring further action].)

phone on or about August 14, 1987, concerning the complaint. (Declaration of Laura Triantafyllos.) After receiving the September 1987 closure letter from the Los Angeles office, Mrs. Macawile called investigator Triantafyllos to advise her of the letter. (*Ibid.*) Triantafyllos retrieved the closed Los Angeles file and, with her supervisor's approval, continued her investigation. (*Ibid.*)

[1b] Respondent maintains that the matter was dismissed and none of the exceptions apply under the facts. The hearing judge denied the motion to dismiss on the grounds that (1) no final decision had been made to abandon proceedings against respondent; (2) if the facts were construed to find the matter had been closed, good cause existed to reopen the case; and (3) new evidence in the case warranted reopening the matter. (Decision p. 3; order denying motion dated January 24, 1990.) From our review of the record, it is evident that there was always an active State Bar investigation open on respondent concerning the allegations raised by the Macawiles. The San Francisco investigation proceeded on a course independent of the Los Angeles office and respondent and Mrs. Macawile were so advised. The last contact the San Francisco investigator had with respondent and Mrs. Macawile was less than a month before the Los Angeles letter was sent. Given those facts, the letter from the Los Angeles examiner, resulting from the lack of coordination between the two offices, while unfortunate, did not serve to extinguish the open investigation in San Francisco. The motion to dismiss under rule 511 was properly denied.

B. Respondent's Claim of Delay

[2] Respondent claims that the passage of more than four years between the date the complaint was made to the State Bar and the filing of its notice to show cause denied him a fair trial. Before us, respondent asserts that specific witnesses (former employees) and records which would have assisted him in defending the action are no longer available because of the passage of time. Respondent must show in his motion more than the passage of time and must demonstrate actual prejudice in order to prevail. (*Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 60; *Wells* v. *State Bar* (1978) 20 Cal.3d 708, 715.) In his motion before the hearing judge, no specific instances of prejudice occasioned by the delay were claimed by respondent. There is no indication in this record that the information respondent now proffers was unavailable or unknown to him at the time he filed his motion before the judge. Our function of independent review is not to enable respondent to improve the record he had the opportunity to make in the hearing department. We sustain the denial of the motion to dismiss on these grounds.

C. Respondent's Claims of Bias

[3] Finally, respondent alleges bias and prejudgment by the hearing judge which he claims, in effect, deprived respondent of a fair hearing. The respondent must show that a person in possession of all the relevant facts in this case would reasonably conclude that the hearing judge was biased or prejudiced against the respondent. (Trans. Rules Proc. of State Bar, rule 230; *United Farm Workers of America* v. *Superior Court* (1985) 170 Cal.App.3d 97, 104.) It is not "the litigants' necessarily partisan views" that control; rather it is an objective standard applied to the facts and circumstances presented in the matter. (*Leland Stanford Junior University* v. *Superior Court* (1985) 173 Cal.App.3d. 403, 408, citing *United Farm Workers of America* v. *Superior Court*, *supra*, 170 Cal.App.3d at p. 104.)

[4] Respondent's first claim is that the hearing judge became a "second examiner" and prejudged the issues based on his pro-State Bar bias. A hearing judge, while permitted to question witnesses, cannot, during the course of that examination "become an advocate for either party or cast aspersions or ridicule upon a witness." (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 533, overruled on another point, *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799, fn. 18.) The hearing judge did conduct his own questioning of witnesses, including respondent, during direct and cross-examination. Those testifying for the State Bar were subject to the same scrutiny to test their credibility as those appearing on behalf of respondent. Our review of the record shows even-handed treatment of both sides by the trial judge. He did not overstep his factfinding role in eliciting or clarifying testimony. (See *ibid.*) The judge's comments during the trial were made in the discharge of

his duties in eliciting, evaluating and ultimately resolving the evidence and, thus, are not evidence of prejudice or bias. (*Jack Farenbaugh & Sons* v. *Belmont Construction Co.* (1987) 194 Cal.App.3d 1023, 1031, citing *Estate of Friedman* (1915) 171 Cal. 431, 440.)

[5] The judge's denial of respondent's request to remove and copy exhibits L and M after they were admitted into evidence was not improper. Respondent was ordered to have his exhibits copied and marked, with an additional copy for the hearing judge, in a November 1, 1990 order, following a status conference of the same date. (See Provisional Rules of Practice of the State Bar Court, rule 1211.) Preservation of the record before the State Bar Court is of foremost concern and we see no impropriety in the judge's determination that removal from the clerk's office of documents admitted in a disciplinary case, even for a short time, posed too great a risk to the integrity of the record. Moreover, respondent made no effort to move for relief before the hearing judge when denied access to the exhibits by the clerk's office and, thus, any objection raised thereafter would appear to be waived. Overall, the record does not support respondent's assertions of bias on this ground.

[6a,7a] Respondent's second bias argument related to the hearing judge's conduct of the case concerns two rulings made in the course of the proceeding. Respondent contends that the hearing judge's refusal to rule on respondent's motion to dismiss prior to the hearing and the variance between the judge's verbal statement of culpability from the bench and his detailed findings and conclusions reflected in the written decision constitute irrefutable evidence of bias. We disagree. **[7b]** Failure of the judge to rule on respondent's motion to dismiss until after the conclusion of the hearing did not result from bias, but rather from respondent's filing of the motion less than a week prior to the hearing. The judge reserved ruling on the motion until he could review respondent's papers as well as those submitted by the examiner (timely filed the day before the hearing).

[6b] At the close of the hearing, the judge made *tentative* findings of culpability, and he advised counsel at the hearing that the findings were subject to his review of the evidence after the close of the record.[10] **[8 - see fn. 10]** (R.T. p. 502.) The judge gave his impressions of the case and heard arguments from both counsel on the weight of the evidence on each charge. Thereafter, he accepted respondent's testimony and other evidence in mitigation and the State Bar's recommendation as to discipline. Respondent has not argued before us that his presentation of evidence on the issues of mitigation and aggravation was in any way affected by or that he unduly relied upon the oral culpability findings.

[6c] Where the hearing judge's impressions varied from his ultimate written findings of fact and conclusions of law, the written decision controls. As the Court of Appeal found in a case regarding a similar variance between judicial statements and final decision, "Where, as here, the evidence supports the findings and the findings support the judgment, we cannot reverse the judgment because of remarks made by the trial judge in summing up the evidence, where those remarks are neither reflected in the findings nor the judgment." (*Furuta* v. *Randall* (1936) 17 Cal.App.2d 384, 388.)

III. CULPABILITY DETERMINATIONS

[9a] Although our review of the record is independent (rule 453, Trans. Rules Proc. of State Bar), we owe deference to the findings of credibility made by the hearing judge who heard the witnesses testify and observed their demeanor, especially when the findings are based on conflicting testimony. (*Borré* v. *State Bar* (1991) 52 Cal.3d 1047, 1051-1052; *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 931.) Here, the hearing judge, in weighing contradictory versions of the facts, found the testimony of Aurora Macawile concerning the events in February and March and the testimony of Aurora's son as to the events through February to be more detailed and trustworthy than that of respondent and, further, concluded that

10. **[8]** The hearing judge's announcement of tentative findings from the bench was necessary because of the bifurcated nature of State Bar Court proceedings (see Provisional Rules of Practice of the State Bar Court, rules 1250 and 1260) coupled with the desire to avoid an extra day of hearing.

respondent's testimony overall was not credible. (Decision p. 17.) Aurora Macawile's testimony is bolstered, in part, by the testimony of attorney Mazuski, who recounted Macawile's confusion and anger when Mazuski told her of the representations of respondent's staff to the DSS that respondent was no longer Macawile's attorney. (R.T. pp. 30-33.) While Aurora Macawile may not have been uniformly reliable in her testimony regarding the exact dates or details in question,[11] the hearing judge found her worthy of credit on this crucial issue. (See, e.g., *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1099 [while complaining witness's testimony on other particulars was subject to challenge, testimony on key element as to culpability accepted by hearing panel as believable].) Respondent merely repeats his version of events presented at the hearing, which alone does not establish error by the hearing judge. (*Harris* v. *State Bar* (1990) 51 Cal.3d 1082, 1088.)

[9b] Looking beyond the conflict in testimony, respondent offered no documents which ordinarily would have been prepared by an attorney upon his or her discharge: a confirming letter to the client or an accounting of time and expenses. Respondent never sent a bill for fees to support his claim at the February meeting that he was owed or entitled to additional fees. When respondent alleged that his clients refused to sign a substitution form, he would have been expected to safeguard his position through some other document. Respondent did not prepare anything for the clients or DSS to indicate that he had been discharged by the Macawiles in February. Nevertheless, he instructed his office staff to inform the state's counsel that he *would* withdraw as he was not getting client cooperation.

[9c] On this record, we are given no reason to depart from the hearing judge's findings that as a result of the February meeting, respondent agreed to attempt to settle the Macawiles' case with DSS; thereafter he intentionally ignored their instructions, contrary to rule 6-101(A)(2), and abandoned their case without notifying them, returning their file, or shielding their rights from foreseeable prejudice, contrary to rule 2-111(A)(2).

[10] There was also an allegation in the notice to show cause that respondent failed to communicate with his clients. Although the conduct at issue allegedly occurred in 1986, prior to the enactment of section 6068 (m), we have found the "common law" doctrine underlying this duty to communicate or to attend to client needs a viable grounds for discipline under 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.) However, as the hearing judge found, the information respondent most significantly failed to communicate to his client was notice of his withdrawal from the case, a requirement under rule 2-111(A)(2). Finding him culpable under section 6068 (a) as well would be duplicative and unnecessary. (*Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

IV. DISCIPLINE

The discipline recommended by the hearing judge—one year actual suspension, stayed, two years probation with conditions, including restitution, the California Professional Responsibility Examination and attendance at the ethics school run by the State Bar—is too harsh according to respondent. The examiner asks that the discipline recommended by the hearing judge be sustained.

A. Mitigating and Aggravating Circumstances

We review the appropriateness of discipline recommendations in light of the primary purposes of discipline: protection of the public, the courts and the bar. All relevant mitigating and aggravating circumstances must be considered. (*Harris* v. *State Bar*, *supra*, 51 Cal.3d at p. 1088.) Respondent contends that there are no aggravating circumstances present in the case and emphasizes mitigating factors such as

11. As noted *post*, Mrs. Macawile steadfastly contended that she met with respondent on March 20, 1986, the date on which he reentered the United States from the Philippines, according to his passport. (R.T. pp. 237, 336-337; exh. HH.) The judge believed Mrs. Macawile insofar as finding that she and respondent did meet but determined that the meeting took place "on or about" March 20. (Decision pp. 15-16.)

his work with the State Bar, the Philippine and Minority Bar Associations, and as a judge pro tempore in the Los Angeles Municipal Court; the impact of his son's murder; his cooperation with the State Bar; and lack of a prior record of discipline.

We agree that respondent's mitigating evidence was not accorded as much weight by the hearing judge as it deserved. **[11]** The lack of a prior disciplinary record is a mitigating factor recognized by the hearing judge. (Decision pp. 26-27; Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("standard(s)"), std. 1.2(e)(i).) Respondent's seven years of practice in California prior to his misconduct should be accorded only slight weight in mitigation. (Std. 1.2(e)(i); *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 658.) Moreover, there is some question whether respondent's 15-year membership in the Philippine bar is mitigating, given the lack of information in the record on the similarities of and differences between attorney discipline systems in the United States and the Philippines. (Compare *Brockway* v. *State Bar* (1991) 53 Cal.3d 51, 66 [attorney's combined years of practice in California and Iowa considered a mitigating circumstance].) Without more proof submitted on this question, we do not find clear and convincing evidence that respondent's Philippine bar membership is a mitigating factor.

[12] Respondent's leadership of minority bar associations and service as a delegate to the State Bar Conference of Delegates were clearly established. Such legal community activities are recognized as mitigating circumstances. (*Porter* v. *State Bar* (1990) 52 Cal.3d 518, 529.) Respondent continued his involvement after the misconduct here, serving as a judge pro tempore in the Los Angeles Municipal Court. We find this service to be a mitigating circumstance, given respondent's prior record of community involvement. (*Ibid.*)

[13] The emotional stress on respondent resulting from the murder of respondent's son was not, in our view, accorded sufficient weight. Severe emotional problems which can be related to the misconduct at issue can be considered to have a mitigating effect. (*Read* v. *State Bar* (1991) 53 Cal.3d 394, 424-425.) Respondent's misconduct occurred in the shadow of his tragic loss. The hearing judge properly considered the impact of the murder in concluding that respondent's unavailability for the first scheduled hearing was not misconduct. We find that respondent's actions on the second hearing date, January 2, 1986, two days after respondent's son's funeral, were understandably affected by his emotional state. While we do not excuse respondent's misrepresentations to his clients as to the status of the case that day, we conclude that the otherwise aggravating impact of this conduct is tempered by respondent's emotional stress. (*Porter* v. *State Bar*, *supra*, 52 Cal.3d at p. 529.)

[14] We do not find clear and convincing evidence that respondent was cooperative with the State Bar. Respondent's inconsistent responses to State Bar investigators regarding his status as the Macawiles' attorney preclude a finding of cooperation. However, we do not agree with the hearing judge that respondent's behavior during the disciplinary proceedings constituted an intent to mislead or hinder the court in its factfinding mission. Upon reviewing the record, we find respondent's actions to be consistent with an honest, if mistaken, belief in his own innocence. (*Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at p. 933.) Further complicating matters, respondent has acted as his own legal counsel. As such, he walks a fine line between the freedom of vigorous advocacy and being judged for his character in presenting his case in the State Bar Court. Respondent is not required to acquiesce in the findings and conclusions of the State Bar Court. (*Beery* v. *State Bar* (1987) 43 Cal.3d 802, 816.) However, his attitude toward the disciplinary proceeding and amenability in conforming his conduct to the Rules of Professional Conduct are proper issues for our review, particularly in determining the appropriate discipline. (*Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d p. 933.)

We agree that respondent lacks insight into the consequences of his misconduct in failing to follow his clients' instructions and thereafter failing to withdraw from their cause without prejudice to their interests. As noted *ante*, some of respondent's misrepresentations to his clients we have tempered because of their proximity to the murder of respondent's son. We have insufficient information in this record to determine what economic harm the Macawiles suffered in

the delay in the eventual settlement of their case (and closure of their business facility) caused by respondent's inattention and abandonment. (See, e.g., *Harris* v. *State Bar*, *supra*, 51 Cal.3d at pp. 1086-1087 [succeeding attorney, an expert in field, testified as to diminution in value of settlement resulting from attorney's misconduct].) The cost to the Macawiles of retaining another attorney to settle their case is harm which we weigh in determining discipline as well.

B. Comparable Case Law

The hearing judge discussed two prior disciplinary decisions in which attorneys with no prior discipline failed to perform services for and abandoned a single client: *Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d 921 and *Wren* v. *State Bar* (1983) 34 Cal.3d 81.

In *Van Sloten*, *supra*, 48 Cal.3d 921, an attorney with no prior record of discipline represented a client in a marital dissolution case, worked on the matter for the first five months, submitted a proposed settlement agreement to the opposing side; and, thereafter, failed to communicate with his client, take action on the matter, or withdraw. His inattention spanned one year. Eventually, the client hired new counsel who completed the dissolution. The attorney claimed that he agreed to represent his client only if the client's spouse agreed to be cooperative in the matter. When the client's spouse refused to return the agreement, the attorney refused to take any further action, although he made no attempts to formally withdraw from the case. The Court concluded that a single act of failing to perform requested services without serious harm to the client, aggravated by the attorney's lack of appreciation for the discipline process and the charges against him, as demonstrated by his failure to appear at the review department proceedings, warranted a six-month suspension, stayed, one year of probation on conditions and no actual suspension.

In *Wren*, *supra*, 34 Cal.3d 81, an attorney, in practice for 22 years without a disciplinary record, represented a client in a dispute over a mobilehome sold by his client. The attorney was to file suit for repossession. Over a 22-month period, the attorney had two meetings with the client, misrepresented the status of the case to the client, leading the client to believe that a lawsuit had been filed and a trial date was pending, when the case had never been filed, and did nothing to prepare the case for filing. The attorney blamed the client for vacillating on the decision to go to trial, an argument which the Court found unsupported in the record. (*Id.* at pp. 88-89.) The Court concluded that the attorney had failed to communicate adequately with his client, misrepresented the status of the matter to his client, failed to prosecute his client's claim and submitted misleading testimony to the hearing panel. The attorney was suspended for two years, stayed, with two years of probation and 45 days of actual suspension.

Two other cases in the past two years in which the misconduct revolved around the abandonment of a single client are *Harris* v. *State Bar*, *supra*, 51 Cal.3d 1082 and *Layton* v. *State Bar*, *supra*, 50 Cal.3d 889. In *Harris*, the attorney, admitted to practice 10 years earlier, neglected a personal injury matter for over four years, doing virtually nothing on the case beyond filing the case and serving the defendant shortly before the statute of limitations ran. (51 Cal.3d at p. 1088.) There was significant harm to the client, who died during the pendency of the case, and a considerable financial loss to the estate when the matter was finally settled by new counsel. (*Id.* at pp. 1086-1087.) The Court also found that there was little, if any, recognition on the part of the attorney of her wrongdoing and no remorse. (*Id.* at p. 1088.) Some mitigating weight was given to the effect of a debilitating illness suffered by the attorney during part of the period of misconduct. (*Ibid.*) The Court suspended Harris for three years, stayed, with an actual suspension of 90 days.

In *Layton*, *supra*, 50 Cal.3d 889, the "client" ignored by the attorney was an estate and trust created from the residue of the estate. The attorney, in practice for over 30 years, served as both attorney and executor of the estate and trustee. Over a five-year period, the attorney neglected his responsibilities as executor and attorney to conserve assets of the estate and to fulfil important duties as executor, including failing to file an accounting of the estate for almost five years. The primary beneficiary of the estate was unable to contact the attorney, was significantly harmed by his inaction and successfully

sued for his removal. The Court adopted the review department recommendation, which noted that the attorney's cooperation with the State Bar was undercut by his contradictory explanations for his conduct and also noted the attorney's indifference toward rectification or atonement. The attorney's many years of practice were accorded mitigating weight. The Court concluded that his failure to perform legal services competently and diligently warranted a three-year suspension, stayed, three-year probation period and 30 days actual suspension.

The *Wren*, *Harris*, and *Layton* cases can be distinguished in part because the misconduct at issue here did not extend over as long a period of time. The discipline imposed in the *Harris* and *Layton* cases included some actual suspension, which could be justified in those cases based on the duration of the misconduct and the seriousness of the harm suffered as a result of the misconduct, factors not present in this case. Although respondent's record of practice prior to misconduct is not as lengthy, and thus as not compelling, as those presented in *Layton* and *Wren*, respondent's emotional stress after his son's murder is an equally compelling circumstance in determining discipline. As in *Wren* and *Harris*, respondent failed to recognize the effect of his misconduct, was not candid with his clients or the State Bar, and acted contrary to his clients' instructions, all aggravating factors. However the lack of candor in this case is mitigated by the emotional stress suffered by respondent. There was no issue of lack of candor in *Van Sloten*, nor was there significant harm shown to the client, and, accordingly, the period of stayed suspension was less. However, the conduct in this case is more serious than that in *Van Sloten* and warrants a longer period of probationary supervision than that imposed in the *Van Sloten* case.

V. RECOMMENDED DISCIPLINE

After reweighing the factors addressed above, we come to the same result as the hearing judge. We recommend that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that respondent be placed on probation for two years, subject to conditions. We have two modifications to the conditions as set forth in the hearing judge's decision. **[15]** We first modify condition 1 of the probation terms to reduce the amount of restitution to Aurora and Charles Macawile to $567 from $700, reflecting the sum actually paid by the Macawiles to their new attorney. This condition of probation is in furtherance of respondent's rehabilitation. (*Sorensen* v. *State Bar* (1991) 52 Cal.3d 1036, 1044-1045.)

[16] Further, it is evident that respondent does not fully appreciate fundamental office practices which would alleviate any future misunderstanding with a client concerning communicating crucial decisions in defending a case, the status of litigation, fee disputes or withdrawal from representation. We therefore recommend that respondent be required to attend the State Bar's ethics school within one year of the effective date of the Supreme Court's order herein. We also recommend as an added condition of probation that respondent be required within one year from the effective date of his probation to complete a law office management course approved in advance by his probation monitor referee.

With the foregoing modifications, we adopt the conditions of probation and all other recommendations, including the award of costs found on pages 34-36 of the hearing judge's decision filed May 3, 1991, as though fully set forth herein.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOEL M. WARD

A Member of the State Bar

No. 86-O-12517

Filed February 13, 1992

SUMMARY

Through gross negligence, but without dishonest intent, respondent misappropriated more than $12,000 held in trust for a client, and failed to comply with other trust fund responsibilities to the client. In another matter, respondent failed to communicate with the client, and did not bring the client's case to trial within the five-year statutory deadline. The hearing judge recommended that respondent be suspended for three years, stayed, and be placed on probation for four years on conditions including a sixty-day actual suspension. (Elias Powell, Judge Pro Tempore.)

The State Bar examiner sought review, arguing that respondent had been untruthful in his testimony at the hearing, and that his offenses warranted disbarment. The review department rejected the examiner's contentions, affirming the finding that respondent was grossly negligent, but not dishonest, in the handling of his client's trust funds, and holding that respondent's continued belief in his version of the facts did not render his testimony untruthful. Further, the review department held that respondent's conduct in missing the statutory deadline to prosecute the second client's lawsuit was due to inadvertence and fell short of constituting grounds for discipline as a reckless failure to perform legal services competently.

Considering both matters together, and taking into account aggravating and mitigating circumstances, the review department recommended increasing the actual suspension from 60 days to 90 days, and reducing the period of probation from four to three years, but adopted the remainder of the hearing judge's recommended discipline.

COUNSEL FOR PARTIES

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For Respondent: Arthur L. Margolis

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HEADNOTES

[1 a-c] **214.30 State Bar Act—Section 6068(m)**
221.00 State Bar Act—Section 6106
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
801.45 Standards—Deviation From—Not Justified
824.10 Standards—Commingling/Trust Account—3 Months Minimum
863.90 Standards—Standard 2.6—Suspension
1093 Substantive Issues re Discipline—Inadequacy

Misconduct committed by attorney who was grossly negligent, though not dishonest, in handling a significant sum of client trust funds in one matter, and who failed to communicate adequately with a client in another matter, warranted 90 days rather than 60 days of actual suspension as condition of 3-year probation accompanying 3-year stayed suspension.

[2 a-d] **162.20 Proof—Respondent's Burden**
165 Adequacy of Hearing Decision
221.00 State Bar Act—Section 6106
420.00 Misappropriation

Where the evidence concerning an attorney's authority to apply client trust funds to attorney's fees consisted largely of conflicting testimony, the hearing judge's finding that the attorney did not have the authority to use the funds, coupled with the documentary evidence supporting culpability, constituted clear and convincing evidence supporting the judge's conclusion that the attorney improperly used and misappropriated client trust funds. Because the attorney's trust account balance repeatedly dropped below the necessary amount over a period of many months, and the attorney did not have an adequate explanation for his inadequate trust account balance, the attorney's misconduct, though not involving intentional dishonesty, constituted gross negligence amounting to moral turpitude.

[3] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where an attorney failed to refund entrusted funds to a client promptly when reasonable attention to the attorney's duties would have made it apparent that the client had overpaid the attorney for fees, the attorney violated the duty to pay clients their funds promptly upon demand.

[4 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

Where there was no evidence that an attorney's failure to bring a client's lawsuit to trial within the statutory deadline resulted from anything other than the attorney's simple error in miscalculating the date, and the attorney had expended substantial efforts on the client's behalf, there was not clear and convincing evidence of a reckless failure to perform legal services competently.

[5] **214.30 State Bar Act—Section 6068(m)**

When a client learned independently that the client's case might be endangered by a statutory deadline, and contacted the attorney regarding that potential problem, the attorney breached the duty to communicate with the client by not having an office system in place to assure that such calls would be brought to the attorney's attention.

[6] **106.30 Procedure—Pleadings—Duplicative Charges**
214.30 State Bar Act—Section 6068(m)
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
While a lack of adequate communication with a client may warrant a finding of failure to perform legal services competently, it would be duplicative to draw such a conclusion when the attorney has been found culpable of violating the statutory duty to communicate with clients.

[7 a, b] **615 Aggravation—Lack of Candor—Bar—Declined to Find**
745.10 Mitigation—Remorse/Restitution—Found
Respondent's persisting in his belief in his innocence of fundamental misconduct did not necessarily show that respondent was deceitful or had misled the hearing judge, and was not a basis for a finding in aggravation, nor did it prevent a finding in mitigation that respondent had showed recognition of ways he could handle client matters more professionally in the future.

[8] **214.30 State Bar Act—Section 6068(m)**
582.10 Aggravation—Harm to Client—Found
Where respondent's disciplinable failure to communicate with his client may have prevented him from earlier discovering the non-disciplinable calendaring mistake that caused his client to lose his cause of action, the harm to the client was properly recognized as a factor in aggravation.

[9] **745.31 Mitigation—Remorse/Restitution—Found but Discounted**
Restitution of misappropriated client trust funds which occurred very belatedly and after the start of disciplinary proceedings was not entitled to any significant weight in mitigation.

[10] **760.31 Mitigation—Personal/Financial Problems—Found but Discounted**
760.32 Mitigation—Personal/Financial Problems—Found but Discounted
Personal stress factors, such as the estrangement, illness, or death of a family member, can constitute mitigating evidence. However, they were properly accorded less weight than would otherwise have been appropriate, where there was evidence that the attorney was responsive to other clients during the same period, the attorney's own testimony did not convincingly show what role these stress factors played in the misconduct, and there was no expert testimony clearly establishing a nexus between the personal difficulties and the attorney's disregard of professional duties.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m)
221.12 Section 6106—Gross Negligence
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
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
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Aggravation

Found

521 Multiple Acts

Found but Discounted

582.39 Harm to Client

Mitigation

Found

710.10 No Prior Record

740.10 Good Character

Standards

802.69 Appropriate Sanction

Discipline

1013.09 Stayed Suspension—3 Years

1015.03 Actual Suspension—3 Months

1017.09 Probation—3 Years

Probation Conditions

1021 Restitution

1024 Ethics Exam/School

OPINION

STOVITZ, J.:

Joel M. Ward (respondent) was admitted to practice law in Illinois in 1963 and in California in 1971. He has no prior record of discipline.

The State Bar examiner has requested that we review a decision of a judge pro tempore of the State Bar Court ("judge") finding respondent culpable, in the Kranjc matter, of negligently misappropriating more than $12,000 he was holding in trust for a client and failing to comply with other trust fund responsibilities owed to that client. As to a personal injury matter involving another client, West, the judge found that between late 1986 and mid-1987 respondent failed to communicate adequately with West and, with reckless disregard, failed to perform legal services competently by not bringing West's case to trial within the applicable five-year period.

The judge recommended that respondent be suspended for three years, stayed, and placed on probation for four years on conditions including a 60-day actual suspension.

In making his recommendation, the judge made findings in aggravation that respondent's misconduct consisted of multiple acts and harmed his clients significantly. In mitigation, the judge considered respondent's lengthy practice without prior discipline; respondent's recognition of his wrongdoing and demonstration of remorse, his making restitution, albeit after the start of disciplinary proceedings; extensive, favorable character testimony; and the stress placed on respondent by two significant family problems.

In seeking our review, the examiner urges that we make additional findings that respondent was untruthful in his testimony below and that his offenses, particularly his misappropriation of funds, warrant disbarment.

[1a] Upon our independent review of the record, we have concluded that in the Kranjc matter, the evidence convincingly shows that respondent was grossly negligent in handling his client's trust funds but not dishonest. In the West matter, we have concluded that the evidence shows that respondent may be disciplined for failure to communicate adequately with his client but that respondent's failure to timely bring West's case to trial was due to inadvertence which falls short of serving as additional grounds for discipline. We do not find clear and convincing evidence to warrant the making of additional findings that respondent misrepresented the facts as urged by the State Bar examiner. However, when we consider both matters together, particularly the protracted breach of trust displayed by respondent in the Kranjc matter, we have concluded that 90 days of actual suspension, rather than 60 days, is the appropriate recommendation to make as a part of a three-year stayed suspension.

I. CULPABILITY

A. Kranjc Matter.

Respondent was retained by Nadia Kranjc in December 1984 to substitute for her prior attorney, George Cole, in defending a lawsuit filed against her and her husband by Vladimer Stanfel, alleging breach of a partnership agreement to share in the ownership and income of an apartment building. (R.T. pp. 308-310.) Kranjc's husband was given about $18,400 by Stanfel, but Kranjc maintained that those funds were not used to purchase the apartment building. (*Ibid.*; exh. 15.) While representing Kranjc, Cole placed those funds in his trust account. On March 21, 1985, they were transferred by check to respondent after he was retained by Kranjc. (Exhs. 10, 11, 12 and 15.) Kranjc permitted Cole to deduct approximately $1,200 in legal fees from $1,600 in accumulated interest. (R.T. p. 171.) Respondent did not place the $18,807 in his trust account until May 1985, after the lawsuit was tried. (R.T. pp. 343-344.)

Respondent had no written fee agreement with Kranjc. Respondent quoted an hourly fee of $150. (Exh. 7.) When he was retained in December 1984 respondent estimated the cost of representing Kranjc through trial at $5,000. (*Ibid.*)

Trial was originally scheduled for December 1984. However, after respondent had an opportunity to consult with opposing counsel and review some

aspects of the case, he became convinced that his client would have been severely prejudiced had the trial been held as scheduled. With Kranjc's consent, trial was continued until the end of April 1985, conditioned on Kranjc reimbursing plaintiff's airfare. (Exh. 7.) In the meantime, between December 26, 1984, and January 29, 1985, Kranjc paid respondent $3,000 in legal fees. (Exh. 9.) In the months between the first trial date (December 1984) and the next trial date (April 1985) respondent conducted discovery and learned that the case was more complex than he had seen at first, for Kranjc's husband and the plaintiff had exchanged a great deal of correspondence written in the Croatian language. Each of the letters had to be translated and meetings were required between Kranjc, her son and respondent to review in detail the lengthy correspondence. This led to respondent revising his estimate of total legal fees to between $5,000 and $10,000. (R.T. pp. 333-337.)

The *Stanfel* v. *Kranjc* trial commenced in late April 1985 and concluded the next month. In April and May 1985 Kranjc paid respondent another $4,000 in legal fees for a total of $6,000. However, respondent had not submitted any bill to Kranjc for legal fees, nor had he accounted in writing for the time he had spent. Nevertheless, about one month after respondent deposited the $18,807 which he received from Kranjc's predecessor counsel, he commenced using those funds. By July 12, 1985, the balance of respondent's trust account stood at only $8,441.22 and by August 7, that trust account balance was just over $5,000. Although the balance went up to $18,009 two days later on August 9, 1985, the balance dropped well below $18,000 on many occasions during the rest of 1985 and into 1986. (Exh. 13b.) It is not disputed that respondent used $12,000 of Kranjc's funds.

On July 22, 1985, respondent sent Kranjc his first and only statement for professional services rendered. (Exh. 8.) This statement covered the period December 9, 1984 through June 1985. Broken down into the number of hours respondent spent on Kranjc's case during each of those seven months, it showed a total of 133 hours of legal work and showed a total fee of $19,950 at respondent's rate of $150 per hour. Respondent billed an additional $2,025 for costs incurred (beeper, handwriting expert, appraiser and translator) for a grand total of fees and costs of $21,975. Respondent's July 22, 1985 statement credited Kranjc with having already paid $6,000 for a balance due of $15,975. Nowhere in respondent's statement did he disclose that he had already withdrawn $12,000 from the trust funds received from Kranjc's previous counsel. Kranjc, unaware that respondent had taken any of the trust funds for his fees, continued to pay respondent's fees. The following table summarizes Kranjc's payments to respondent for fees and costs. It shows that between July 22, 1985, and March 7, 1986, Kranjc paid respondent an additional $8,000 in fees for a total of $14,000 in legal fees and $925 for costs. (Exh. 9.)

PAYMENTS BY NADIA KRANJC
TO RESPONDENT (EXH. 9)

Date	*Paid to Fees*	*Cumul. Fees*	*Paid to Costs*
12/26/84	$1,000	$1,000	
1/29/85	1,000	2,000	
4/25/85	1,000	3,000	
5/17/85			$225
5/18/85	1,000	4,000	
5/20/85			200
5/28/85			500
5/30/85	2,000	6,000	
7/22/85	1,000	7,000	
8/30/85	1,500	8,500	
10/23/85	1,500	10,000	
11/10/85	1,000	11,000	
12/5/85	1,000	12,000	
1/16/86	1,000	13,000	
3/7/86	1,000	14,000	
Totals	$14,000		$925

To recap, respondent's billing in July 1985 for fees and costs totalled $21,975. By March 1986 Kranjc paid respondent nearly $15,000 of that sum, but respondent had taken from his trust account for fees $12,000 of the $18,707 he had received from Kranjc to hold in trust. Thus, respondent had collected $5,000 *more* from Kranjc than he was entitled to by his one and only billing.

Although no formal judgment was filed in *Stanfel* v. *Kranjc* until the fall of 1985, the result was adverse

to Kranjc. The trial court awarded her opposing party a one-half interest in the property at issue and ordered Kranjc to pay slightly more than $250,000 in damages, attorney fees, interest and costs. (Exh. C.)[1] Kranjc wished to appeal. Respondent informed Kranjc that it would be better for her to hire someone more objective than he might be and more expert in appeals. (R.T. p. 362.)

The key issue in dispute at the hearing below on this count was whether Kranjc had authorized respondent to use the $18,807 of trust funds for his fees. Kranjc testified at the hearing that she never gave respondent permission to invade trust funds to pay for his services. (R.T. pp. 152-153.) It was her desire to keep the funds intact through the appeal because in her view they were owed to plaintiff Stanfel and were not her funds. (R.T. p. 152.) When she received respondent's July 1985 bill, she believed she had already paid respondent $15,000, and did not realize her error until the disciplinary hearing. (R.T. pp. 196-197, 207-208.) Kranjc testified that the amount of the bill shocked and dumbfounded her because it was more than she had agreed to pay. (R.T. pp. 183-191.) As shown *ante*, she continued to make periodic payments to respondent totalling an additional $7,000 after receiving respondent's one and only 1985 bill. (Exh. 9.)

Respondent testified at the hearing that he had spoken to Kranjc once or twice about her outstanding legal fees,[2] advised her that the trust funds were hers to dispense as she wished and, although Kranjc preferred to continue to make periodic payments to respondent, she agreed to allow respondent to use his discretion in choosing to withdraw trust funds to pay his fees. (R.T. pp. 353-354.) Respondent admitted that he did not memorialize Kranjc's consent to the withdrawal. (R.T. pp. 380-381.) He was not aware that Kranjc had overpaid him until he was preparing for the hearing of this disciplinary proceeding. (R.T. pp. 366.) He cited his carelessness for his trust account falling below the amount required to be held for Kranjc. (R.T. p. 367.)

In October 1985 after Kranjc retained Peter K. Levine, Esq., new counsel for the appeal, Levine wrote to respondent to discuss the appeal and to request that respondent transfer the $18,807 to Levine's trust account. (Exh. 1.) Levine testified at the hearing below, it was of "paramount importance" to Kranjc that the funds remain in trust during the pendency of the appeal. (R.T. pp. 13-14.) Respondent spoke to Levine thereafter but did not forward any trust funds. In a letter to respondent dated May 8, 1986, Levine reminded respondent of his October letter requesting transfer of the almost $19,000 in trust funds. Respondent spoke to Levine on May 14, 1986, and Levine summarized respondent's reply in a letter dated May 16, 1986: "You stated you were preparing a letter to Mrs. Kranjc, and would not return all the monies because of outstanding legal fees allegedly owed to you by her." (Exh. 4.) Levine and Kranjc both objected to respondent taking his fees out of the trust funds. Levine also asked for return of the file in order for Levine to prepare a motion in the case scheduled for May 29, 1986. The file was not returned for three weeks after the May 8 request.

Kranjc filed a complaint with the State Bar. The State Bar investigator wrote to respondent on August 20, 1986, seeking his response to Kranjc's complaint. (Exh. 16.) In his response dated September 6, 1986, respondent indicated that he had been assured of monthly payments from Kranjc but had not received any monies since November 1985. (Exh. 15.) As to payment of his outstanding fees, respondent indicated that he had reviewed his records of Kranjc's payments and stated: "On several occasions, I suggested to Mrs. Kranjc that the balance owed, (at varying times) be taken from the funds that she gave me to hold, *however, she told me that she preferred to pay me direct*. There was no reason given as to why

1. Respondent testified that the trial court also awarded Stanfel punitive damages against Kranjc, but those damages are not referred to in the later opinion affirming most of the award. (R.T. p. 344; exh. C.)

2. The hearing judge found, based on respondent's testimony, that respondent had 10 meetings with Kranjc during which his fees were discussed. (Decision pp. 7-8.) Respondent's testimony indicated that he met with Kranjc 10 times after the trial but only one or two of these meetings concerned his fees. (R.T. pp. 347-349, 353.)

she requested this—only that this was her preferance [sic]. During those conversations, I had advised her that I thought it only fair that I would be protected, and exercise any statutory or other attorney's lien that I had for the remaining balance, towards the funds that I was holding. I also had several conversations with Mr. Levine to the same effect, and further assured him as well as Mrs. Kranjc that the entire fund would be released upon payment of the balance of my fees and costs in full. Since I was still owed approximately $11,000, and these funds belonged to Mrs. Kranjc, I felt there was nothing wrong with this and maintain that position today. I have always been prepared and remain prepared today to tender the balance of $7,807 to Mrs. Kranjc, which would balance out my statement, assuming that my figures are correct. I would appreciate your checking the correctness of these figures with Mr. Levine, and if correct, I will pay the difference forthwith . . . ." (*Ibid.*, emphasis added.)

In January or February 1990 respondent's counsel in this disciplinary proceeding tendered a check to Levine for approximately $7,800, which Levine deposited in his trust account. (R.T. p. 24.)

The judge found that respondent's acts did not violate Business and Professions Code sections[3] 6068 (a) or 6103, based on *Baker* v. *State Bar* (1989) 49 Cal.3d 804. He concluded that respondent violated section 6106 by misappropriating client funds and former rule 8-101(B)(4), Rules of Professional Conduct[4] by failing to promptly pay Kranjc her funds after her repeated demands. Respondent's failure, after repeated requests, to provide Levine with Kranjc's file violated rule 2-111(A)(2). Although the judge found that respondent violated section 6106 in misappropriating Kranjc's funds, it is clear from the judge's decision as a whole, that he did not find respondent's misappropriation to be malicious or intentionally dishonest. Rather, the judge found that although respondent's violations were wilful, they were the result of gross negligence and mismanagement in handling Kranjc's trust funds. (See decision p. 22.)

The examiner sought review contending that the judge should have found that respondent had an unreasonable belief that Kranjc had given permission to use the trust funds to satisfy his fees. Before us, respondent concedes that his trust account fell below the amount required to be held for Kranjc, though he contends it was the result of inadvertence. However, respondent has not expressly disputed the finding or conclusions of the hearing judge that respondent misappropriated trust funds.

Our review of the record is an independent one. That is, we reweigh the evidence and reach our own determination as to the findings of fact and conclusions which should be made based on that record. (See rule 453, Trans. Rules Proc. of State Bar; *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327, 333.) **[2a]** Here, the record consists of both testimony and documentary evidence. A great deal of the evidence bearing on whether respondent had authority to use any portion of Kranjc's $18,807 in trust funds was disputed testimony: Kranjc and attorney Levine testified that respondent had no authority to use such funds and respondent testified that he did have that authority. We give great weight to the hearing judge who saw and heard that conflicting testimony and reached the conclusion that respondent misappropriated trust funds, although as a result of gross neglect or mismanagement and not through intentional dishonesty. As did the hearing judge, we also consider the documentary evidence and we note that it supports the conclusions of respondent's culpability. Respondent's own July 22, 1985 statement to Kranjc failed to show that respondent started using $12,000 of Kranjc's trust funds one month earlier. When dealing with Kranjc's new counsel, Levine, respondent never stated that Kranjc had given him authority earlier to use the trust funds for fees. Moreover, in August 1986, when respondent wrote to a State Bar investigator looking into Kranjc's complaint, respondent acknowledged that Kranjc told respondent that she wished to pay respondent's fees directly to him. Although respondent stated his view in that

3. Unless noted, all further references to "sections" are to the Business and Professions Code.

4. Unless noted, all further references to "rules" are to the former Rules of Professional Conduct in effect prior to May 27, 1989.

letter that he thought it proper to be protected for his fees, he failed to state or show clearly or expressly how Kranjc manifested her consent to respondent to use trust funds. Admittedly, respondent never placed in writing the consent he claimed Kranjc had given him.[5] In the circumstances, we conclude that clear and convincing evidence exists that respondent improperly used trust funds, and we also agree with the hearing judge that his misuse of those funds, while not dishonest, was nevertheless a violation of section 6106 as interpreted by our Supreme Court.

Through June 1985, respondent expended nearly $20,000 of billable time representing Kranjc in pretrial preparation and at trial and no one has disputed respondent's performance of those services. In addition, respondent expended another $2,025 in costs. However, no monthly billings were provided that would have allowed the client to object to any of the services or seek to limit his future services on her behalf. From respondent's perspective, he had amassed nearly $22,000 of billable time and expenses and Kranjc had paid only $6,000 up to that time. Thus, it was not inappropriate for respondent to seek to be paid the balance of his fees and costs which had been earned up to that time. However, the amount of time and effort was well beyond what he had estimated and he improperly invaded trust funds for payment, as the evidence convincingly shows that he lacked consent from Kranjc. **[2b]** As Kranjc's attorney, respondent had a fiduciary duty to Kranjc and a specific obligation under the Rules of Professional Conduct of the State Bar to safeguard Kranjc's trust property and to timely and properly account for it. (See *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 330, fn. 7.) But unlike the situation in *Sternlieb*, *supra*, and *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, where the evidence warranted conclusions that only rule 8-101(A) and not section 6106 was violated, the record before us shows support for the judge's conclusion that respondent violated section 6106 through gross neglect or carelessness of his responsibility to oversee client funds.

[2c] In neither *Sternlieb* v. *State Bar*, *supra*, nor *Dudugjian* v. *State Bar*, *supra*, was there any evidence of any extended carelessness or inattention to the trust account as the record reveals here. Over many months respondent's trust account balance dropped repeatedly below the amount he was obligated to hold for Kranjc. All the while, Kranjc continued to pay his fees. As respondent admitted, due to carelessness, he was unaware until State Bar proceedings were well underway that he had collected a considerable overpayment from Kranjc.

In *Giovanazzi* v. *State Bar* (1981) 28 Cal.3d 465, 474, the Court held that "[t]he mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. This is a serious violation of professional ethics likely to undermine the public confidence in the legal profession. [Citations.]" The Court also observed that even though Giovanazzi's misappropriation stemmed from poor trust account management rather than from intentional acts, "[g]ross carelessness and negligence . . . involve moral turpitude as they breach the fiduciary relationship owed to clients." (*Id.* at p. 475.)

In the more recent case of *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, the Court again held that evidence that an attorney's trust account balance fell below the amount credited to a client was sufficient to support a wilful misappropriation finding. The Court continued, "[i]f the misappropriation was caused by serious and inexcusable violations of an attorney's duties to oversee client funds entrusted to his care and to keep detailed records and accounts thereof, the violation is deemed wilful even in the absence of deliberate wrongdoing. [Citations.]" (*Id.* at p. 37.)

[2d] Considering respondent's extent of inat-

5. Although respondent cites portions of the record wherein Kranjc and her later attorney, Levine, each had shown less than complete recollection of all events, respondent's testimony was not precise or persuasive on some of the important events and very significantly it was unaccompanied by documentary proof establishing and manifesting consent by Kranjc for respondent's use of her trust funds.

tention to his fiduciary responsibility to Kranjc and the lack of adequate explanation or records to overcome the effect of his inadequate trust account balance, we adopt the judge's conclusion that respondent violated section 6106 and misappropriated his client's funds by his gross carelessness.

[3] In addition, as concluded by the judge, respondent breached his trust account responsibilities under rule 8-101(B)(4) to promptly refund Kranjc's funds when reasonable attention to his duties would have made it apparent that Kranjc had overpaid him.

We also conclude that the evidence clearly and convincingly showed that respondent delayed unreasonably in turning over to Kranjc's new counsel, Levine, Kranjc's file after repeated requests to do so. Under the circumstances, we uphold the referee's conclusion that respondent thereby violated rule 2-111(A)(2).

B. West Matter.

As to the second count of the charges, respondent was retained in 1982 by Bob West, a band and studio musician, writer and arranger, to file suit on his behalf against the owners of a dog which caused an accident, injuring West and damaging his motorcycle. After some investigation, respondent filed a lawsuit against the dog owners on January 25, 1983, and opened discussions with the owners' insurer, Farmer's Insurance Company, concerning West's claims. Until 1985, West was satisfied with respondent's efforts. During 1986, however, West found it increasingly difficult to contact respondent to discuss the status of his case. His phone calls were not returned promptly and a number of calls were required before West was contacted by respondent. West testified that at times in 1986, he could not get an understandable explanation from respondent as to what steps respondent was taking to move the case along. (R.T. pp. 84-86, 95.) Nevertheless, West testified that as late as March 1986 respondent was still meeting with him and reporting action he (respondent) was taking with the insurer to get it to narrow its demands for medical or other reports so that a firm settlement offer could be made. (R.T. pp. 87-88.) However, by October 1986, West was sufficiently frustrated by the communication problems with respondent to complain to the State Bar. (Exh. D.)

In March or April 1987, West contacted Farmer's Insurance Company directly and was told by the employee handling the claim that the statute of limitations on West's cause of action (apparently the five-year limit to bring the case to trial) was close to expiring and the company was not going to do anything on the case. (R.T. pp. 72-73, 99-100.) Afterwards, West tried to speak with respondent, but was only able to leave a message with respondent's receptionist. According to West, the substance of his message for respondent was that the statute was about to run and he (West) was going to be forced to take some action because of respondent's inaction. (R.T. pp. 320-322.) West called respondent twice in May 1987 and twice in June 1987 without a response. In West's last contact with respondent's office, he was told by respondent's secretary to come to respondent's office if he wanted to pick up his records. (R.T. p. 75.)

Respondent testified that the last letter in his file between respondent and the insurer was dated May 8, 1987. (R.T. p. 273.) The five-year statutory deadline for prosecuting the civil case (Code Civ. Proc., § 583.310) expired in January *1988*. Respondent had erroneously calendared the deadline for January *1989*. (R.T. p. 288.) By order dated September 9, 1988, the lawsuit was dismissed for failure to bring the case to trial within the prescribed time. (Exh. 5.) Thomas Weindorf, Farmer's Insurance Company's branch claims supervisor, testified that while he recalled few details of this matter, he recalled that it was the only non-denied claim with medical specials in the insurer's files in which the five-year statute was "blown." (R.T. p. 114.)

Respondent did not introduce his file in evidence, but testified it consisted of 279 pages. The file included six letters he wrote to West, one letter from West, eleven letters to doctors, seven letters from doctors, four letters to the insurer, four letters from the insurer, one hundred six pages of West's prior employment records and many bills from doctors, plus x-rays and photographs. (R.T. pp. 264-277.) Respondent testified to some difficulty he had with the case. Although there was no problem of liability, there were damage proof problems. Because West's income from music was cyclical and because West

did not want respondent to talk to others in the music industry about West's case, respondent found it difficult to make a convincing wage loss case. According to West, his wife's medical insurance covered some of the medical bills he incurred. (R.T. p. 311.) Respondent testified that could affect the settlement. (R.T. pp. 299-300.) Also, the insurer kept changing or adding adjusters. Every time respondent was close to settlement with one adjuster, another adjuster would enter the picture and set back progress. (R.T. pp. 273-274.) Finally, West wanted the insurer to bifurcate settlement—settle his medical claims promptly and the rest later. The insurer refused and respondent so told West. (R.T. pp. 277-280.)

According to respondent, he never received any messages from West referring to any statute of limitations problem. (R.T. pp. 290, 295-296, 329.) Although respondent denied ceasing work on West's case, he had no records of any communications to West after May 1987. (R.T. pp. 296-297.)

Although West had some difficulty recalling the precise dates or sequence of events, respondent, too, had difficulty recalling some key events, such as when the last phone call was made by West which respondent returned. (R.T. pp. 300-302.) Respondent testified that in January 1988 he personally went to the insurer's office to see if he could negotiate a settlement in person. At that time, he discovered the statute's expiration. (R.T. pp. 306-307.)

The judge concluded that respondent failed to respond to West's reasonable status inquiries and to keep West reasonably informed, contrary to section 6068 (m), and recklessly failed to perform legal services promptly by not bringing the West lawsuit to trial within the statutory period, in violation of rule 6-101(A)(2). The judge did not find a violation of section 6106 as urged by the examiner because the notice did not include the charge, nor was any motion made to add it.

[4a] Upon our independent review of the record, it is clear that respondent expended substantial efforts for West between the time he was retained in 1982 and 1986. Respondent had built up nearly a 300-page file concerning West's case which included six letters he had written to West and extensive evidence concerning West's previous employment and medical condition. Until 1985, West was satisfied with respondent's efforts and the evidence shows that even after that time, respondent was attempting to settle this case within the requirements laid down by West and in light of the continued change of insurance adjusters. There is no dispute that respondent miscalculated the five-year period for bringing the matter to trial and there is no evidence that this miscalculation was other than a simple error.

[5] On the other hand, we do find clear and convincing evidence to support the conclusion that respondent failed over about an eight-month period from October 1986 to June 1987 to respond to West's attempts to contact him about the status of his case. Even if respondent did not wilfully fail to return several phone messages which West left with respondent's office staff, respondent did have a duty to answer West's reasonable status inquiries. In the spring of 1987, West learned on his own by direct contact with the insurer that that insurer saw a five-year statute problem. West's inquiry directed to respondent's office about that problem was clearly reasonable under the circumstances and respondent breached his duty under section 6068 (m) by not having in place a system which would bring to his attention such repeated calls to his office so that he could return them.

[4b] Rule 6-101(A)(2) provided that "[a] member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." We find the evidence short of clear and convincing to uphold a violation of this rule based either on any lack of effort by respondent toward West's matter or on account of respondent's miscalendaring of the five-year limitation period. **[6]** In the recent case of *Calvert* v. *State Bar* (1991) 54 Cal.3d 765 the Supreme Court held that rule 6-101(A)(2) was breached by the attorney's lack of adequate communication with the client. While we could, under *Calvert*, conclude that respondent's lack of adequate communication with West violated rule 6-101(A)(2), such a conclusion would essentially be duplicative in light of our conclusion that respondent violated his statutory obligation found in

section 6068 (m). (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

II. DISCIPLINE

Respondent was admitted to practice law in Illinois in 1963 and California in 1971. He has no prior discipline. After his admission to practice in California, he had a sole practice except for a brief time during which his son was involved. Respondent's practice has been devoted largely to business litigation and personal injury matters. For one year he taught legal subjects at the University of San Fernando Valley College of Law. He has done a substantial amount of arbitration work for the superior court and the American Arbitration Association. (R.T. pp. 611-612.) Respondent testified that as a result of his experiences with these proceedings he had better insight into his conduct in the Kranjc and West matters. In the Kranjc matter, while stating emphatically that it was his understanding that he had Kranjc's permission to use her funds, he realized that he bore the responsibility for having not documented his file in order to resolve any dispute at the very outset. In retrospect he realized he could have done a number of things differently in that matter such as having immediately sent Kranjc those funds which were not in dispute and placing the entire amount or a portion of it in a trust account pending the outcome of any dispute. He testified that as time went by, he probably got more neglectful about the balance of funds in the Kranjc matter in his trust account, believing that he really did not make the mistake he was charged with because he expected to receive advice from someone at the State Bar as a result of his 1986 exchange of correspondence with the State Bar investigator. (See *ante*.) Respondent stressed his solvent financial condition at the time to make the point that he did not need the money and that none of the Kranjc funds made any difference in his standard of living or his expenses. (R.T. pp. 612-615.)

From the West matter, respondent testified he has learned to be more careful with calendaring. As far as the lack of communication with West, he testified that in 1987, when his father-in-law was ill and died, he was not returning all of the calls from clients that he normally returned prior to that time. He apologized for any calls from clients that he did not return. Respondent closed his testimony in mitigation with the following statement: "I apologize to the Court for anything I did that the Court feels was wrong. It's not my style. I don't need this. It's something that's extremely embarrassing to me, my family, my friends, particularly after having practiced, I felt, very carefully and very diligently for so many years, as I have. It's something I'll never live down." (R.T. pp. 616-617.)

In mitigation, respondent presented the very impressive testimony of 13 character witnesses. Two of these witnesses were attorneys, seven were clients and four were family members or social acquaintances. Apart from the family members, the witnesses knew respondent for from three to thirty-seven years. Most witnesses were generally familiar with the charges against respondent and the essence of findings of his culpability but did not change their uniformly excellent view of respondent's moral character. Several of the witnesses testified collectively they observed respondent go through a very difficult experience in coping with the serious illness and ultimate death in late 1986 of respondent's father-in-law, to whom he was very devoted; and, at about the same period, an estrangement from his son who refused to let him see or have any contact with his grandchild. (R.T. pp. 471-472, 508, 523, 534, 545, 572-574, 603-604.) However, respondent's character witnesses also testified that he was very responsive to their client needs during that same period. (R.T. pp. 483-484, 501-503, 520, 530-531, 541-542, 595-596.) Indeed respondent's clients testified about a person who was completely devoted to their legal needs, who always communicated with them and who was scrupulous about handling their funds and property.

The judge recommended as appropriate discipline a three-year suspension, stayed and a four-year probation term with conditions, including 60 days on actual suspension. Upon reconsideration, the judge added as a condition that the Kranjc matter be submitted to fee arbitration for a determination of whether restitution is owed to Kranjc and if so, the amount owed.

[1b] In assessing independently the discipline to recommend in this matter, we start with the offenses

of which we have found respondent culpable. Respondent's violations of section 6106 and rule 8-101(B)(4) were serious and involved a significant sum of money. They involved not only his misappropriation of Kranjc's trust funds to satisfy his fee but also his disregard of his trust account responsibilities. This was no technical or merely inadvertent violation of these most important provisions designed to safeguard a client's funds against intentional loss. Indeed, respondent's disregard of his duties to Kranjc started even before he invaded the trust funds for he never sent her periodic billings to show that his fees were increasing over his earlier estimates. When he finally did bill Kranjc, it was after he had performed almost all services and after he invaded the trust funds—an invasion he never revealed on that bill or any other document. Looking to the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("stds."), as guidelines (see, e.g., *Bernstein* v. *State Bar* (1990) 50 Cal.3d 221, 233), respondent's culpability of violation of rule 8-101(B)(4) alone would warrant at least a three-month actual suspension from the practice of law irrespective of mitigating circumstances. Concerning the West matter, the standards provide that respondent's violation of section 6068 (m) could, by itself, result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. Under the standards, the specific discipline to recommend is necessarily affected by the presence of and the balance of aggravating and mitigating circumstances. (Std. 1.6.)

In aggravation, the judge found that respondent's misconduct evidenced multiple acts of misconduct, citing standard 1.2(b)(ii). We agree. As the second instance of aggravation, the judge cited significant harm to respondent's clients caused by his misconduct. The judge determined that Kranjc had to retain an attorney and file a complaint against respondent to recover her funds and West's cause of action was lost. (See std. 1.2(b)(iv).) We do not view all of the harm to the clients as having been caused by respondent for the following reasons. First, the record shows that Kranjc retained her subsequent counsel to appeal from the adverse judgment against her. She needed to do this whether or not respondent committed any ethical violations. However, Kranjc's new counsel had to devote considerable effort to attempting to obtain Kranjc's file and funds. **[7a]** We do not agree with the examiner's urging us to find that respondent misled the hearing judge. Persisting in his belief, in the circumstances of this record, does not show that respondent should be found to be deceitful. (See *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.)

[8] In the West matter, the client's cause of action appears to have been lost by respondent's miscalendaring. However, it is possible that respondent's failure to communicate with West in late 1986 and 1987 prevented respondent from earlier discovering his calendaring mistake. The judge implicitly recognized this in his decision and we are given no good reason to disregard this aspect of harm to West.

The hearing judge correctly recognized the many factors in mitigation. Respondent had an extensive period in practice with no prior record of discipline. (See *Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 259.) In addition, respondent presented "an extraordinary demonstration of good character" attested to by a wide range of persons, most of whom were generally aware of the extent of respondent's misconduct. (Std. 1.2(e)(vi).) **[7b]** While respondent persisted in asserting his belief of innocence of fundamental misconduct, he nevertheless showed in his testimony recognition of several ways in which he could have and would handle client matters more professionally in the future. **[9]** However, respondent's restitution to Kranjc was most belated and occurred after the start of these disciplinary proceedings, and was not itself entitled to any significant weight in mitigation. (*In re Billings* (1990) 50 Cal.3d 358, 368.)

[10] There is no doubt that the illness and ultimate passing of respondent's father-in-law and his estrangement from his son and grandchild had very strong effects on him, but we agree with the hearing judge that the evidence is not clear that it had a noticeable effect on his handling of the Kranjc and West matters, particularly in light of the testimony of his character witnesses who described the very responsive service they received from respondent throughout, including at the time he was suffering

stress. Moreover, respondent's own testimony did not convincingly show what role these stress factors played; for at one point, he did not know whether these factors affected him and could only "surmise" that they did based on their timing. (R.T. pp. 612-613.) Further, these factors could never satisfactorily explain respondent's long delay either in recognizing Kranjc's overpayment nor in refunding it to her. Therefore, we agree with the hearing judge's assessment in assigning some mitigating weight to these personal stress factors but not giving them greater weight which would have been appropriate had expert testimony been presented to show clearly the nexus between these difficulties and respondent's disregard of his duties to Kranjc and West. (See decision pp. 19-20.)

In arriving at his recommendation of a three-year stayed suspension and sixty days actual suspension, the judge looked at a number of cases in which the discipline has ranged widely for a wide variety of acts of misappropriation of funds. As we discussed earlier, although respondent's misdeeds were more serious than those found in *Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d 317, we find some of the factors in mitigation in this case similar to those in *Sternlieb* where the court ordered a 30-day actual suspension as a condition of a one-year stayed suspension. For example, both attorneys had excellent character references and respondent had practiced for several years longer without prior discipline than had Sternlieb. In *Sternlieb*, however, the attorney's mishandling of trust funds was the only violation and that mishandling amounted only to a violation of rule 8-101. Here, respondent also violated section 6106 in the Kranjc matter and failed to communicate reasonably in the West matter.

In another recent case, *Kelly* v. *State Bar* (1991) 53 Cal.3d 509, the Supreme Court ordered a three-year stayed suspension on condition of a 120-day actual suspension for two matters of misconduct. In one matter, Kelly had placed $2,000 of trust funds in a personal account and had written two insufficiently funded checks on that account. In the other matter, Kelly had also committed a trust account violation and had wilfully, but not dishonestly, misappropriated $750. In reducing the former review department's one-year actual suspension recommendation, the Supreme Court took into account circumstances similar to the case before us: Kelly's lack of acts of deceit, that his failure to remit the $750 promptly was likely the result of negligent acts and misunderstanding of his duties to his client rather than an intent to cause client harm, and his 13-year unblemished record of law practice. Here, respondent's trust account violation and misappropriation affected only one client, albeit more seriously than in *Kelly*, but respondent appears to have presented slightly more mitigating circumstances.

[1c] Considering the guidance of both *Sternlieb* and *Kelly*, we believe that the appropriate discipline is that recommended by the judge with two exceptions: 1) that we deem a three-year probation period rather than a four-year period to be sufficient and 2) we have concluded that a 90-day actual suspension is warranted together with the usual requirement for such a recommendation that respondent be directed to comply with rule 955, California Rules of Court.

III. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent, Joel M. Ward, be suspended from the practice of law in this state for a period of three (3) years; that execution of said suspension be stayed; and that respondent be placed on probation for said period of three (3) years on the following conditions:

1) that during the first ninety (90) days of the period of probation, respondent shall be actually suspended from the practice of law in this state; and

2) that during the period of probation, respondent shall comply with paragraphs 2 through 12 of the conditions of probation recommended by the hearing judge in his amended decision filed December 31, 1990.

We further recommend that within a period of

one year of the effective date of the Supreme Court's order, respondent be required to take and pass the California Professional Responsibility Examination administered by the Committee of Bar Examiners of the State Bar of California. We also recommend that costs of this proceeding be awarded the State Bar.

Finally, we recommend that he 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 Supreme Court's order.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PATRICK M. PASSENHEIM

A Member of the State Bar

No. 86-C-13006

Filed February 19, 1992; as modified, March 6, 1992

SUMMARY

Respondent participated in two different cocaine distribution operations during 1977 and 1978. He was admitted to practice in June 1989. In August 1989, he pled guilty in federal district court to one count of conspiracy to distribute cocaine. Respondent reported his conviction promptly to the State Bar, and was placed on interim suspension in April 1990. The hearing judge weighed respondent's considerable mitigating and rehabilitative evidence against the seriousness of and harm caused by his criminal conduct and determined that respondent should be suspended for three years, stayed, on conditions of three years probation and actual suspension for 20 months, retroactive to the start of his interim suspension. (Hon. Ellen R. Peck, Hearing Judge.)

The State Bar examiner requested review, asserting that respondent had not demonstrated sufficient rehabilitation and that disbarment was the appropriate discipline. The review department found the hearing department decision to be well reasoned in recognizing the unique nature of the case, with the considerable passage of time since the criminal conduct and the ample evidence of respondent's strong, positive and consistent rehabilitation. However, to better underscore the gravity of respondent's criminal conduct, the review department lengthened the actual suspension to two years, retroactive to the date of the interim suspension, and until respondent makes a showing under standard 1.4(c)(ii) of rehabilitation, including expert evidence of continued freedom from drug dependency, and of present learning and ability in the law.

COUNSEL FOR PARTIES

For Office of Trials: Loren J. McQueen

For Respondent: James J. Warner

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-c] **144 Evidence—Self-Incrimination**
193 Constitutional Issues
750.10 Mitigation—Rehabilitation—Found
1699 Conviction Cases—Miscellaneous Issues
2690 Moral Character—Miscellaneous

No question on respondent's application for admission to practice law called upon respondent, as an applicant, to reveal criminal conduct for which respondent had not yet been convicted or arrested and for which respondent was not awaiting trial. If any such question had been asked, respondent would have had a good argument for withholding information that would lead to criminal liability. Nothing in respondent's manner of completing the application, or in respondent's subsequent two-month delay in reporting to the State Bar a criminal indictment handed down after the application was completed, undermined respondent's showing of rehabilitation from pre-admission criminal conduct.

[2] **740.10 Mitigation—Good Character—Found**
750.10 Mitigation—Rehabilitation—Found
791 Mitigation—Other—Found
1699 Conviction Cases—Miscellaneous Issues

If an attorney engages in criminal conduct, it is not a minimum requirement for rehabilitation that the attorney turn himself or herself in to law enforcement authorities. Where the attorney was not hiding from anyone except those who wished him to resume his criminal activities; he cooperated fully with law enforcement once asked, and he presented character witnesses who attested to his current good character, the hearing judge's finding of rehabilitation was appropriate.

[3 a, b] **745.10 Mitigation—Remorse/Restitution—Found**
750.10 Mitigation—Rehabilitation—Found
801.41 Standards—Deviation From—Justified
1092 Substantive Issues re Discipline—Excessiveness
1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply

Although respondent's use and distribution of illegal drugs did not result from an initial, legal use of prescribed medications, which would have mitigated his later, reprehensible drug transactions, the great number of years which had passed since the attorney's misconduct, coupled with evidence of impressive and sustained rehabilitation, were sufficiently mitigating to conclude that disbarment would be excessive discipline. To underscore the gravity of the attorney's misconduct, which occurred after the attorney had completed law school and had applied unsuccessfully to the California bar, the review department recommended two years actual suspension, retroactive to the start of the attorney's interim suspension.

[4] **176 Discipline—Standard 1.4(c)(ii)**
1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes
1699 Conviction Cases—Miscellaneous Issues
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

Where an attorney previously involved in serious drug abuse had ceased such abuse unilaterally and did not present any expert evidence of current freedom from substance abuse, and the attorney

did not submit any evidence of present learning and ability in the law following an interim suspension the length of which exceeded the attorney's prior period of licensure, public protection would be served by continuing the attorney's actual suspension until the attorney established freedom from drug dependency and present learning and ability in the general law.

ADDITIONAL ANALYSIS

Aggravation

Found

521 Multiple Acts
584.10 Harm to Public

Declined to Find

695 Other

Mitigation

Found

735.10 Candor—Bar

Discipline

1613.09 Stayed Suspension—3 Years
1615.08 Actual Suspension—2 Years
1616.50 Relationship of Actual to Interim Suspension—Full Credit
1617.09 Probation—3 Years

Probation Conditions

1023.40 Testing/Treatment—Psychological
1024 Ethics Exam/School
1630 Standard 1.4(c)(ii)

Other

1521 Conviction Matters—Moral Turpitude—Per Se
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

STOVITZ, J.:

Respondent, Patrick M. Passenheim, was admitted to practice law in California in 1989. Later that same year, he pled guilty in federal court to one count of conspiracy to distribute cocaine. (21 U.S.C. § 846.) In April 1990, after the record of respondent's conviction was sent to the Supreme Court, it placed him on interim suspension, since his crime was one involving moral turpitude per se. As of the filing of this opinion, respondent's interim suspension has lasted about 22 months.

Respondent's crime was inexcusable for it undeniably involved his trafficking in large quantities of cocaine for profit. Yet this proceeding is unique in State Bar jurisprudence because respondent's misdeeds occurred over 13 years ago. In a record where many of the facts were either stipulated or not in dispute, the judge concluded that respondent showed exemplary conduct since his offenses and his proof of rehabilitation is "exceptionally compelling, predominating and unusual." The judge recommended that respondent be suspended for three years, stayed, on conditions of three years probation and actual suspension for 20 months, retroactive to the start of his interim suspension.[1]

The State Bar examiner seeks review contending that respondent has not shown sufficient rehabilitation and that we should recommend his disbarment. Respondent urges that the judge's decision below is correctly reasoned and her suspension recommendation should be adopted.

As is our function, we have independently reviewed the record. While we do not condone respondent's acts in 1977 and 1978, any more than did the judge, we conclude that the judge skillfully performed her function in recognizing the unique nature of the passage of so many years since respondent's misdeeds coupled with ample evidence of his strong, positive and consistent rehabilitation. Her conclusion as to respondent's rehabilitation is fully supported by this record.

Although we also recommend suspension, for the reasons which follow, we shall recommend a two-year actual suspension, commencing on the effective date of respondent's interim suspension and continuing until respondent presents sufficient evidence to the State Bar Court under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V), particularly that he has sufficient present learning and ability in the law to resume practice.

I. RESPONDENT'S OFFENSES.

In September 1966 respondent started a business which involved the tinting of windows. Originally the company was very successful and respondent began selling franchises nationwide. In the mid-1970's, the business ran into some financial problems. Respondent, who had been attending law school during this period, graduated in 1975. He took the California Bar Examination that same year, but as he was not seriously interested in becoming a lawyer at that time, he did not prepare for the examination and failed it. He registered for the February 1976 bar examination, but did not take the test. (I R.T. pp. 18-20.)[2]

About a year later, respondent was approached by a cocaine dealer, Stolpmann, who invited respondent to participate in distributing cocaine. Stolpmann had met respondent during the previous summer in connection with respondent's window tinting business, knew that respondent was a cocaine user and had given cocaine to respondent. In the fall of 1977, respondent agreed to participate with Stolpmann and his partners in distributing cocaine and between fall of 1977 and April 1978 respondent distributed a total of about 110 pounds of the drug by the following

1. The judge filed her recommendation in July 1991. Had no request for review been filed, the Supreme Court likely would have acted on this recommendation in December 1991 at just about the time of respondent's 20th month of interim suspension.

2. For convenience, the phrase "I R.T." refers to the reporter's transcript of January 22, 1991, and the phrase "II R.T." to the reporter's transcript of January 23, 1991.

method: He would receive a suitcase or suitcases filled with cocaine from either Stolpmann or another. Respondent would then distribute the cocaine to one of four persons according to prescribed procedures. When delivered, respondent would receive cash from the recipient. He would then deliver the cash to Stolpmann or Stolpmann's partner, keeping a percentage of the profits for himself. (Partial stipulation as to facts ("S.") pp. 7-8.)

In about April 1978, when those in the drug operation asked respondent to be involved with weapons, respondent ceased dealings with this group (which later became known as the Medellin Cartel). In May 1978, one month later, respondent met with another cocaine dealer, Hunter. Hunter asked respondent to deal cocaine with him since respondent was no longer involved with Stolpmann's group. Respondent agreed and between May 1978 and October 1978, respondent participated with Hunter in distributing and selling cocaine. (*Id.* pp. 7-9.)

In the fall of 1978, respondent stopped all cocaine distribution activities. Respondent did not keep records of how much he had made from cocaine dealing. However, after taking several vacations and making several business investments such as purchasing land on the island of Kauai, the amount of money he had left in 1979 from cocaine sales was $100,000. Respondent did not report any of the money he earned in cocaine deals to taxing authorities. At some later time, he settled with the Internal Revenue Service by paying $30,000 in taxes on a portion of his unreported income. (S. pp. 8-9; I R.T. pp. 45-50, 117.)

II. RESPONDENT'S CONDUCT SINCE 1978.

The record contains no evidence that respondent has engaged in any other conduct reflecting adversely on his character since he stopped dealing in cocaine in 1978. Additionally, respondent took positive, consistent steps reflecting his rehabilitation. We summarize the findings of the hearing judge as to respondent's post-1978 activities, noting that none have been disputed on review.

On his own, respondent ceased using cocaine and has not used any controlled substance since 1978. (Decision p. 12.)[3] He rebuffed repeated overtures in 1978 and 1979 from those with whom he dealt in cocaine to return to that activity, even moving great distances to avoid them. (*Id.* pp. 12-13.) He used some profits from his past cocaine distribution to fund a legitimate business in gemstones which he conducted in 1981 and 1982 (*id.* p. 13), but the record yields no evidence that this business was conducted in any but a legitimate manner. In 1984 respondent attended to his very ill grandmother, living with her and assisting her until her death at the end of that year. (*Ibid.*) After her death, respondent stayed with his mother who was depressed and quite ill. Between 1985 and 1989, respondent assisted his mother and was her primary source of care until her death from cancer. (*Id.* p. 14.)

III. RESPONDENT'S PASSAGE OF THE BAR EXAMINATION, INDICTMENT AND CONVICTION.

While taking care of his ill mother, respondent decided to prepare seriously to practice law and he again attempted the California Bar Examination. After six tries, he passed in 1989. (I R.T. pp. 18, 93-96, 99.) Respondent's 1986 application for admission to practice law in California is in evidence. (Exh. 12.) **[1a]** No question on the application called on respondent to reveal his conduct for which he had not yet been convicted or arrested and for which he was not awaiting trial.[4] **[1b - see fn. 4]**

On about April 7, 1989, respondent learned that he had been indicted in U.S. District Court, Middle District of Florida, Jacksonville. His first reaction was disbelief, but within a few days of his learning of his indictment, he realized he had a duty to update his

3. References to "decision" are to the hearing judge's decision filed July 15, 1991.

4. **[1b]** Even if a question on the application for admission had asked respondent for information about criminal conduct for which he had not been charged, he would have had a good argument to withhold information which would have subjected him to criminal liability. (See the disciplinary case of *Black* v. *State Bar* (1972) 7 Cal.3d 676, 684-688, and cases cited.)

State Bar application and notify the bar of the indictment. At the same time, he was taking care of his mother who was going through chemotherapy and radiation treatment and he contacted the counsel who represents him in this proceeding, James Warner, Esq., to deal with issues such as notifying the bar. (I R.T. pp. 36-38.)

Respondent learned of his passage of the bar examination on May 29, 1989. According to the record, Warner's first letter to the State Bar notifying it of respondent's indictment was dated June 2, 1989. (Exh. 5.) Respondent was admitted to practice law five days later on June 7. At the hearing, respondent testified that he thought that Warner had had earlier telephone conversations with State Bar staff about the indictment, but Warner's own June 2 letter did not so state. At oral argument, Warner represented to us that he had had such telephone contacts with State Bar staff.

It is undisputed that, once he learned of his indictment, respondent cooperated fully with federal authorities, making several trips from San Diego to Jacksonville, Florida, including one on less than one day's notice. He gave evidence against the others who had acted in the drug cartel and participated in a detailed written criminal court agreement to plead guilty, which he did in August 1989, to one count of conspiracy to distribute cocaine. Respondent was sentenced to two years imprisonment, but the conditions of that sentence allowed him to be confined for six months in a halfway facility with execution of the remainder of the sentence suspended. He was placed on four years probation and ordered to pay a $20,000 fine. According to respondent, he had not yet paid the fine, but he was given until the end of his probation, December 6, 1993, to do so. The State Bar introduced no evidence to rebut respondent's testimony that he successfully completed his halfway house confinement and is successfully completing his probation. (I R.T. pp. 109-115.)

IV. OTHER CHARACTER AND MITIGATION EVIDENCE.

At the State Bar Court hearing, respondent testified to the shame he felt over his earlier cocaine involvement. He is now totally against the use of cocaine and has developed a great maturity of insight and hindsight about his earlier life. (I R.T. pp. 63, 97-99, 113-114, 116.)

Five character witnesses also testified on respondent's behalf. One was a lawyer in San Diego who had known respondent since 1986 and the other four were business people such as investment advisors and small business owners who had known respondent anywhere from just under two years to twenty-six years. All of these witnesses gave positive ratings to respondent on his moral character, none had reservations about him, all were generally familiar with his history of drug dealing and three of the witnesses testified to the manner in which respondent had displayed remorse and regret for his earlier acts. Almost all of the witnesses gave specific, credible examples of respondent's more recent actions which show why they considered him to be a moral person and a person about whom they would have no reservations in hiring as their lawyer. The testimony of attorney Carnohan was especially significant. He testified that while he was a friend of respondent and wanted him to succeed because of that, another side of Carnohan was as a lawyer, member of the bar and "officer of the court" and therefore he had a responsibility to make sure that the public was protected. Carnohan saw respondent as no threat to the bar, but rather as one who would be beneficial to the bar. In Carnohan's view, it would be an injustice for respondent to be disbarred in that he has been fully rehabilitated. (II R.T. p. 42.)

V. HEARING JUDGE'S DECISION.

After making findings of fact as generally outlined *ante*, which we adopt, the hearing judge gave mitigating weight to respondent's candor and cooperation with law enforcement authorities after indictment and with the State Bar, his "sound demonstration" of good character evidenced by those generally familiar with his prior misdeeds, his spontaneous removal from the drug conspiracy and his demonstration of regret and remorse for his misdeeds. The judge gave substantial weight in mitigation to the number of years which had passed since respondent's misconduct together with his convincing proof of rehabilitation. (Decision pp. 17-19.) In aggravation, the judge considered respondent's mul-

tiple acts of misconduct over a substantial time period and the great harm caused society by his distribution of cocaine, undertaken by respondent without thoughts as to the consequences of that activity. (*Id.* pp. 19-20.)

After discussing opinions of the Supreme Court imposing attorney discipline for drug-related convictions of other attorneys, the hearing judge observed that respondent's cessation of drug use and activity was unique because it was self-occasioned and not the result of pressures of the criminal justice system. Further, the judge reasoned that his period of rehabilitation was the longest and most consistent of all the cases cited. She concluded that, while respondent's misconduct was extremely serious, his proof of rehabilitation was "exceptionally compelling, predominating and unusual" and obviated the need for further prospective actual suspension. She recommended prospective probation and counseling to ensure, respectively, promotion of public confidence in the integrity of the legal profession and unbroken continuation of respondent's rehabilitation. (*Id.* pp. 23-26.)

VI. DISCUSSION.

The hearing judge recognized the unique nature of this case. She was fully aware of the cases cited by the examiner which would guide that judge as well as us to recommend disbarment for any drug profiteering by an attorney of the type engaged in here if the conduct were more recent and the rehabilitation less. (See *In re Meacham* (1988) 47 Cal.3d 510; *In re Giddens* (1981) 30 Cal.3d 110.) Both cases ordered disbarment, *Meacham* for conspiracy to distribute cocaine and *Giddens* for conspiracy to distribute amphetamines over several months where Giddens made a $5,000 to $7,000 profit. (*Id.* at p. 113.) *Meacham* was a memorandum opinion, but in *Giddens*, the Court was influenced by several factors, most notably the failure of any explanation, such as alcohol or drug abuse or other emotional disorders, which got Giddens into drug dealing coupled with the Court's conclusion that his rehabilitation had not been complete. In addition, the Court did express concern that Giddens did not attempt to contact the authorities to try to halt the scheme or surrender himself to law enforcement until after indictment. That is the one aspect that this case has in common with the facts in *Giddens*. However, unlike Giddens, respondent was a cocaine user at the time he started dealing, although it appears that his motivation was more monetary than it was in keeping a cocaine supply. Another important difference between *Giddens* and this case is the 13 years which have passed since the very serious misconduct without any hint of subsequent illegal activity or any reason to believe that respondent is anything but completely rehabilitated.

The disbarment case of *In re Possino* (1984) 37 Cal.3d 163 (conviction of possessing for sale 350 pounds of marijuana), cited by the examiner, is readily distinguishable. Other misconduct was apparent in that case, including the attorney's offer to sell large amounts of stolen securities. His attempt to show that he was rehabilitated was undermined by evidence that he had made an ex parte contact with a member of the jury sitting in judgment on his criminal case. The more recent disbarment opinion of *In re Scott* (1991) 52 Cal.3d 968, following conviction of possession of cocaine, was influenced strongly by Scott's open use of cocaine while a sitting judge and his presiding over an arraignment of one who had previously sold him drugs.

The examiner has cited cases which have imposed suspension for drug offenses. (See *In re Leardo* (1991) 53 Cal.3d 1 and *In re Nadrich* (1988) 44 Cal.3d 271.) Leardo engaged in several drug sales over only a three-month period, all to one undercover agent. He put no illicit drugs in circulation and made no profit other than getting to keep a small part of the drugs for himself. His drug crimes occurred after he had become addicted to the drugs following his failure to be able to obtain prescribed drugs for the pain of a broken leg. As soon as he was arrested, Leardo's rehabilitation began (six years before the Supreme Court's opinion). The Supreme Court deemed that Leardo's five-year interim suspension was sufficient discipline. Finally, in *In re Nadrich*, *supra*, that attorney, too, was addicted to drugs and became a large-scale drug dealer to support that addiction. He was convicted of possessing for sale LSD valued at $60,000, but there was evidence that he had also sold substantial quantities of other illegal drugs, including heroin and cocaine, for financial

gain. He admitted engaging in at least eight transactions over two years. This happened about seven years before the Supreme Court's opinion. Nadrich had been on interim suspension two and a half years and the Supreme Court ordered an additional year of actual suspension.

[2] While not objecting to most of the judge's findings of fact, the examiner does dispute the hearing judge's conclusion that respondent is rehabilitated and that he should be suspended rather than disbarred. She points to his lack of expert evidence that he has overcome his drug addiction. She posits that respondent deserves recognition for his cooperation and recognition only since 1989, contending that he was earlier "on the lam" or a fugitive. She points out that respondent took no earlier steps to stop the cocaine dealing operation or report it to law enforcement and that his living a law-abiding life since 1978, like any citizen is expected to do, is not adequate to establish rehabilitation. In our view, the examiner has judged too harshly respondent's life since 1978. There is no evidence that respondent was hiding from anyone, except those who repeatedly urged him to re-enter drug trafficking. While he did not turn himself in to law enforcement, that requirement has never been a minimum requirement for rehabilitation. Once respondent was asked to cooperate with the prosecution, even the examiner does not dispute that his cooperation was complete and unwavering. Finally, we believe that the five character witnesses he presented amply showed that his current character was undoubtedly high.

[3a] We agree with the hearing judge's emphasis on the great number of years which have passed since respondent's grievous misconduct together with the evidence of rehabilitation as being determinative in this matter. As is the judge, we are unaware of any previous decision of our Supreme Court which has presented such a great number of years of sustained rehabilitation since the offense. In the present case, respondent was a cocaine user at the time he started dealing. He did not have the mitigation of *Nadrich* and *Leardo* of entry into cocaine abuse through legally prescribed drugs. His drug transactions were reprehensible. No one, including respondent himself, denies that. But because of the extraordinary passage of time since his offense coupled with evidence showing impressive and sustained rehabilitation, we conclude that disbarment would be excessive in this matter.[5] **[1c - see fn. 5]** **[3b]** Nevertheless, we believe that the three-year stayed suspension and three-year probation recommended by the hearing judge are appropriate with the exception that, as a condition thereof, respondent should be actually suspended for a period of two years commencing on April 13, 1990, the effective date of the Supreme Court's order of interim suspension. We believe that our two-year actual suspension recommendation will better underscore the gravity of respondent's offenses, occurring as they did, after he completed law school and had applied unsuccessfully for the California bar. **[4]** At the same time, the Standards for Attorney Sanctions for Professional Misconduct guide that an actual suspension of two years or greater should ordinarily be accompanied by a showing under standard 1.4(c)(ii). While we conclude that respondent's overall rehabilitation has been impressively demonstrated, we also agree with the hearing judge's observation that respondent's self-cessation of serious drug abuse is unique in drug-related attorney discipline cases decided by our Supreme Court. Respondent presented no expert evidence as to his current freedom from substance abuse. We also note that the record is barren of any evidence as to whether respondent has maintained his present learning and ability in the law. Considering that respondent's suspension from practice has exceeded his period of licensure, we believe that for the added protection of the public, his actual suspension should continue until he establishes under standard 1.4(c)(ii), his learning and ability in the general law. It would also be appropriate for him to

5. **[1c]** While not raised by the examiner, we do not see anything in the manner in which respondent completed his application for admission to practice law in 1986 or in the two-month delay from the time respondent became aware of his federal indictment until his counsel formally revealed it to the State Bar which would undermine respondent's rehabilitative showing.

provide at that time medical evidence that confirms that he does not suffer from any condition of drug or substance abuse or dependency.[6]

Should the Supreme Court adopt this recommendation, respondent would be entitled to petition the State Bar Court for termination of his suspension as soon as he is prepared to make the specified showing under standard 1.4(c)(ii). (See Trans. Rules Proc. of State Bar, rule 812.)

VII. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for a period of three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on the following conditions:

1. That he shall be actually suspended from the practice of law in this state for a period of two years and until he has shown proof satisfactory to the State Bar Court, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, of his learning and ability in the general law and medical evidence that he does not suffer from any condition of substance abuse or dependency. The period of actual suspension shall commence on April 13, 1990, the effective date of the Supreme Court's order of interim suspension.

2. That he shall comply with conditions 2 through 10 and the further condition of passage of the Professional Responsibility Examination as recommended by the hearing judge on pages 27 through 30 of her decision; but that he not be required to comply with the provisions of rule 955, California Rules of Court for the reason given by the judge. We recommend that costs be awarded the State Bar as recommended by the judge.

We concur:

PEARLMAN, P.J.
NORIAN, J.

6. At oral argument, respondent represented to us that he was willing to comply with a condition of probation that he be required to seek psychiatric or psychological counseling at least to determine if further such treatment were needed. We shall adopt that condition and the other conditions of probation recommended by the hearing judge and we deem our recommendation of presentation under standard 1.4(c)(ii) of medical proof of freedom from substance abuse to be related to this probation condition.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STEVEN J. SEGALL

A Member of the State Bar

No. 89-C-11101

Filed February 21, 1992

SUMMARY

The Office of Trial Counsel requested the review department, in its exercise of powers delegated to the State Bar Court by the Supreme Court, to disbar respondent summarily, pursuant to Business and Professions Code section 6102 (c), upon the finality of respondent's federal felony conviction for mail fraud. The crime entailed a specific intent to defraud, was committed in the course of the practice of law, and involved a client as victim.

Based on the record of the conviction, the review department concluded that respondent's crime met the statutory requirements for summary disbarment. However, after reviewing applicable constitutional principles and Supreme Court precedent, the review department held that only the Supreme Court and not the State Bar Court has the power to disbar an attorney summarily. Accordingly, the review department recommended to the Supreme Court that respondent be summarily disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Teresa J. Schmid

For Respondent: Arthur L. Margolis, Susan L. Margolis

HEADNOTES

[1 a, b] 1512 Conviction Matters—Nature of Conviction—Theft Crimes
1541.20 Conviction Matters—Interim Suspension—Ordered
Mail fraud (18 U.S.C. § 1341) is a crime involving moral turpitude, for which interim suspension is ordered following an attorney's conviction.

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] **151 Evidence—Stipulations**
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding
In reviewing the record of an attorney's criminal conviction resulting from a guilty plea, for the purpose of determining the propriety of summary disbarment, the court does not take into account language in the information unnecessary to the crime to which the attorney pled guilty, but may consider additional undisputed facts based on the record.

[3 a-d] **193 Constitutional Issues**
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1699 Conviction Cases—Miscellaneous Issues
Business and Professions Code section 6102 (c), providing for summary disbarment of attorneys convicted of crimes meeting the criteria set forth in the statute, must be read in the context of the statutory scheme of the State Bar Act as a whole, which indicates the Legislature's intent to defer to the Supreme Court's inherent authority to judge each case on its merits and disbar or suspend pursuant to its own view of the record.

[4] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
A conviction for mail fraud (18 U.S.C. § 1341) involves intentional fraud within the meaning of the summary disbarment statute (Bus. & Prof. Code § 6102 (c)).

[5 a, b] **230.00 State Bar Act—Section 6125**
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
The practice of law includes not only performing services in court but also legal advice and counsel and the preparation of legal instruments and contracts. Where an attorney was convicted of mail fraud based on the attorney's fraudulent creation of a separate corporation in order to obtain payment for legal work for clients which otherwise would have been performed by the attorney's law firm, the crime was committed in the practice of law within the meaning of the summary disbarment statute (Bus. & Prof. Code § 6102 (c)).

[6] **582.10 Aggravation—Harm to Client—Found**
745.51 Mitigation—Remorse/Restitution—Declined to Find
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
Where an attorney was convicted of mail fraud based on fraudulently billing an insurance company for services rendered on behalf of its insureds, the insureds, as the attorney's clients, were victimized by the crime, and the crime therefore involved a client as a victim within the meaning of the summary disbarment statute (Bus. & Prof. Code § 6102 (c)). The attorney's subsequent restitution to the insurance company, ordered as part of the attorney's criminal sentence, did not negate the harm caused by the crime.

[7] **1091 Substantive Issues re Discipline—Proportionality**
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1699 Conviction Cases—Miscellaneous Issues
Before recommending to the Supreme Court that an attorney be summarily disbarred pursuant to Business and Professions Code section 6102 (c), the State Bar Court has a duty to analyze the record in light of the case law to assure that application of section 6102 (c) does not conflict with Supreme Court standards for disbarment. The State Bar Court will only order a hearing if Supreme Court precedent supports a lesser sanction than disbarment for the particular crime depending on circumstances which might be adduced at a disciplinary hearing.

[8] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
Where an attorney was convicted of mail fraud arising out of a scheme to defraud an insurance company which retained the attorney to defend its insureds, disbarment would be an appropriate sanction regardless of mitigating circumstances, due to the extremely serious nature of the misconduct and its direct connection with the practice of law.

[9] **101 Procedure—Jurisdiction**
193 Constitutional Issues
194 Statutes Outside State Bar Act
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1699 Conviction Cases—Miscellaneous Issues
Rule 951(a), California Rules of Court, delegating certain powers to the State Bar Court regarding the discipline of attorneys convicted of crimes, limits the State Bar Court to recommending summary disbarment to the Supreme Court, rather than imposing it directly.

[10] **175 Discipline—Rule 955**
1549 Conviction Matters—Interim Suspension—Miscellaneous
Where respondent had been interimly suspended following a criminal conviction, and had been ordered at that time to comply with rule 955, California Rules of Court, the State Bar Court did not recommend that he be required to comply with rule 955 again upon his disbarment.

ADDITIONAL ANALYSIS

Discipline
1610 Disbarment

OPINION

PEARLMAN, P.J.:

This case arises from the criminal conviction of Steven J. Segall (respondent) of mail fraud (18 U.S.C. § 1341). The Office of Trial Counsel seeks summary disbarment by the State Bar Court under subdivision (c) of section 6102 of the California Business and Professions Code.[1] The California Supreme Court has not yet summarily disbarred an attorney pursuant to section 6102 (c). We have concluded that respondent should be summarily disbarred, but that authority to do so lies only with the Supreme Court. We therefore recommend to the Supreme Court that it summarily disbar respondent.

PROCEDURAL HISTORY

In December 1989 the Office of Trial Counsel transmitted the original conviction documents to the State Bar Court, which, in turn, transmitted them to the Supreme Court in January 1990. **[1a]** On January 17, 1990, the Supreme Court ordered the respondent interimly suspended, noting that mail fraud is "a crime involving moral turpitude."[2] **[1b - see fn. 2]** Respondent has remained on interim suspension ever since.

Effective December 1, 1990, the Supreme Court delegated to the State Bar Court the authority to exercise statutory powers pursuant to Business and Professions Code sections 6101 and 6102 with respect to the discipline of attorneys convicted of crimes (California Rules of Court, rule 951(a).) On July 19, 1991, the Office of Trial Counsel transmitted the documents evidencing the finality of respondent's criminal conviction to the State Bar Court. On July 26, 1991, we discharged the power delegated to us by the Supreme Court and issued an order directing the respondent to show cause why summary disbarment should not be recommended to the Supreme Court. Respondent's counsel filed a return to the order to show cause on August 20, 1991. The Office of Trial Counsel formally requested respondent's summary disbarment on August 21, 1991. Thereafter, we solicited briefs on several issues related to summary disbarment and heard oral argument on November 20, 1991. Post-argument briefs were thereafter filed and the matter was submitted for decision on December 6, 1991.

FACTS

On June 30, 1989, respondent and his wife were charged by information with five felony counts of mail fraud. The charges included the following: "Beginning in or about January 1985 and continuing through in or about August 1988, defendants Steven Joseph Segall and Andrea Segall . . . knowingly participated in a scheme to defraud and to obtain money by means of false and fraudulent pretenses . . . . Specifically, as part of the scheme to defraud, the defendants knowingly and willfully created and caused approximately 750 false invoices for legal

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1. Business and Professions Code section 6102 (c) provides in relevant part as follows: "After the judgment of conviction of an offense specified in subdivision (a) has become final . . . 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."

2. **[1b]** The Supreme Court's classification of respondent's offense as a crime of moral turpitude followed well-settled precedent. (See *In re Utz* (1989) 48 Cal.3d 468, 482; *In the Matter of the Conviction of Beecroft* (Bar Misc. No. 4104) min. order filed October 25, 1978.) As of the date respondent was criminally charged, 18 United States Code section 1341 read as follows: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

services totalling $350,000 to be processed for payment to the defendants' fictitious company 'Legal Research.' The defendants then caused the related payments for these invoices to be sent through the United States mails to their fictitious company and converted the money to their own personal use."

On August 14, 1989, Steven J. Segall pled guilty to the five felony counts. In his "Factual Basis for Guilty Plea," the respondent admitted that he:

1) had been employed as an "insurance claims litigation attorney" by a "Cigna Insurance Company affiliate law firm";

2) personally formed a company called "Legal Research";

3) referred legal research assignments from his firm to Legal Research without disclosing to the firm that he controlled Legal Research;

4) performed the legal research assignments referred to Legal Research while on the firm's payroll without disclosing to the firm that he was doing so; and

5) caused bills for the legal research to be sent to Cigna.

The guilty plea related to five specific invoices totaling $2,113. (Information pp. 3-4.)

[2] In reviewing the record for purposes of determining the propriety of summary disbarment, we do not take into account language in the information unnecessary to the crime to which respondent pled guilty. (Cf. *In re Hallinan* (1954) 43 Cal.2d 243, 249-250.) We therefore cannot assume that respondent created 750 false invoices as alleged in the information from his plea of guilty to creating five false invoices, nor can we assume that the magnitude of the amount involved was $350,000. However, certain additional undisputed facts are appropriate for us to consider. Although respondent pled guilty only to obtaining five checks by fraudulent means over a period from October 25, 1985, through June 18, 1986, respondent was ordered to pay restitution "in the amount of $254,000 or in some other figure set by the probation officer depending upon the outcome of any civil litigation arising from the events underlying this case." (*U.S.* v. *Segall* (U.S. District Court, C.D. Cal., No. CR-89-560), judgment and probation commitment order filed November 7, 1989.) At oral argument, in response to questions from this department, counsel stated that respondent does not dispute that the total sum billed by Legal Research to Cigna was in the range of $300,000. Respondent also does not dispute that the time period over which the misconduct occurred exceeded two years.

DISCUSSION

The Scope of the Inquiry on the Issue of Summary Disbarment

One of the issues the parties were asked to address is whether our inquiry is limited to the criteria set forth in section 6102 (c) of the Business and Professions Code.[3] If so, then the undisputed fact that fraud was an element of the crime and the determination that the felonious offense was committed in the course of the practice of law or a client was a victim would result in automatic disbarment. If the Legislature did not intend to preclude judicial discretion, then we must also make an independent determination of the propriety of summary disbarment according to established Supreme Court precedent.

Respondent's counsel argue that section 6102 (c) is not binding on the Supreme Court, citing section 6087 and the historic authority of the California Supreme Court to have sole control over the discipline and disbarment of attorneys. (*Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-301.) The examiner argues that section 6102 (c) expressly removes any discretion on the part of the Supreme Court and that, in any event, it precludes the exercise of any discretion by the State Bar Court.

3. Hereafter all references to sections shall be to the Business and Professions Code, unless otherwise specified.

[3a] We agree with respondent's counsel that the statutory scheme reveals the Legislature's intent to defer to the Supreme Court's inherent authority to judge each case on its merits and "disbar or suspend" pursuant to its own view of the record. We note, however, that in exercising that discretion the Supreme Court has always given great weight to Legislative enactments and State Bar rules implementing them, and has indicated its intent to follow section 6102 (c) in appropriate cases. (See, e.g., *In re Utz* (1989) 48 Cal.3d 468, 482.)

[3b] In adopting the State Bar Act, the Legislature itself recognized the inherent control of the Supreme Court over the admission, discipline, and reinstatement of attorneys in this state. (See, e.g., Bus. & Prof. Code, §§ 6066, 6075, 6077, 6082, 6087 and 6107.) Section 6087 provides, in part, as follows: "Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of Chapter 34 of the Statutes of 1927, relating to the State Bar of California."

In article 6 of the same chapter of the State Bar Act the Legislature specifically addressed the disciplinary authority of the courts, categorically stating: "6100. *Disbarment or Suspension*. For *any* of the causes provided in this article, arising after an attorney's admission to practice, he or she may be *disbarred or suspended* by the Supreme Court. *Nothing in this article limits the inherent power of the Supreme Court to discipline*, including to summarily disbar any attorney." (Emphasis added.)

[3c] The Legislature clearly intended section 6102 to be read in light of sections 6087 and 6100. (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 94, pp. 146-147.) In so limiting the effect of this statutory scheme, the Legislature expressly recognized the separation of powers between the Supreme Court and the Legislature and did not wish to exceed its constitutional role.

Thirty years ago, in *Brotsky* v. *State Bar*, *supra*, 57 Cal.2d at pp. 300-301, the Supreme Court reviewed the role of the Legislature in the area of attorney discipline, and explained it as follows: "Historically, *the courts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them* [citations]." (*Id.* at p. 300, emphasis added.) The Court also stated that "In disciplinary matters (and in many of its other functions) [the State Bar] proceeds as an arm of this court. *If the Legislature had not recognized this fact, and made provision therefor, the constitutionality of those portions of the State Bar Act which provide for the admission, discipline and disbarment of attorneys could have been seriously challenged on the ground of legislative infringement on the judicial prerogative*." (*Ibid.*, emphasis added.)

Nearly twenty years later, in *Hustedt* v. *Workers' Compensation Appeals Board* (1981) 30 Cal.3d 329, it was determined that a Labor Code provision granting the Workers' Compensation Appeals Board disciplinary power over attorneys appearing before it was an unconstitutional interference with the inherent power of the courts, and that it violated the constitutional doctrine of separation of powers embodied in article III, section 3 of the California Constitution. The Court stated, in part, as follows: ". . . [T]hat the discipline of attorneys is a judicial function, is undisputed. Article VI, section 1, of the California Constitution vests the judicial power of this state in the Supreme Court, Courts of Appeal, superior courts, municipal courts and justice courts. Since the 'courts are set up by the Constitution without any special limitations' on their power, they 'have . . . all the inherent and implied powers necessary to properly and effectively function as a separate department in our scheme of our state government. [Citations.]' [Citations.] [¶] In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. (Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?* (1981) 69 Geo. L.J. 705, 707, fn 4.) 'This is necessarily so. An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question.' [Citations.]" (*Hustedt*, *supra*, 30 Cal.3d at pp. 336-337, fns. omitted.)

Nonetheless, in both *Brotsky* and *Hustedt*, the Supreme Court recognized the important role of the

legislative police power, stating in *Hustedt* that despite the ultimate power of the Court: "Nevertheless, this court has respected the exercise by the Legislature, under the police power, of 'a reasonable degree of regulation and control over the profession and practice of law . . .' in this state. [Citations.] This pragmatic approach is grounded in this court's recognition that the separation of powers principle does not command 'a hermetic sealing off of the three branches of Government from one another.' [Citation.] Although the doctrine defines a system of government in which the powers of the three branches are to be kept largely separate, it also comprehends the existence of common boundaries between the legislative, judicial, and executive zones of power thus created. [Citation.] Its mandate is 'to protect any one branch against the overreaching of any other branch. [Citations.]' [Citations.] [¶] . . . . [¶] The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle has been summarized as follows. '[T]he legislature may put reasonable restrictions upon constitutional functions of the courts *provided they do not defeat or materially impair the exercise of those functions*.' [Citations.]" (*Id.* at pp. 337-338, emphasis added, fn. omitted.) "This principle, which was first recognized in California in 1850 [citation], has been reaffirmed on numerous occasions. [Citations.]" (*Id.* at p. 336, fn. 5.)

Similarly, in *Merco Construction Engineers* v. *Municipal Court* (1978) 21 Cal.3d 724, the Supreme Court stated: "We deem it established without serious challenge that legislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary. *When conflict exists, the legislative enactment must give way*." (*Id.* at pp. 728-729, emphasis added.)

History of Business and Professions Code Section 6102

The predecessor of section 6102 was enacted in 1872.[4] Section 6102 itself was adopted in 1939[5] and amended in 1941.[6] Section 6102 historically used mandatory language for disbarment after criminal convictions involving moral turpitude. In 1955, section 6102 was again amended. (Stats. 1955, ch. 1190, § 2, p. 2201.) The effect of such amendment was summarized in *In re Smith* (1967) 67 Cal.2d 460, 462: "Prior to 1955, petitioner's conviction of either grand theft or forgery would have resulted in his automatic disbarment. (Stats. 1939, ch. 34, p. 357.) In 1955 section 6102 was amended to do away with summary disbarment and, among other changes, to substitute the present language of the statute requiring disbarment or suspension 'according to the gravity of the crime and the circumstances of the case.' . . . Sponsored by the State Bar, the amendments give greater flexibility and in substance (a) affirm this court's established policy of referring cases where the question of moral turpitude was doubtful upon the 'record of conviction' to the State Bar for hearing, report and recommendation [citations]; (b) provide a means of obtaining a better record than provided under the former law by the bare 'record of conviction' (which consists of indictment, information or complaint, pleas of guilty and other minute orders); (c) permit disciplinary investigation where the crime itself does not involve moral turpitude [citations]; (d) remove the legislative mandate that disbarment is mandatory

4. Code of Civil Procedure section 299 (enacted 1872, repealed 1939).

5. When enacted in 1939, section 6102 read as follows: "Upon the receipt of the certified copy of the record of conviction of an attorney of a crime involving moral turpitude, the court shall suspend the attorney until the judgment in the case becomes final. When a judgment of conviction becomes final, the court shall order the attorney disbarred. [¶] The other provisions of this article providing a procedure for the disbarment and suspension of an attorney do not apply to an attorney convicted of a crime involving moral turpitude, unless expressly made applicable." (Stats. 1939, ch. 34, § 1, p. 357.)

6. In 1941 the first paragraph of section 6102 was amended to read, in pertinent part, as follows: "Upon the receipt of the certified copy of the record of conviction of an attorney of a crime involving moral turpitude, the court shall suspend the attorney until the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal. The court shall order the attorney disbarred when the time for appeal has elapsed or the judgement of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence . . . ." (Stats. 1941, ch. 1183, § 1, p. 2942.)

upon the final conviction of any crime involving moral turpitude; and (e) permit this court to take into account unusual situations even in the case of more serious crimes."

The Supreme Court was not limited during this time by the lack of a legislative provision for summary disbarment. Thus, in *In re Hardeman*, S.F. 21997, a municipal court judge convicted of conspiracy to obstruct justice (Pen. Code, § 182(5)) and conspiracy to commit arson (Pen. Code, § 182(1)) was removed from the bench and disbarred by Supreme Court minute order issued December 7, 1966.

The Supreme Court also did not hesitate to use its inherent and plenary powers to avoid the operation of statutes that would have otherwise limited the Court in carrying out its disciplinary functions. For instance, in *Stratmore* v. *State Bar* (1975) 14 Cal.3d 887, an attorney's misconduct occurred prior to his admission to practice. In defense, the attorney pointed to section 6100 which provides that the Court may suspend or disbar an attorney for specified causes "'arising *after* his admission to practice.'" (*Id.* at p. 889, emphasis added.) Concluding that "'a statute cannot limit the inherent power of the court,'" the Supreme Court suspended the attorney. (*Id.* at p. 890, quoting *In re Bailey* (1926) 30 Ariz. 407 [248 P. 29, 31]; *In re Bogart* (1973) 9 Cal.3d 743, 749; *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 230.)

The Supreme Court also specifically rejected the apparently mandatory use of the word "shall" in imposing discipline under former section 6102. The case of *In re Cooper* (1971) 5 Cal.3d 256 involved an attorney convicted of the crime of contempt which was classified as a crime which "may or not involve moral turpitude." Under the circumstances, Cooper was found to have committed an act of moral turpitude. At that time, section 6102 provided that in such cases, the Court "shall" disbar or suspend the attorney. Yet, in *Cooper*, the Court ordered a public reproval. Similarly, in the case of *In re Battin* (1980) 28 Cal.3d 231, 236, the attorney was convicted of the misuse of public funds, and the surrounding circumstances involved moral turpitude. Despite the provision of section 6102 appearing to call for mandatory suspension or disbarment, the Supreme Court exercised its inherent power and imposed a public reproval.

Supreme Court Cases Interpreting Business and Professions Code Section 6102 (c)

[3d] Effective January 1, 1986, statutory summary disbarment was legislatively restored. (Stats. 1985, ch. 453, § 15.) Although section 6102 (c) again appears to use mandatory language prescribing a fixed formula for requiring disbarment regardless of the circumstances, the Legislature, in also reenacting section 6100, clearly expressed its recognition that the Supreme Court retained ultimate authority to determine the appropriate discipline in any proceeding.[7]

In *In re Ford* (1988) 44 Cal.3d 810, the conviction was not transmitted to the Supreme Court by the Office of the State Bar Court with a recommendation that he be summarily disbarred because Ford was convicted of a violation of Penal Code section 506, embezzlement by fiduciary,[8] on January 23, 1985, prior to the effective date of section 6102 (c). The Office of Trial Counsel argued for disbarment at the hearing, citing as support for its position standard 3.3, Standards for Attorney Sanctions for Professional Misconduct ("standards") (Trans. Rules Proc. of State Bar, div. V) which provides that "Final conviction of a felony defined by section 6102 (c) shall result in summary disbarment, irrespective of any mitigating circumstances." In the Supreme Court, Ford argued that application of section 6102 (c) and/or standard 3.3 would have an illegal ex post facto effect. The Court said that although there was "an absence of an express legislative mandate" to make section 6102 (c) retroactively applicable, it was not "necessarily precluded." (*Id.* at p. 816, fn. 6.) The Supreme Court had recently given similar retroactive effect to the guidance provided by the State Bar's adoption of the Standards for Attorney Sanctions for Professional

7. The operative language in Section 6100 expressly recognizing the inherent authority of the Supreme Court was enacted in 1951.

8. Ford misappropriated more than $20,000 in life insurance proceeds that he collected as an attorney on behalf of the beneficiary, a minor.

Misconduct. (See *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 198, fn. 14.) Ford was disbarred based on the complete record following hearing that had been presented to the Supreme Court on review.

In *In re Ewaniszyk* (1990) 50 Cal.3d 543, the Office of the State Bar Court transmitted a recommendation to the Supreme Court that Ewaniszyk be summarily disbarred, but the Supreme Court referred the case to the State Bar Court for hearing and recommendation as to discipline. Ewaniszyk had been convicted on October 12, 1984, "of two counts of felony grand theft, both of which arose out of misappropriation of client funds." (*Id.* at p. 544.) The theft totaled approximately $11,000. A full hearing was conducted in which suspension was recommended followed by review by the former volunteer review department which recommended disbarment. Appearing before the Supreme Court, Ewaniszyk made the same ex post facto argument as Ford had with respect to section 6102 (c). Again, as in *Ford*, the State Bar contended that the Legislature must have intended retroactive effect on the grounds of public protection. The Supreme Court concluded that the "serious nature" of Ewaniszyk's misconduct warranted disbarment without reference to the summary disbarment provision of section 6102 (c). (*Id.* at p. 550.) In its discussion regarding the appropriate degree of discipline, the Court said that "*We also find guidance* in the Standards for Attorney Sanctions for Professional Misconduct . . . [which] provide for summary disbarment upon a felony conviction for theft of client funds. (Std. 3.3.)" (*Id.* at p. 549, emphasis added.) Justices Mosk and Broussard would have followed the hearing panel's recommendation of a one-year actual suspension and five years probation. Again, the Supreme Court did not summarily disbar Ewaniszyk prior to hearing, but disbarred him only in light of the record after a full evidentiary hearing.

In *In re Utz*, *supra*, 48 Cal.3d 468, Utz was disbarred after having been convicted of seven counts of mail fraud (18 U.S.C. § 1341) and two counts of using interstate transportation to defraud individuals (18 U.S.C. § 2314), also crimes involving moral turpitude per se, in connection with a land fraud scheme. The Supreme Court noted that "In May 1986, this court issued petitioner an order to show cause why discipline should not be imposed. In response to the order, petitioner requested a hearing before the State Bar. In July 1986, we referred this matter to the State Bar . . . ." (*Id.* at p. 478.) The referral order was made even though the State Bar Court recommended summary disbarment under section 6102 (c).

The Supreme Court concluded that the first part of the summary disbarment test was satisfied because petitioner's offenses required proof of specific intent to defraud, but that he did not commit the misrepresentations and abuses in the course of practicing law. "Petitioner's activities as an attorney were only circumstances *related* to his offenses. Therefore section 6102, subdivision (c) was an inappropriate basis *for recommending disbarment*." (*Id.* at p. 483, first emphasis original; second emphasis added.) The Court noted that most of petitioner's misrepresentations and abuses which resulted in his conviction occurred while he was lending credibility to the financial status of his partner as a credit reference and while he acted as a silent partner in a land sale project. Since the thrust of his misconduct was not committed in his capacity as attorney, the Court rejected the application of the second prong of section 6102 (c). Nonetheless, after carefully considering all of the mitigating and aggravating factors, the Court considered disbarment appropriate. (*In re Utz*, *supra*, 48 Cal.3d at p. 485.)

In *In re Basinger* (1988) 45 Cal.3d 1348, Basinger was disbarred following his conviction of grand theft of client trust account funds and law office operating funds. This matter was not recommended to the Supreme Court as eligible for summary disbarment by the Office of the State Bar Court, nor argued for at hearing in the State Bar Court by the Office of Trial Counsel, although when the matter came before the Supreme Court, the General Counsel of the State Bar argued for summary disbarment. The Court noted the existence of the summary disbarment provision of section 6102 (c), but quoted *Ford*, *supra*, 44 Cal.3d at p. 816, fn. 6, to the effect that "the same result obtains even if his mitigating evidence is considered." (*In re Basinger*, *supra*, 45 Cal.3d at p. 358, fn. 3.) Thus, each of these potential summary disbarment cases was disposed of on a full record developed at trial. We therefore will address

both the statutory criteria and the case law in assessing the propriety of summary disbarment without a State Bar Court trial.

Application of the Criteria for Summary Disbarment to the Instant Proceeding

Although some of respondent's criminal conduct predated the effective date of section 6102 (c), respondent concedes that a substantial part of the criminal conduct for which he was convicted occurred after the effective date of section 6102 (c).[9] In his "Return to Order to Show Cause Re Discipline After Conviction of Crime," respondent nevertheless requests that he not be summarily disbarred and that the review department exercise its discretion to refer the matter for hearing and a recommendation as to discipline pursuant to subdivisions (d) and (e) of section 6102. In addition to mentioning certain potential evidence in mitigation including remorse, rehabilitation, and medical, emotional, economic and family difficulties, he alleges that his criminal conduct was inconsistent with his good character. Respondent also claims that his activities as an attorney were only circumstantially related to his offenses, citing *In re Utz*, *supra*, 48 Cal.3d at pp. 481-483. He further claims that there was no loss either to "the insured clients," i.e., Cigna's insureds, or to his law firm, due to restitution.

Counsel for respondent state "[w]hether the crime was committed in the course of the practice of law or in a manner such that a client was a victim, *generally* cannot be determined by the record which establishes merely the fact of conviction." (Emphasis added.) His counsel also argue that: 1) because *United States* v. *Frick* (5th Cir. 1979) 588 F.2d 531, 536 and *United States* v. *Love* (9th Cir. 1976) 535 F.2d 1152, 1158 hold that violation of 18 United States Code section 1341 may require only "reckless indifference to the truth" rather than fraudulent intent, the respondent's conviction for mail fraud lacks the necessary element of "specific intent to deceive, defraud, . . . or make . . . a false statement." However, it was conceded at oral argument that respondent did not contend that his guilty plea was based on recklessness rather than specific intent.

The examiner argues that the statutory criteria for summary disbarment have been met. We agree. The respondent's "Factual Basis for Guilty Plea" provides both the fact that the crime was one of intentional fraud committed in the practice of law and that a client was a victim.

[4] As to the intentional fraud aspect of respondent's conviction of mail fraud, the Supreme Court's discussion in *In re Utz*, *supra*, 48 Cal.3d at p. 482 conclusively establishes the presence of that element. We also find that the second element was satisfied.

[5a] As explained in *In re Utz*, *supra*, 48 Cal.3d 468, "Courts have generally defined the term [practice of law] as follows: '[t]he practice of law is the doing and performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matters may or may not be pending in a court.' [Citations.]" (*Id.* at p. 483, fn. 11.) Respondent stipulated that he performed the legal research assignments referred to Legal Research and caused the bills to be sent to Cigna while employed as a litigation attorney by Cigna's affiliate law firm. Most of the misconduct by attorney Utz was nonlegal in nature—acting as a credit reference and a silent partner in a real estate fraud scheme. Utz's activity contrasts with respondent's whose very practice of law in performing legal research referred by Cigna to his undisclosed legal research company while on Cigna's law firm's payroll was fraudulent.

Respondent's conduct also contrasts with that of

9. The effective date of the legislation providing for the current summary disbarment provision of section 6102 (c) was January 1, 1986. The charging information alleged that the scheme took place "[b]eginning in or about January 1985 and continuing through in or about August 1988 . . . ." Respondent concedes that much of the conduct postdated the effective date of section 6102 (c).

the respondent in *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96. Stamper embezzled funds from his law partnership in breach of his fiduciary duties as a partner, not as a lawyer, and his criminal conviction therefor was held by the Court of Appeal to be unrelated to the fact that he was an attorney. In the subsequent disciplinary proceeding, we agreed with the Court of Appeal's analysis of this issue, noting that no clients were affected, nor were any of the forged documents intended for dissemination. They were internal to the law firm and were created solely for the purpose of deceiving his partner.

[5b] Here, in contrast, respondent created a separate corporation for the purpose of fraudulently obtaining payment for legal work performed for clients, legal work that, presumably, if not farmed out, would have been performed by the law firm employing respondent. We cannot see any basis for concluding that this elaborate fraud was not perpetrated in the practice of law.

[6] Section 6102 (c) provides, as an alternative basis for summary disbarment, that the fraud be perpetrated in any manner such that a client was a victim, even if not perpetrated "in the course of the practice of law." We also reject respondent's argument that the insureds, as clients of respondent, were not victimized by the fact that Cigna was fraudulently billed for attorney's services performed on behalf of the insureds. Respondent argues that the insureds were never billed for the fraudulent research and Cigna received restitution. Respondent's reliance on *In the Matter of Stamper*, *supra*, 1 Cal. State Bar Ct. Rptr. 96 is misplaced. There, no clients were *ever* affected. We did not conclude there was no harm, but simply found in mitigation that the victimized business partner was not permanently harmed because Stamper voluntarily made full restitution to his partner before the crime ever came to light. Here, restitution ordered as part of respondent's criminal conviction does not negate harm, it demonstrates the magnitude of the economic harm which was only redressed by court order.

ANALYSIS OF THE SUPREME COURT STANDARDS FOR DISBARMENT

[7] Because we construe our duty to include assurance that application of section 6102 (c) does not conflict with Supreme Court standards for disbarment, we have also analyzed the record in light of the case law. Respondent's counsel argue that despite the statutory change, the Supreme Court has continued to balance all relevant factors including mitigating circumstances on a case-by-case basis. (See, e.g., *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 618.) They, therefore, seek an opportunity for a trial to put on mitigating evidence in an effort to convince the court that disbarment is inappropriate under all of the circumstances. This is contrary to the very purpose of section 6102 (c)—to impose summary disbarment for certain categories of felonies without a hearing. The Legislature itself recognized that such a blanket rule might be deemed inappropriate in particular cases where the Supreme Court would likely exercise its inherent power not to disbar. Our interpretation of our duty in a case meeting the statutory criteria for summary disbarment is that we should only order a hearing if Supreme Court precedent supports a lesser sanction than disbarment for the particular crime depending on circumstances which might be adduced at a disciplinary hearing. **[8]** We conclude, after analyzing the relevant case law that not only does this case meet the statutory criteria for summary disbarment, it is also similar to other conviction-based attorney discipline cases in which the Supreme Court has disbarred the attorney regardless of mitigating factors due to the extremely serious nature of the misconduct and its direct connection with the practice of law. (See *In re Aquino* (1989) 49 Cal.3d 1122 [participating in sham marriage scheme to contravene immigration law]; *In re Lamb* (1989) 49 Cal.3d 239 [false personation of bar examinee]; *In re Rivas* (1989) 49 Cal.3d 794 [false statements made in documents regarding domicile by judicial candidate]; *In re Basinger*, *supra*, 45 Cal.3d 1348 [theft of client and partnership funds].)

As in *In re Lamb, supra*, 49 Cal.3d 239 and *In re Aquino*, *supra*, 49 Cal.3d 1122, Segall's misconduct cannot be considered aberrational given the elaborate nature of the scheme evident from the guilty plea. For purposes of this determination, we assume that respondent might have very strong mitigating evidence. In the cases cited above, very substantial mitigation was offered to no avail. In fact,

in *In re Aquino* the concurring opinion of three justices expressly stated that Aquino would "appear to be an excellent candidate for reinstatement" upon eligibility to apply six months following his disbarment. (*Id.* at p. 1134.) In *In re Rivas*, *supra*, 49 Cal.3d 794, the Court similarly noted that Rivas would soon be eligible to apply for reinstatement due to his lengthy interim suspension. (*Id.* at p. 802, fn. 8.) Here, too, respondent's interim suspension allows him to be eligible to apply for reinstatement five years from the effective date of his interim suspension—February 16, 1995. (See rule 662, Trans. Rules Proc. of State Bar.) We have no basis for evaluating his chances of success. However, respondent would be gaining no benefit and incurring great expense if we were to allow him to proceed to a hearing only to conclude upon review of the entire record that the magnitude of his fraud in the course of his practice called for disbarment irrespective of mitigating circumstances.

APPROPRIATE DISPOSITION

Counsel for respondent argue that even if the State Bar Court considers summary disbarment appropriate, it does not have the power to impose summary disbarment directly, as urged by the Office of Trial Counsel, but only to recommend summary disbarment to the Supreme Court. In support they cite, among other authorities, rule 951(a) of the California Rules of Court: "The State Bar Court shall impose or recommend discipline in conviction matters *as in other disciplinary proceedings*." (Emphasis added.) They also cite rule 952(a): "Unless otherwise ordered, if no petition for review is filed within the time allowed . . . as to a *recommendation* of the State Bar Court for disbarment or suspension of a member, . . . the *recommendation* of the State Bar Court shall be filed as an order of the Supreme Court . . . ." (Emphasis added.)

The examiner argues that the State Bar Court has been delegated the authority under section 6102 (c) to summarily disbar respondent by its own action. In support of her position, she cites to the first sentence of rule 951(a): "The State Bar Court shall exercise statutory powers pursuant to Business and Professions Code section 6101 and 6102 with respect to the discipline of attorneys convicted of crimes." **[9]** We agree with respondent's counsel that rule 951(a), read as a whole, must be construed to limit the State Bar Court to recommending summary disbarment, rather than imposing it directly. The rules expressly contemplate recommendations in all other cases warranting suspension or disbarment and it would be anomalous to construe our authority in the case of summary disbarment to be greater than our general authority after a full evidentiary hearing is conducted. We believe that the Supreme Court did not delegate to us the power to summarily disbar, but merely the power to consider such issue in the first instance and either make a recommendation for summary disbarment or refer the matter for hearing.

FORMAL RECOMMENDATION

For the reasons stated above, we recommend to the Supreme Court that it summarily disbar Steven J. Segall from the practice of law. **[10]** As the respondent was interimly suspended by the Supreme Court effective February 16, 1990, and ordered to comply with rule 955 of the California Rules of Court within 30 and 40 days, respectively, from that date, we do not include a recommendation of compliance with rule 955. An award of costs in favor of the State Bar is recommended pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT EARL WYRICK, III

A Member of the State Bar

No. 88-O-10804

Filed April 6, 1992; reconsideration denied, May 12, 1992

SUMMARY

Respondent was found to have concealed his prior suspension from practice on two job applications for attorney employment with the State of California, conduct involving moral turpitude. The hearing judge dismissed one other count which charged respondent, while on interim suspension, with failing to disclose the suspension on an application to be a judicial arbitrator and holding himself out implicitly as entitled to practice law. The hearing judge recommended that respondent be suspended for four months, stayed, with two years probation and no actual suspension. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent requested review, contending that all disciplinary charges should have been dismissed because he had no intent to deceive his prospective employers, there was no reliance on the information he supplied on the forms, and he had followed the instructions of the prospective employers in preparing the applications. Respondent also contended that the hearing judge did not resolve all reasonable doubts in his favor and imposed an undue burden on respondent because of his prior record of discipline.

The review department reversed the hearing judge's decision to dismiss one of the counts. It found that respondent was grossly negligent in failing to ascertain the legal requirements for a judicial arbitrator and, in his application for the position, holding himself out as an active member of the bar when he was then on interim suspension from practice. Affirming the remaining culpability findings, and weighing the additional misconduct found together with the aggravating factors in the record, including respondent's prior record of discipline, the review department increased the recommended discipline to two years suspension, stayed, and two years probation, on the same conditions recommended by the hearing judge, but with an actual suspension of six months.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro, Gregory B. Sloan

For Respondent: Robert Earl Wyrick, III, 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] **191 Effect/Relationship of Other Proceedings**
1549 Conviction Matters—Interim Suspension—Miscellaneous
An attorney's interim suspension following a criminal conviction is not affected by the expungement of the conviction.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Even where the examiner does not seek review of the dismissal of a count of the notice to show cause, the review department is obligated to conduct a de novo review of the hearing judge's disposition of that count, and may reach a different conclusion based on the record. (Trans. Rules Proc. of State Bar, rule 453(a).)

[3 a-e] **221.00 State Bar Act—Section 6106**
231.00 State Bar Act—Section 6126
Where respondent was suspended from practice as a result of disciplinary charges, and by omitting this fact from his application for a position as a judicial arbitrator, created the false impression that he was currently able to practice law, respondent's gross negligence in failing to ascertain that active membership in the State Bar was a requirement of the position, and his improper holding himself out as entitled to practice law, constituted an act involving moral turpitude. A suspended attorney cannot expressly or impliedly create or leave undisturbed the false impression that the attorney has the ability to practice law.

[4 a, b] **159 Evidence—Miscellaneous**
166 Independent Review of Record
A hearing judge's interpretation of a written exhibit is not a determination on the credibility of a witness. The review department is free to make its own findings on issues that turn on documentary evidence, and to disagree with the hearing judge's resolution of such issues.

[5 a, b] **191 Effect/Relationship of Other Proceedings**
586.11 Aggravation—Harm to Administration of Justice—Found
Because a suspended attorney is unqualified to sit as a judicial arbitrator, any decisions the attorney renders as an arbitrator could be open to attack as void. Thus, respondent's misconduct in failing to disclose his suspended status when applying for an arbitrator position was of most serious concern because of its potential for harm to public confidence in the court system. Respondent's very service as an unqualified arbitrator harmed the administration of justice.

[6] **162.19 Proof—State Bar's Burden—Other/General**
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
231.00 State Bar Act—Section 6126
Where respondent, who had been previously suspended from practice, described his legal career to a prospective employer in such a way as to indicate that respondent's practice of law had been uninterrupted, it was sufficient to establish culpability of misrepresentation to show that respondent knowingly presented a statement which itself tended to mislead. It was not material that the employer did not rely on the application or was not in fact deceived.

[7] **221.00 State Bar Act—Section 6106**
231.00 State Bar Act—Section 6126
Instructions on a job application asking for a statement of those experiences which met the requirements of the position sought did not entitle respondent to misrepresent his employment history by selective omissions or misrepresentations calculated to imply that there had been no hiatus in his ability to practice law.

[8] **103 Procedure—Disqualification/Bias of Judge**
162.90 Quantum of Proof—Miscellaneous
231.00 State Bar Act—Section 6126
A hearing judge's statement that the State Bar Court has a duty to ensure that suspended attorneys are scrupulously honest regarding their suspensions did not indicate that the judge had improperly shifted the burden of proof on culpability at the disciplinary hearing from the State Bar to the respondent. The view that suspended attorneys have a duty not to mislead the public about their suspensions has also been expressed by the Supreme Court.

[9] **221.00 State Bar Act—Section 6106**
720.50 Mitigation—Lack of Harm—Declined to Find
795 Mitigation—Other—Declined to Find
Misrepresentations are no less egregious when made to a public agency than when made to an individual client, and warrant discipline of no less magnitude.

[10] **801.41 Standards—Deviation From—Justified**
805.59 Standards—Effect of Prior Discipline
1092 Substantive Issues re Discipline—Excessiveness
1549 Conviction Matters—Interim Suspension—Miscellaneous
An attorney on interim suspension following a criminal conviction has little control over the length of such suspension prior to final resolution of the case. Where an attorney's prior actual suspension had consisted largely of time already spent on interim suspension, and such a lengthy actual suspension would not ordinarily have been imposed for the misconduct involved in the prior matter, and where imposition of an even greater actual suspension in the attorney's subsequent matter would have resulted in discipline far in excess of that warranted by the facts and comparable case law, it would not be appropriate to adhere strictly to the standard directing imposition of greater discipline for a second offense.

[11] **221.00 State Bar Act—Section 6106**
521 Aggravation—Multiple Acts—Found
535.20 Aggravation—Pattern—Declined to Find
621 Aggravation—Lack of Remorse—Found
1512 Conviction Matters—Nature of Conviction—Theft Crimes
Where an attorney's prior discipline involved culpability of moral turpitude for attempted receipt of stolen property, and the attorney's subsequent misconduct involved moral turpitude in misleading applications for employment, there was no pattern or common thread linking the former misconduct with the later case. However, the attorney's multiple breaches of ethical duties demonstrated that the attorney lacked a true understanding of professional responsibilities.

[12 a, b] 221.00 State Bar Act—Section 6106
231.00 State Bar Act—Section 6126
801.45 Standards—Deviation From—Not Justified

Departure from the disciplinary standards was not justified based on the novelty of the issues raised in the matter, when the misconduct involved was respondent's misrepresentation of his status as an attorney, an area in which the governing rules have been clearly established for many years.

[13] 221.00 State Bar Act—Section 6106
231.00 State Bar Act—Section 6126
511 Aggravation—Prior Record—Found
621 Aggravation—Lack of Remorse—Found
833.10 Standards—Moral Turpitude—Suspension
833.90 Standards—Moral Turpitude—Suspension

Attorneys placed on disciplinary suspension must be careful not to hold themselves out as being able to practice when they are not and must not mislead employers regarding their prior status. An attorney's statements in a resume or job interview should be as trustworthy as that professional's representation to a court or client. Where respondent did not seem to understand the seriousness of his ethical duties in this regard, and had a prior record of discipline, a period of actual suspension was necessary for the protection of the public.

ADDITIONAL ANALYSIS

Culpability
Found
221.12 Section 6106—Gross Negligence

Aggravation
Found
582.50 Harm to Client

Discipline
1013.08 Stayed Suspension—2 Years
1015.04 Actual Suspension—6 Months
1017.08 Probation—2 Years

Probation Conditions
1024 Ethics Exam/School

OPINION

NORIAN, J.:

In this case we face the issue of the obligations of an attorney who has been suspended from the practice of law in seeking employment as a superior court arbitrator during his suspension and as an attorney thereafter. Respondent, Robert Earl Wyrick, III, asks that we review the decision of a hearing department judge who found that respondent concealed his prior suspension from law practice on two job applications for attorney positions, in violation of Business and Professions Code section 6106.[1] The judge dismissed a third charge that respondent failed to disclose his then-current suspension when applying for an arbitrator position for a superior court on the basis that there was insufficient evidence of respondent's intent to mislead. The judge recommended that respondent's license be suspended for four months, that the suspension be stayed, and that respondent be placed on probation for two years with no actual suspension and with conditions, including attending ethics school and passing the California Professional Responsibility Examination.

On review, respondent asks that all counts in the notice to show cause be dismissed. He denies any intent to deceive in his employment applications, asserting that he merely followed the instructions of the individuals in the prospective employers' offices. He also contends that the prospective employers did not rely on the application forms or on his prior legal experience. In his view, the hearing judge failed to resolve all reasonable doubts in his favor and imposed an undue burden on respondent because of his prior record of discipline. The examiner for the Office of Trial Counsel contends that all of respondent's arguments are without merit.

At oral argument, we asked for further briefing from the parties on count one of the notice to show cause, which had been dismissed by the hearing judge.[2] Upon our independent review of the record we conclude that respondent held himself out to the Sacramento County Superior Court arbitration program as an active member of the State Bar while under interim suspension, a breach of duties in violation of section 6106. We concur with the hearing judge's findings on counts two and three. Given respondent's prior record of discipline and the additional finding of misconduct, we increase the recommended discipline to two years suspension, stayed, and two years of probation with conditions including six months of actual suspension. We adopt the remaining conditions of probation recommended by the hearing judge and further recommend, as did the hearing judge, that respondent be ordered to take and pass the California Professional Responsibility Examination within one year. We also recommend that respondent be ordered to comply with rule 955, California Rules of Court.

FACTS

Respondent was admitted to practice law in California in December 1973, and has a prior disciplinary record. On May 28, 1980,[3] the California Supreme Court placed respondent on interim suspension based on his conviction for attempting to receive stolen property in violation of Penal Code sections 496 and 664.[4] The conviction referral was

1. All further section references are to the Business and Professions Code unless otherwise stated.

2. In requesting the additional briefing, we asked the parties to focus on two prior Supreme Court cases, *In re Naney* (1990) 51 Cal.3d 186 and *In re Cadwell* (1975) 15 Cal.3d 762, and to compare those cases with the evidence submitted on count one.

3. The parties, in a stipulation filed in this matter on December 13, 1990 (December stip.), stated that respondent's interim suspension began on June 27, 1980. However, the Supreme Court's order, filed May 28, 1980, placed respondent on suspension effective immediately. (*In the Matter of the Conviction of Wyrick*, order filed May 28, 1980 (BM 4270).)

4. Respondent accepted from a former client two stolen used truck tires, with rims. He was convicted on March 12, 1980, and sentenced on April 14, 1980, to one year in state prison, with execution of the sentence suspended for three years, on conditions which included twenty-one days in the county jail and periodic reports to the county probation department. He satisfactorily completed the terms of probation and, pursuant to Penal Code section 1203.04, his conviction was expunged on April 4, 1983.

consolidated with another conviction matter then pending before the State Bar, an October 13, 1978 conviction for recording a conversation with the son of a client without the consent of the son, in violation of Penal Code section 632. Thereafter, a two-count original disciplinary proceeding was filed and consolidated with the conviction matters.[5] Respondent and Office of Trial Counsel entered a stipulation as to facts and discipline dated October 26-27, 1983 (exh. A), in which respondent admitted that his criminal conduct in attempting to receive stolen property constituted an act of moral turpitude, and that his October 1978 conviction and his misuse of the legal process in multiple cases involving the same defendant violated his oath and duties as an attorney. By order filed May 30, 1984, the Supreme Court suspended respondent for five years, commencing May 28, 1980 (the date he was placed on interim suspension); the execution of this suspension was stayed, and he was placed on probation for five years on conditions which included three and one-half years of actual suspension, commencing on May 28, 1980. He was also ordered to take and pass the Professional Responsibility Examination.

Count One: Letter Application to Be a Judicial Arbitrator

While on interim suspension, respondent was employed as a sales manager trainee for a tire company, a technical writer, and a substitute teacher, and sold consumer products from his home. (October stip., exh. A, p. 12.) Respondent also applied for a position as a judicial arbitrator in a letter he wrote to Robert A. Borghesi, then administrator of the judicial arbitration program for the superior court in Sacramento. (December stip.) In the letter he stated, "The following is a brief summary reflecting my qualifications based upon education and experience." In the letter, respondent also stated, "I am a member of the American Arbitration Association and the State Bar of California, having been admitted in 1973. My law practice has been that of a sole practitioner in a varried [sic] caseload." (*Ibid.*) He appended the honorific "ESQ." to his signature on the letter. Respondent admits that he did not volunteer that he was then suspended and could not practice. (December stip., p. 3.) Respondent claims that prior to sending his letter, he asked one of the administrative assistants in Borghesi's office whether active membership in the bar was necessary and was told it was not. (1 R.T. p. 13.) The hearing judge did not believe that respondent received this assurance from the court personnel. Respondent contends that he was unaware that rule 1604(b) of the California Rules of Court required a judicial arbitrator to be an active member of the State Bar and that had he known, he would not have applied for or served in the position. (1 R.T. pp. 30, 36.)[6] Respondent served on arbitration panels for the superior court from April 15, 1983, through November 28, 1983, while on interim suspension. (December stip., p. 3.) The conviction for which he had been placed on interim suspension had, however, been expunged upon completion of his criminal probation, approximately two weeks prior to the commencement of his services on the arbitration panel.[7] **[1 - see fn. 7]**

Count Two: Application to Office of Administrative Law

On November 19, 1984, six months after his actual suspension terminated, but during his probation term, respondent submitted an application for

5. The notice to show cause for the original proceeding alleged that between 1975 and 1979 respondent filed multiple lawsuits against two sets of defendants simultaneously in federal and state court and prosecuted the actions for the purpose of harassing the defendants. In the stipulation which resolved the disciplinary cases, respondent acknowledged culpability in the five court actions concerning one of the defendants, an expert witness who originally had a dispute with respondent over his fee to testify at trial. Respondent admitted that he repeatedly filed motions after the same motions had been previously considered and denied, filed other motions and then, without notice to the opposing party or the court, failed to appear at the hearings, and presented claims not warranted under existing law. The parties stipulated that respondent did not violate any court orders in his defense and prosecution of these multiple suits.

6. Hearings occurred in this matter on December 17, 1990, and January 4, 1991. We have referred to the December 17 hearing as "1 R.T." and the January 4 hearing as "2 R.T."

7. **[1]** The interim suspension of an attorney in accordance with section 6102 is not affected by the expungement of the criminal conviction.

state employment to the Office of Administrative Law (OAL) for a position as an entry-level attorney (legal counsel). In the section of the form requesting information on respondent's prior employment history, respondent indicated that he had been self-employed from December 1973 to the present, as a "Member, State Bar of CA, Fact Finder, Arbitrator, Mediator, Concilliator [sic] and Labor Rel. Consultant." (December stip., exh. B, p. 2.) Under the heading "duties," he included presenting court cases and appeals. (*Ibid.*) Respondent did not disclose his suspension from law practice on the application nor did he raise it during his interview for the OAL position.

Respondent contends that he was hired based on his interview, which took place prior to submission of the state application form at issue. He also asserts that admission to the bar was the sole criterion for the OAL position and the only prior legal experience he discussed with the OAL interviewer was his work as a law clerk and legal assistant while reading for the bar with a superior court judge and an appellate judge between 1968 and 1972. The hearing judge found that respondent did discuss his work on cases in which he appeared on his own behalf during the period of his suspension, but did not indicate that he appeared pro se. (Decision p. 6.) Respondent testified to the contrary at the hearing. (1 R.T. pp. 19-20.) Respondent was hired by the OAL and worked as a legal counsel from November 1984 until June 1985.

Count Three: Application to Department of Transportation

Respondent applied to work as deputy attorney general assigned to the California Department of Transportation (Cal Trans) by state application dated April 4, 1985. (December stip., pp. 3-4.) Respondent photocopied the application form he had submitted to the OAL, substituting the Cal Trans attorney position on the application, signed and dated the form. (1 R.T. p. 33.) Respondent maintained that his interview with Cal Trans focused on his employment with the OAL and he did not offer any information concerning his prior suspension or pro se appearances while suspended. (1 R.T. pp. 24-25.) Cal Trans hired respondent as a legal counsel and he began work on June 25, 1985. Five days later, respondent was seriously injured in an automobile accident and was placed on a leave of absence.

On October 10, 1985, Cal Trans dismissed respondent from his legal counsel position, alleging that respondent's written application was incomplete and misleading and that statements made by respondent during his three interviews with supervisors in Cal Trans were misleading as to his past experience and ability to practice law. The decision was upheld by the California State Personnel Board after a hearing before an administrative law judge in which respondent was represented by counsel. In his decision dated July 21, 1986, Judge Jose M. Alvarez found that respondent had omitted from his recitation of his past work experience his most recent employment at the OAL, his 1979 experience as general counsel to two companies (a mining firm and a manufacturing research and development firm), and his employment, while under suspension, as a substitute teacher and tire sales manager. (Exh. 1, p. 4.) As a consequence, he found respondent's application to be misleading and incomplete. He rejected respondent's testimony and found that in three interviews with supervisors at Cal Trans respondent represented that he had handled litigation from 1973 until the present without mentioning his period of suspension. Judge Alvarez determined that respondent's failure to voluntarily reveal his suspension to the interviewers in discussing his past work experience was misleading. (*Id.* at p. 5.) Judge Alvarez found respondent's overall conduct constituted fraud in securing his employment with Cal Trans and he was removed for cause. (*Ibid.*) The decision was adopted by the State Personnel Board on July 29, 1986.

Mitigation and Aggravation

Respondent presented little evidence in mitigation. Besides his own testimony, he offered one witness, Taylor S. Carey, a former co-worker at the OAL, who described the desperate need for entry-level attorneys at the OAL at the time of respondent's hire. (2 R.T. p. 9.) Carey characterized respondent as a diligent worker during the time they worked together. (2 R.T. p. 23.) Since leaving the OAL, he has

had little contact with respondent. (2 R.T. pp. 27-28.) Respondent also testified briefly concerning his subsequent employment, which is divided evenly between private practice and work as an arbitrator for the San Joaquin County Superior Court and private organizations.

The only aggravating factor identified by the hearing judge was respondent's prior record of discipline. (Decision pp. 18-19; Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct ["standard(s)"], std. 1.2(b)(i).)

ISSUES ON REVIEW

Count One: Letter Application to Be a Judicial Arbitrator

[2] The examiner did not seek review of the hearing judge's dismissal of count one. However, this department is obligated to conduct a de novo review of the dismissal of this count. (Trans. Rules Proc. of State Bar, rule 453(a).) After reviewing the record, we find that respondent held himself out as entitled to practice law in his letter applying for the position of arbitrator with the superior court in Sacramento when he was then on interim suspension.

Respondent was charged with concealing his suspended status from the judicial arbitration program of the Sacramento County Superior Court when he applied to be a judicial arbitrator. When respondent wrote his letter applying for the position, he was on interim suspension. The notice also charged that respondent "knew or should have known" of the provisions of rule 1604(b), California Rules of Court, requiring judicial arbitration panelists to be either retired judges or active members of the State Bar. The hearing judge did not find respondent was grossly negligent in failing to review the requirements for the post before he sent his letter of January 19, 1983, applying for the position. (Decision p. 10.) Nor did he find respondent's omission was an affirmative misrepresentation. The judge found that the letter, read as a whole, was not reasonably susceptible to a reading that respondent was able to practice law at the time the letter was written. (*Id.* at p. 11.) The hearing judge concluded that the examiner did not prove by clear and convincing evidence that respondent engaged in an act of dishonesty in violation of section 6106.

Respondent has asserted before the hearing judge and this department that a court administrative employee had given him incorrect advice upon which he relied in applying to be an arbitrator. The hearing judge found his testimony on this issue to be incredible and we defer to this finding which is based on an assessment of credibility. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1056.)

[3a] Even if we accepted respondent's claim that he asked court personnel whether he needed to be a member of the bar and was told that admission to the bar was not required, it remains that respondent did not give the court administrator a true picture of his status. The problem was not that respondent was not a member of the bar; it was that respondent was then a member suspended from the practice of law as a result of disciplinary charges. Whether or not he actually knew bar admission was required, respondent asserted his membership in the State Bar as one of his qualifications for the arbitration position and signed his letter "ESQ." apparently in order to enhance the chances of his selection as an arbitrator. However, he misstated his status by omission. As a result, he created in his letter the false impression that he was then currently able to practice when in fact he could not.

[4a] We recognize that the hearing judge found that the letter, read as a whole, was "not reasonably susceptible of being interpreted as indicating he was then able to practice law." (Decision p. 11.) Nevertheless, this finding was based on the hearing judge's interpretation of the letter, and not on the testimony of a witness. Thus, we do not view the hearing judge's interpretation of the letter as a resolution of a credibility issue. We can make findings of our own on issues that turn on documentary evidence. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 309.)

[3b] While respondent was under suspension, he was prohibited from holding himself out as entitled to practice during the suspension period. (*Arm* v. *State Bar* (1990) 50 Cal.3d 763, 775; *In re Cadwell*, *supra*, 15 Cal.3d at 770.) The situation here is akin to

that in *In re Naney*, *supra*, 51 Cal.3d 186. There, the Court found misconduct[8] when a suspended attorney applied for a job requiring admission to the bar by means of a resume which reflected his original admission, but not his interim suspension. Naney asserted that when he applied, he believed that the position as in-house counsel did not involve the practice of law. The Court concluded that through his resume, the attorney was improperly holding himself out as a person permitted to practice law. (*Id.* at p. 195.)

[3c] Respondent had the obligation both to ascertain the requirements applicable to judicial arbitrators and, when presenting his legal qualifications, to advise the court arbitration administrator of his current status as a lawyer. By omitting any mention of his suspension in his letter and statements to court personnel, the court was not put on notice that respondent could not then practice law and was unqualified for the position. **[5a]** Since he was appointed when unqualified to serve, his service could render void any decision which he may have rendered as an arbitrator. (See Code Civ. Proc., §§ 473 [setting aside void judgments], 1615, subd. (d) [motion to vacate arbitration award]; *In re Henry C.* (1984) 161 Cal.App.3d 646, 652 [any act of disqualified judge absolutely void whenever brought into question]; see also *T.P.B.* v. *Superior Court* (1977) 66 Cal.App.3d 881, 885-886, and cases cited therein.)[9]

[3d] A suspended attorney cannot hold himself out as entitled to practice law. *In re Naney*, *Arm* v. *State Bar*, and *In re Cadwell* all stand for the proposition that an attorney cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present or future ability to practice law when in fact he or she is or will be on suspension. We apply the same principle to this case, and find that respondent, by omission, gave the judicial arbitration program a false impression in his application to be a judicial arbitrator that he was then entitled to practice law. **[4b]** We, therefore, disagree with the hearing judge in the interpretation of the letter application submitted by respondent. **[3e]** While we defer to the hearing judge's credibility determination that respondent did not act with intent to deceive, we find that respondent was grossly negligent in preparing the application letter and thereby improperly held himself out as entitled to practice law. As a result, he committed an act involving moral turpitude in violation of section 6106. (*In re Cadwell*, *supra*, 15 Cal.3d at p. 771.)

Counts Two and Three: State Employment Applications

Respondent (1) challenges the findings that he misled the two state agencies concerning his legal background; (2) contends he justifiably relied on state personnel officers in preparation of his applications, and (3) asserts that the hearing judge applied the wrong standard and improperly shifted the burden of proof from the State Bar to him. The examiner responds that respondent is merely rearguing his version of the facts without demonstrating that the hearing judge's findings are erroneous and is misreading the hearing judge's remarks from the close of the culpability portion of the hearing.

The hearing judge did not accept respondent's version of the facts, finding many of his explanations to be tortured and, overall, unpersuasive. We agree with the hearing judge. **[6]** A plain reading of respondent's description of his legal career on the applications is that he misrepresented the facts; respondent was not engaged in the practice of law continuously from his admission in 1973 to the present. The question of whether the state interviewers relied upon the application is not material to the issue of the truthfulness of respondent's statements on the application. Analogizing to the case law

8. The misconduct, which occurred after the initial disciplinary hearing in *Naney* and thus was uncharged, was considered as an aggravating circumstance. (*In re Naney*, *supra*, 51 Cal.3d at pp. 193-194.)

9. Respondent stated at oral argument that he could not remember whether he decided any cases as an arbitrator while on interim suspension. We note that he stipulated that he served on arbitration panels while on suspension (December stip., p. 3) and in motion papers before the hearing judge indicated that he was rendering decisions on or about August 1983 when he was still suspended. (Respondent's motion to dismiss, exh. A.)

involving wilful deception of a court, it is sufficient to show respondent knowingly presented a statement which itself tends to mislead without having to demonstrate actual deception. (*Davis* v. *State Bar* (1983) 33 Cal.3d 231, 240; *Pickering* v. *State Bar* (1944) 24 Cal.2d 141, 144-145.) In fact, respondent's application and his misleading statements during the interviews with Cal Trans resulted in his employment by the agency and were material. (Exh. 1, p. 5.)

[7] The hearing department decision does not address respondent's contention that he relied on instructions from state personnel board employees and the instructions on the form when completing his application. We find little merit in his arguments. Respondent does not assert that he was instructed to make misleading statements on his application. While the form does ask for detailed information "on the experience which you believe meets the entrance requirements," that was not a license for respondent to misrepresent employment history by selective omissions or other misrepresentations calculated to imply that no gap existed in his ability to practice law.

[8] The hearing judge's statement that the State Bar Court has a duty to ensure that suspended attorneys are scrupulously honest with respect to the facts of their suspensions (1 R.T. p. 58) does not indicate that he had shifted the burden of proof from the examiner to respondent in this case. Nor do his comments at the close of the culpability phase of the hearing reflect more than the judge's view, expressed by the Supreme Court as well, that suspended attorneys have a duty not to mislead the public concerning their suspensions. (*Arm* v. *State Bar*, *supra*, 50 Cal.3d at p. 775; *In re Cadwell*, *supra*, 15 Cal.3d at pp. 771-772.) We adopt the hearing judge's conclusion that respondent violated section 6106 in both counts two and three.

APPROPRIATE DISCIPLINE

The hearing judge himself noted that his recommended discipline was fairly lenient and a departure from the standards. (Decision p. 23.) The standards are guidelines and not binding on the Supreme Court or the State Bar Court. (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221-222.) In this case, the judge departed from the standards because he viewed the issues raised in the case as novel, citing to our decision in *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332. Moreover, he found respondent's misrepresentations to the state agencies less egregious than similar misconduct toward an individual client. Since the judge had reasonable doubts about whether respondent's prior and present acts of misconduct constituted a pattern of dishonesty, he resolved the issue in respondent's favor.

The Office of Trial Counsel initially recommended an actual suspension of four years, with five years probation, based on the standards and respondent's prior discipline. The trial examiner's personal view was a far more lenient recommended actual suspension of six months. (2 R.T. pp. 34-35.) The examiner on review acknowledged in his post-argument brief that some actual suspension would appear to be appropriate in this case and recommended a minimum of three months actual suspension. Respondent maintains that no discipline is warranted.

Under the standards, respondent's dishonest acts would ordinarily warrant, at a minimum, some actual suspension. The degree of discipline is dictated by the extent of harm to the victim of the misconduct, and the degree to which the misconduct relates to respondent's practice of law. (Std. 2.3.) In addition, an attorney with a prior record of discipline normally receives discipline greater than that imposed in the prior proceeding unless, because of remoteness in time and the minimal severity of the prior offense, it would be manifestly unjust to do so. (Std. 1.7(a).)

[5b] Among respondent's acts of misconduct, his application for the arbitrator position while on interim suspension is of most serious concern because of its potential for harm. Whatever arbitration cases he handled during that period are subject to attack as void because he acted as an unqualified arbitrator. No record was made at the hearing of the number of such cases. Nevertheless, respondent's mere service on a panel undermines the public's confidence in the court system and the administration of justice, since it has the potential to disrupt

both the court arbitration system and the finality of the arbitration cases heard by respondent. His very service as an unqualified arbitrator harmed the administration of justice.

[9] With respect to respondent's employment by OAL and Cal Trans, the hearing judge found that respondent's acts did not result in harm in the usual sense because their effect was on public agencies rather than individual clients. We disagree. Misrepresentations are no less egregious when a public body is misled, and they warrant discipline of no less magnitude. The definition of aggravating circumstance encompasses significant harm to "a client, the public or the administration of justice." (Std. 1.2(b)(iv).)

However, there is no clear and convincing evidence that respondent's misrepresentations caused significant harm to the state agencies for which he worked. Cal Trans discharged him from state employment as a result of his acts but the administrative law judge did not believe they would recur and thus did not bar respondent from applying for state government service in the future. His fellow employee vouched for respondent's excellent work while at OAL. Although there was deceit involved in respondent's misconduct, the resulting harm to the public and its state agencies was minimal.

The hearing judge concluded that there was little if any mitigating evidence present in the record. We agree. **[10]** Respondent's prior record of discipline has an aggravating impact on the discipline to be recommended. However, both the examiners at hearing and on review appear to have discounted this prior record almost as much as the hearing judge did. The discipline imposed in the prior case, three and one-half years of actual suspension, constituted the time he had already spent on interim suspension as of the time the stipulation was approved. The Supreme Court has recognized that an attorney on interim suspension has little control over the length of time he or she may be suspended from practice prior to final resolution of the case. (*In re Young* (1989) 49 Cal.3d 257, 267.) We agree with the hearing judge that we cannot reweigh the evidence in the prior case. We note, however, that the misconduct which respondent admitted in the stipulation would not ordinarily warrant such a lengthy actual suspension. The examiners who have appeared in this matter have proposed discipline of between three and six months actual suspension, far below the length of respondent's prior suspension. While we find respondent's prior discipline to be an aggravating circumstance, we conclude that strict adherence to standard 1.7(a) would result in discipline far in excess of what would be warranted under the facts and circumstances of the current case and comparable case law. (Cf. *In re Young*, *supra*, 49 Cal.3d at pp. 267-268.)

[11] Respondent's application as a judicial arbitrator occurred while he was on interim suspension in the previous matter. His misleading applications for employment with OAL and Cal Trans occurred within two years of the Supreme Court's final order resolving the case. Respondent admitted in the prior case that his criminal conviction for attempted receipt of stolen property was an act of moral turpitude and moral turpitude is again an issue in these cases. However, we do not see a pattern or "common thread" linking respondent's actions in these matters with his prior misconduct. (See *Arm* v. *State Bar*, *supra*, 50 Cal.3d at p. 780 [type of misconduct found in four disciplinary cases involving same attorney sufficiently dissimilar not to constitute a pattern or require disbarment].) Nevertheless, respondent's multiple acts of breaching his ethical duties demonstrate that he lacks a true understanding of his professional responsibilities. (*Ibid.*)

[12a] Another reason given by the hearing judge for his departure from the standards was because he viewed the issues raised in the case as novel, citing to our decision in *In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. 332. In *Mitchell*, the attorney misrepresented his legal education on his resume and in interviews with prospective employers over a three-year period. His misrepresentation on the resume was, as in this case, by omission, leaving readers with a false impression as to where Mitchell went to law school. In addition, Mitchell lied about his law school education when asked in his interviews. However, the misrepresentations were not shown to have unduly influenced the decision to hire him, so little harm to the victims was found. He also lied in his answers to interrogatories from the State

Bar, an aggravating factor. Mitchell presented evidence concerning the emotional stress caused by his wife's medical condition and strained financial circumstances and he had no prior record of discipline, all mitigating circumstances. The Supreme Court, by order filed August 15, 1991, imposed on Mitchell the discipline recommended by this department: one year suspension, stayed, one year probation and sixty days actual suspension. (*In the Matter of Mitchell*, order filed August 15, 1991 (S020327).)

[12b] In weighing the discipline in *Mitchell*, we noted that except for the discussion of misrepresentations in a resume as an aggravating circumstance in *In re Naney*, *supra*, 51 Cal.3d 186, 195, there were no California cases regarding the appropriate discipline for these kinds of misrepresentations by an attorney seeking employment. (*In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 339.) The hearing judge here relied on the novelty of the issue to mitigate the discipline. (Cf. *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 602 [attorney's conduct found less egregious since violation involved an issue of first impression and not a clearcut or established ethical rule].) However, the critical charge in this case concerned respondent's misrepresentation of his status as an attorney and the governing rules in this area have been clearly established for many years. (*In re Cadwell*, *supra*, 15 Cal.3d at p. 771.)

In the *Mitchell* case, the misrepresentations occurred over a long period of time (three years) and were knowingly promulgated by Mitchell. Mitchell also benefitted from extensive mitigating evidence and the lack of a prior record. Here, respondent's grossly negligent failure to disclose his interim suspension to the court arbitration program, and his participation thereafter, occurred while he was on interim suspension for a conviction of a crime involving moral turpitude.

In *Chasteen* v. *State Bar* (1985) 40 Cal.3d 586, the Supreme Court ordered a two-month actual suspension, conditioned on a lengthy probation and other conditions, for an attorney who knowingly engaged in practice for one year while suspended. The attorney, who had a prior record of discipline, had additional serious misconduct, including abandoning clients, failing to act competently, and commingling and misappropriating client funds. The attorney's misconduct was mitigated by his recovery from both the debilitating effects of alcoholism and a severe depression, which were contributing factors in his misconduct. Chief Justice Lucas, joined by two members of the court, dissented on the issue of the appropriate discipline and would have ordered a six-month actual suspension. (*Chasteen* v. *State Bar*, *supra*, 40 Cal.3d at p. 594 (dis. opn. of Lucas, C.J.).)

In both *Chasteen* and this case, previously disciplined attorneys breached their ethical duties while suspended from the practice of law. Both committed acts of moral turpitude; however, much of the additional misconduct found in *Chasteen* occurred prior to his suspension, while respondent's acts occurred while he was on suspension or probation. We do not find the extensive mitigating evidence in this matter which was persuasive in the *Chasteen* case. We cannot say that respondent has come to terms with his misconduct as did Chasteen. (*Id.* at p. 593.)

[13] Balancing the misconduct at issue, respondent's prior record of discipline and the aggravating factors, we find that a period of actual suspension is necessary for the protection of the public as respondent does not seem to understand the seriousness of his ethical duties. Attorneys must be careful not to hold themselves out as being able to practice when they are not and must not mislead employers regarding their prior status. Employers, clients and the public are entitled to rely on the statements of lawyers for what they say. As we stated in *Mitchell*, "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." (*In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 341.)

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 years; that execution of the suspension be stayed; and that respondent be placed on probation for two years with conditions including actual suspension for the first six months of his probation. We adopt the remaining conditions of probation recommended by

the hearing judge and further recommend that respondent be ordered to take and pass the California Professional Responsibility Examination within one year of the effective date of the Supreme Court's order. We also recommend that respondent be ordered to comply with rule 955, 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, after the date the Supreme Court order becomes effective.

We concur:

PEARLMAN, P.J.
VELARDE, 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

DAYE SHINN

A Member of the State Bar

No. 85-O-11506

Filed May 13, 1992

SUMMARY

Respondent was found culpable of misappropriating at least $90,000 of almost $200,000 in client funds held in trust as part of the proceeds of a eminent domain case, as well as failing to perform services competently and appearing without his client's authority. After weighing the aggravating effect of respondent's prior suspension for a less serious, but nonetheless similar trust fund violation and other aggravating factors, which outweighed respondent's mitigating evidence, the hearing judge recommended that respondent be disbarred. (Hon. Christopher W. Smith, Hearing Judge.)

Respondent requested review, seeking limited modifications to the hearing judge's factual findings and contesting the fairness of the proceeding because the instant matter had not been consolidated with his prior disciplinary case, which involved misconduct occurring around the same time. The review department rejected respondent's procedural challenge, finding that it would not have been possible to consolidate the two matters, and that respondent did not suffer any prejudice as a result of the separation of the two proceedings. The review department also found the hearing judge's findings and conclusions to be well supported by the record, and adopted them. After reviewing the standards and relevant case law, the review department concurred in the hearing judge's conclusion that public protection necessitated respondent's disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Teresa J. Schmid

For Respondent: Robert L. Kirste, Daye Shinn, 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] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

When, without the client's consent, an attorney waived a client's rights to trial by jury, the presence of a shorthand reporter at the court proceeding, the preparation of findings of fact and conclusions of law and the right to appeal, the attorney's conduct constituted a failure to perform services competently.

[2] **162.20 Proof—Respondent's Burden**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation

Where, as justification for taking client trust funds, respondent asserted that his written fee agreements had been modified to provide for a large contingent fee in one matter and a large flat fee in another matter, but did not produce any documents to support this contention, and offered varying characterizations of the alleged change in the fee arrangements, and, in contrast, the client testified credibly that he had never consented to a change in the fee agreements and had never been billed for additional fees, respondent failed to establish entitlement to the claimed fees.

[3] **204.90 Culpability—General Substantive Issues**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation

Restitution of client funds taken by an attorney is no defense to disciplinary charges of misappropriation.

[4] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**

Where respondent chose to place entrusted client funds in a complex series of numerous trust accounts, cashier's checks, and certificates of deposit, and failed to produce any accounting of the funds for more than three years after the client requested it, respondent's contention that his efforts to provide an accounting were impeded by an office fire which destroyed most of the records of the client's funds was unpersuasive given that a timely response to the client's request would have avoided the difficulties resulting from the loss of the records three years thereafter.

[5 a, b] **740.33 Mitigation—Good Character—Found but Discounted**
801.45 Standards—Deviation From—Not Justified
822.10 Standards—Misappropriation—Disbarment

Favorable testimony by six character witnesses, four of whom were respondent's co-workers, was not sufficient to show that disbarment was excessive given the many aggravating circumstances surrounding respondent's misappropriation of a large sum of client trust funds.

[6] **611 Aggravation—Lack of Candor—Bar—Found**
735.30 Mitigation—Candor—Bar—Found but Discounted

Despite respondent's cooperation in executing a detailed and broad pretrial stipulation, his efforts to show his innocence through testimony which was not credible, and his admitted misleading of a State Bar investigator, were aggravating factors.

[7] **513.20 Aggravation—Prior Record—Found but Discounted**
805.51 Standards—Effect of Prior Discipline

A private reproval more than 20 years earlier, for improperly stopping payment on a $500 check to another law firm, was too remote in time to merit significant weight on the issue of degree of discipline.

[8 a, b] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
110 Procedure—Consolidation/Severance
511 Aggravation—Prior Record—Found
755.52 Mitigation—Prejudicial Delay—Declined to Find

The passage of time since respondent's misconduct and the failure of the State Bar to consolidate respondent's two disciplinary matters did not render the disbarment recommendation in the second matter unfair. Consolidation of disciplinary matters, while preferable when reasonably possible and not prejudicial, is not mandatory, and independent consideration of separate matters involving the same attorney is not uncommon. Where an investigation by state law enforcement and the State Bar of respondent's misconduct in the second matter was still ongoing after the initiation and disposition of respondent's earlier disciplinary matter, consolidation would not have been possible. Further, it could not be presumed that if the matters had been consolidated, the recommended discipline would have been suspension rather than disbarment, given the far greater seriousness of the misconduct in the second matter. Finally, respondent had shown no prejudice from the delay, and had benefited from being able to practice almost continually in the interim.

[9] **130 Procedure—Procedure on Review**
166 Independent Review of Record

Where respondent failed to brief a contention raised on review, addressing it for the first time at oral argument, the review department was reluctant to consider it.

[10 a, b] **220.30 State Bar Act—Section 6104**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
582.10 Aggravation—Harm to Client—Found
591 Aggravation—Indifference—Found
801.45 Standards—Deviation From—Not Justified
822.10 Standards—Misappropriation—Disbarment

Disbarment was the appropriate sanction for an attorney's misappropriation of a very large sum of client funds over many years, which was surrounded by utter disregard of the attorney's fiduciary and trust account duties, and aggravated by incompetent representation of the client and prosecution of a lawsuit without the client's consent, demonstrating a lack of basic understanding of the fundamental responsibilities of an attorney.

ADDITIONAL ANALYSIS

Culpability

Found

213.41 Section 6068(d)
220.31 Section 6104
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
420.11 Misappropriation—Deliberate Theft/Dishonesty
420.13 Misappropriation—Wrongful Claim to Funds

Not Found

213.15 Section 6068(a)
213.35 Section 6068(c)
220.15 Section 6103, clause 2
221.50 Section 6106

Aggravation

Found

521 Multiple Acts

Mitigation

Found

745.10 Remorse/Restitution

Discipline

1010 Disbarment

OPINION

STOVITZ, J.:

After an extensive pre-trial stipulation and a five-day trial at which over 40 exhibits were received in evidence, a State Bar Court hearing judge filed a 60-page decision finding respondent, Daye Shinn, culpable of very serious professional misconduct, including the misappropriation of at least $90,000 of client trust funds in an eminent domain matter. The hearing judge recommended that respondent be disbarred. In making that recommendation, the judge considered respondent's 1987 suspension from practice for misconduct less serious than but similar to the present findings: the commingling with his personal funds of over $100,000 of client trust funds in another eminent domain matter.

Respondent's request for our review is extremely limited. As to a few findings, respondent claims that the hearing judge failed to adopt respondent's version of the facts. At oral argument, respondent's counsel also argued that unfair delay occurred in conducting the present disciplinary proceeding. He contended that since both the present and prior proceedings arose at essentially the same time, the present proceeding should not have been allowed to continue as a separate matter for several years after the prior proceeding was decided.

After independently reviewing the record of State Bar Court proceedings, we have determined that respondent's arguments are without merit. As to the issue of delay, respondent has made no showing that it was error for the State Bar to pursue this proceeding separately from his prior disciplinary proceeding or that he has been prejudiced by any delay. In any case, any passage of time that occurred during this proceeding has redounded to respondent's benefit since it has permitted him to practice law during almost its entire pendency. Since respondent's own pre-trial stipulation and testimony largely established his culpability of misconduct warranting severe discipline, his very limited attack on the findings cannot justify us adopting different findings or a less severe recommendation. For the protection of the public, courts and legal profession, we shall adopt the hearing judge's findings and recommendation of disbarment.

I. ISSUES BEARING ON CULPABILITY

A. Introduction.

This proceeding involves three aspects: 1) respondent's representation of client Oscar Dane in an eminent domain action between March 1978 and February 1979; 2) respondent's subsequent misappropriation between 1979 and 1985 of most of Dane's $200,000 recovery; and 3) respondent's filing in 1984 and prosecution until 1989 of a suit on behalf of Dane without Dane's authority to recover interest on a check stolen by another.

Most of the facts are undisputed. Nevertheless, we have independently reviewed the entire lengthy record of testimonial and documentary evidence. Upon that review, we have concluded that the hearing judge's findings of fact are amply supported by clear and convincing evidence and we adopt them. Considering what little of this case is disputed, for the most part we find it necessary only to summarize briefly the hearing judge's most detailed findings.

We deal with each of the three principal aspects of the case in turn.

B. Representation of Client Oscar Dane in Eminent Domain Action.

This aspect of the case rested almost entirely on stipulated facts.

Respondent was admitted to practice law in California in 1961. His practice was mainly criminal defense, but he had handled one or two eminent domain cases over the years. (R.T. pp. 584-586, 794-795, 801.) In 1977, the City of Santa Monica (City) filed suit to condemn the residential real property of one Oscar Dane in order to build a downtown mall as a redevelopment project. Dane had been a real estate broker for many years and he did business out of his 14-room home, built in 1927. (Decision of hearing judge ("D.") pp. 5-7.)

In March 1978, Dane retained respondent to defend him in the eminent domain action. Their written fee agreement provided for a $75 per hour fee for respondent's legal services on that matter. That agreement also provided an identical fee for

respondent's services in pursuing a civil action against the City arising out of alleged police misconduct. For convenience, this second matter will be referred to as the "police case." (D. pp. 5-6.)

At the time he hired respondent, Dane gave him an "initial retainer" of $400. In June 1978 respondent asked for and received an additional $502 in fees from Dane. (D. p. 6.)[1] Dane never received any other bills from respondent on the eminent domain case. (D. p. 28; R.T. pp. 377-379.)

In 1977, the City had obtained a writ of possession for Dane's property. Pursuant to the writ, Dane was evicted in September 1978 and moved to Texas to live with his son. The City demolished his home and trial on the issue of fair market value of Dane's property was set for early 1979. (D. pp. 6-7.)

In late 1978, after demolition, respondent told Dane to obtain an owner's appraisal of the property. He also advised Dane of an upcoming trial date. In January 1979, Dane sent respondent his personal, handwritten appraisal[2] and told respondent he could not afford to return to California for the trial. (D. pp. 7-8.)

On February 20, 1978, a mandatory settlement conference was held in the eminent domain action. Respondent appeared before a temporary judge and waived the following of Dane's rights: 1) trial by jury, submitting the case instead to the judge pro tempore conducting the settlement conference; 2) the presence of a shorthand reporter; 3) preparation of findings of fact and conclusions of law; and 4) the right to appeal. (D. pp. 8-9.) Respondent failed to submit Dane's letter of appraisal to the court and did not get an independent appraisal until after Dane's home had been demolished by the City. (D. pp. 7-9, 39-40.)[3] Because respondent did not submit an "owner's statement" by Dane as to his property's value, as required by the superior court's pretrial rules, the court ruled that Dane would not be allowed to testify at trial concerning his opinion of the property's fair market value. (Exh. 1, Memorandum of Intended Decision, filed February 22, 1979.)[4] After trial, the temporary judge ordered that the City pay Dane $200,000 as fair market value. The judge deducted $1,376.52 owing by Dane to the Franchise Tax Board, leaving Dane with a net recovery of $198,623.48. (D. pp. 9-10.)

The only issue not made entirely clear by respondent's State Bar Court pre-trial stipulation was whether Dane had authorized respondent to waive Dane's rights.[5] **[1]** After considering the evidence at trial, the hearing judge found that Dane had not given consent and that respondent failed to act competently in several aspects of his representation of Dane in wilful violation of former rule 6-101(A)(2), Rules of Professional Conduct.[6] Upon our independent review of the record, we agree with the hearing judge. Respondent testified only that he consulted with opposing counsel as to the waiving of Dane's rights (R.T. p. 562) and never testified that he had any conversations with Dane about them or that he had gotten Dane's consent. Respondent's testimony was that he did not recall whether he had waived presence of a court reporter and whether a reporter was present although he stipulated in the State Bar Court pro-

1. Respondent allocated half of the $902 he had collected from Dane to fees and costs in the eminent domain case and the other half to the police case. (Exh. 3.)

2. Dane's appraisal was in the form of a three-page letter valuing his property at $1.6 million for the land and $900,000 for the residence which had since been bulldozed. He calculated the value of the residence on his estimate of current replacement value and did not provide detailed support for his estimate. (Exh. 41.)

3. At the eminent domain trial, respondent also stipulated that Dane's appraiser would value the property at $220,000 and the City's appraiser at $180,000 (See Partial Stipulation of Facts, filed March 8, 1990 ("Stip."), p. 3.)

4. As noted, Dane was not present at the settlement conference or the trial that same day.

5. The parties' State Bar Court stipulation strongly suggested that, as to the waiver of right to appeal, Dane did not consent, for the stipulation stated that, "[n]otwithstanding [r]espondent's knowledge that . . . Dane was out of town and therefore could not be consulted at time of trial, [r]espondent waived his client's right to appeal the [j]udgment entered." (Stip. p. 4.)

6. Unless noted, all references to rules are to the Rules of Professional Conduct in effect prior to May 27, 1989.

ceeding that he had made such waiver. (*Id.* at p. 592.) The memorandum of intended decision prepared by the temporary judge who tried the eminent domain case also recited, inter alia, that the parties stipulated that no "court stenographer" need be present, that the matter be heard by the temporary judge without jury and the parties waived findings of fact and conclusions of law and time for and right of appeal. (Exh. 1.) Dane testified clearly that he never gave respondent permission to waive appeal. (R.T. p. 325.) Accordingly, we adopt the hearing judge's findings and conclusions as to this aspect of the charges. (See D. pp. 5-9, 39-40.)

C. Respondent's Handling of Dane's Funds.

1. Misappropriation of funds.

As we stated *ante*, in 1979, the superior court awarded Dane $198,623.48. Dane was still in Texas at this time and in January 1980 the court ordered payment issued to respondent for that sum on respondent's declaration that he would hold the money for Dane's benefit. (Stip. pp. 4-5.) The court order for payment also required respondent to hold the funds for Dane's benefit. (Exh. 1.) In February 1980, respondent deposited the $198,623.48 in his client trust account.[7] For different reasons, Dane refused to accept his funds until February 1985, five years after respondent first deposited them. Respondent stipulated that in 1985 he gave Dane $178,287.93. (Stip. p. 12.) This sum was $20,000 *less* than respondent recovered for Dane five years earlier even though substantial interest had been earned on Dane's funds during the five-year period. (See *id.* at pp. 6-8, 11-12.)

Before the start of the State Bar Court trial, respondent stipulated to many of the facts concerning his handling of Dane's funds. He admitted that he had held them in five different trust accounts, had opened and closed six different certificates of deposit or money market accounts and purchased eleven cashier's checks, mostly used to transfer funds from one account to another.[8] He had also stipulated to the use made of his larger withdrawals from these accounts; for example, that in February 1980 he had loaned $50,000 to a former law associate and in July 1981 had paid $70,019 to another former client, unconnected with Dane. (*Id.* at pp. 5-12.) Respondent did not admit in his stipulation that these withdrawals and many smaller ones were from Dane's funds and were without Dane's authority. At the State Bar Court trial, respondent sought to show that he was innocent of the charges of misappropriation and failure to account, claiming that he had a right to the use of some of Dane's funds because of an orally modified fee agreement and that the withdrawals from respondent's trust accounts did not make use of Dane's funds. However, Dane testified that he had never given respondent permission to invade those funds and one of the State Bar's expert witnesses who had investigated respondent's use of Dane's funds was able to reconstruct the basic flow of Dane's funds through respondent's different accounts. At the very end of his testimony, respondent admitted he had misappropriated $26,538 of Dane's funds, and (although not charged) that he misled a State Bar investigator about the misappropriation. (See R.T. pp. 803-817.)

After weighing all the evidence, the hearing judge found that respondent misappropriated far more than $26,538. Because of the complexity of respondent's trust account transactions, and the lack of adequate records by respondent, it was not possible for the witnesses or the judge to determine the precise amount of misappropriation. However, the

7. Respondent was unable to deposit the first warrant issued to him for it was payable jointly to respondent and Dane and respondent did not have Dane's endorsement. Respondent had a new warrant issued for the sum without Dane's name as payee. (Stip. p. 5.)

8. The examiner called to testify Hassan Attalla, Supervising Investigative Auditor for the Los Angeles County District Attorney's Office and Charles Gibbons, Los Angeles County Deputy Sheriff who had had 11 years of experience exclusively in investigation of fraud cases. Each had investigated respondent's flow of Dane's funds through the various accounts after Dane had complained to law enforcement agencies about respondent's handling of his (Dane's) funds. According to Gibbons, of all his investigations, this one was unusual because it had more cashier's checks and bank accounts to trace than any other investigation. (R.T. pp. 421-423.)

judge found that respondent improperly withdrew $180,693.03 from Dane's eminent domain recovery. (D. pp. 26-27.) These sums were made up of respondent's February 1980 loan of $50,000 to his former law associate and his July 1981 payment of $70,019 to his other former client. In addition, the hearing judge found that over more than a three-year period, respondent retained $10,755 of interest earned on Dane's funds and $34,241 in principal or principal and interest combined from maturing certificates of deposit purchased with Dane's funds and withdrew $7,000 in cash from the different trust accounts holding Dane's funds. Further, two weeks after he deposited Dane's funds, respondent withdrew $8,623.78 for fees in the eminent domain case. Recognizing that there was a sharp conflict in the evidence over whether respondent modified his written hourly fee agreement, the hearing judge noted the varying nature of respondent's testimony and found that respondent's hourly fee agreement was unmodified. (D. pp. 27-29.) The judge concluded that "at a minimum," respondent misappropriated $90,000 of Dane's funds in wilful violation of section 6106[9] and wilfully violated rule 8-101(A) by failing to maintain Dane's funds in a proper trust account. (D. pp. 36-42.) Our review of the record finds ample support for the hearing judge's findings and conclusions which we adopt.

[2] On review, respondent has devoted most of his brief to rearguing his testimony that he modified his fee agreement to provide himself with a contingency fee of $40,000 in the eminent domain case and a flat fee of $50,000 in the police case. Significantly, respondent does not deal with those findings of the hearing judge which detail why the judge disbelieved respondent's testimony of entitlement to those fees. Moreover, respondent's theory of fee modification was unaccompanied by any supporting documentation. That respondent would make a major undocumented change in basis for his fees was a suspicious circumstance in light of respondent's use of a written contract to set forth his hourly fee agreement with Dane on both cases as soon as he was hired. Dane's testimony was clear and uniform that he never entered into a modified fee agreement and that respondent never billed Dane for additional fees due. But perhaps the strongest supporting evidence for the hearing judge's findings that respondent's fee agreement was unmodified was the varying nature of respondent's own characterization of the alleged fee change. The judge's decision cited four different versions of his eminent domain fee change offered by respondent, either in his testimony or to others. (D. pp. 28-29.) Respondent's urging to us that he was entitled to $50,000 in police case fees is even more baffling because after testifying that he had changed his hourly fee contract to provide for that fixed fee, he abandoned that theory, testifying that he decided to "give back" the $50,000 police case fee. (R.T. pp. 36, 42-44, 46-47, 53-55, 59, 112, 122, 139-141.)

Even if, arguendo, respondent were somehow entitled to $90,000 of fees from Dane's settlement, he has never satisfactorily explained the remaining $90,000 he improperly withdrew from Dane's funds. **[3]** His argument on review that the hearing judge's finding of that misappropriation had no basis because respondent ultimately gave Dane $178,287.93 completely fails to deal with the holding by our Supreme Court that restitution of funds is no defense to their misappropriation. (See, e.g., *Athearn* v. *State Bar* (1977) 20 Cal.3d 232, 237; *Sevin* v. *State Bar* (1972) 8 Cal.3d 641, 646.)

Although respondent testified that his $70,000 payment to his former client and $50,000 loan to his former associate did not use Dane's funds, the hearing judge gave detailed reasons for not crediting that testimony. Those reasons included documentary evidence listing Dane's name along with respondent's as beneficiary of a trust deed given when the loan to his associate was made or listing Dane's name on a cashier's check the relevant funds of which were later used for the payment to respondent's other client. (See D. pp. 12-17.)

Finally, respondent testified that he shifted accounts and placed Dane's money in certificates of deposit to get high rates of interest for Dane. (See

9. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

R.T. pp. 148, 185.) However, respondent admitted that at times, Dane's funds earned no interest. (*Id.* at p. 142.) The district attorney's auditor, Attalla, testified that the total interest earned on respondent's accounts used to hold Dane's funds was $59,594.21. (R.T. pp. 305-306.) Despite this accrued interest, respondent ultimately turned over to Dane about $20,000 *less* than the $198,623.48 he first deposited for Dane.

2. Failure to account.

[4] In 1981, Dane learned that respondent had received the eminent domain proceeds. Dane demanded an accounting, but respondent never gave him one. In 1984 respondent had an office fire which he testified largely destroyed his records of Dane's funds. (R.T. pp. 146-147.)[10] By this time, Dane had complained to various legislators and the district attorney's office. Under this pressure, in 1984, respondent delivered to the district attorney's office and in 1985 to the office of a member of congress, a five-page handwritten summary of the bank accounts in which respondent held Dane's funds, the interest earned and his alleged fee agreement. (Exh. 36.) As the hearing judge found, this summary contained errors and significant omissions. (D. pp. 43-44.) Accordingly, the judge concluded that respondent wilfully violated rule 8-101(B)(3) by failing to render any appropriate accounting of Dane's funds. (D. pp. 32-34, 43-44.) On review, respondent's sketchy defense of his "accounting" does not address the hearing judge's findings and we adopt those findings and the related conclusion. While respondent appears to have suffered a serious office fire in 1984, had he not waited until he was under pressure of several agencies of government and instead had provided a *timely* accounting to Dane, the 1984 fire would not have frustrated his ability to accurately record his receipt and disbursal of most of Dane's funds. Additionally, given the great complexity of how respondent chose to handle Dane's funds, the belated difficulty of accounting for them was not surprising. However, respondent must bear full responsibility for any such difficulty as he had chosen this patently complex structure of numerous trust accounts, cashier's checks and certificates of deposit.

D. Respondent's Unauthorized Filing of Suit on Dane's Behalf.

This final aspect of the proceeding was entirely admitted by respondent in his pre-hearing stipulation. We shall summarize it briefly: In January 1984, while still holding Dane's funds, respondent closed out a State Savings and Loan Association (State Savings) account and received a check for $145,285.88. This check was made payable to "##Daye Shinn## Trust Account Attn Oscar Dane . . . ." (Exh. 30.) The wife of respondent's law partner stole this check. In September 1984, State Savings' acquirer, American Savings and Loan Association, replaced the check. (Stip. pp. 11-12.)

In November 1984, without Dane's consent or knowledge, respondent filed suit against his partner's wife and the savings and loan associations involved, to recover lost interest on the funds from the time the check was stolen until it was replaced. (*Id.* at pp. 12-13.) Respondent sued as attorney for both himself and Dane and started litigation without Dane's consent or knowledge. Respondent appeared "throughout the course of the litigation" as Dane's attorney, but respondent did not have Dane's authority for that role. (*Id.* at p. 13.)[11]

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10. The fire in respondent's office was corroborated by respondent's character witnesses who described the damage as extensive.

11. A copy of the court file in respondent's suit on behalf of himself and Dane arising out of the stolen check is in evidence. (Exh. 32.) It was started by a 16-page complaint on behalf of himself and Dane as the only plaintiffs. Therein, respondent alleged in part that he and Dane "were and . . . are entitled" to possession of the $145,285.88 savings and loan association check which was stolen. Six named defendants were listed including Home Federal Savings and Loan and American Savings and Loan. Respondent sought unliquidated general and special damages and exemplary damages of $1 million. This action was defended by the savings and loan defendants and pended over five years, until February 1990 when it was dismissed for respondent's failure to attend a court conference. (Code Civ. Proc., § 583.410.) In the interim, according to a request for trial de novo filed by respondent in January 1990, the case had been ordered to arbitration resulting in an award of $4,594.47 for Dane.

In July 1988, while speaking to counsel for one of the State Savings defendants, respondent admitted that he did not have Dane's authority to represent him and that Dane did not want respondent's representation. In later conversations with that same attorney, respondent repeated that Dane did not want respondent to represent him. Despite respondent's knowledge that Dane did not want his representation, respondent never withdrew nor filed a substitution. (*Id.* at pp. 13-14.)

In their stipulation, the parties did not agree to any statutory or rule violations committed by respondent. In count two of the notice to show cause (regarding the lawsuit on the forged check), respondent was charged with violations of sections 6068 (a), 6068 (c), 6068 (d), 6103, 6104 and 6106. The hearing judge concluded that respondent's offenses in this count violated sections 6068 (d) and 6104 but none of the other charged sections. (D. pp. 48-49.) We adopt the findings and conclusions of the judge as to this final aspect of the matter, noting that they are undisputed on review.

E. Evidence in Mitigation and Aggravation.

[5a] In mitigation, respondent presented six character witnesses. Three were lawyers who worked with him and one was a legal secretary, also in his office. Another witness was an outside attorney and another was the real estate broker whom respondent had consulted in the Dane matter. These witnesses knew respondent for from seven to twenty years. Most had a general knowledge of the charges against him and a very favorable opinion of the quality of his service to clients and his honesty and integrity. This was the only circumstance deemed mitigating by the judge. (D. p. 54.)

Respondent also testified in mitigation. As noted, he was admitted to practice in 1961 and 90 percent of his practice was in criminal defense. However, he had handled one or two eminent domain cases before Dane's. (R.T. pp. 584-586, 801.) Respondent felt "very sorry, very bad" about the Dane matter. In his heart, respondent felt that he had accounted to Dane for all interest owed him but would accept the conclusion that more money is owed Dane. Respondent told the hearing judge that he would accept any discipline "given out." (*Id.* at pp. 798-802.)

[6] Respondent showed cooperation by executing a detailed and broad pretrial stipulation. However, until near the very end of his testimony, he sought to show his innocence of misappropriation charges. He did this by testimony which was not credible, because it was often internally inconsistent or at odds with the documentary evidence. When he finally admitted that he had misappropriated funds, he also admitted that he concealed from a State Bar investigator that his trust account fell below the required amount; and, in May 1989, made a misleading statement to the investigator. (R.T. pp. 810-815; exh. 49.) Overall, the judge found these factors to be aggravating. (D. pp. 52-54.) Also found aggravating by the hearing judge were respondent's multiple acts of misconduct, his harm to Dane and indifference toward its rectification. (*Ibid.*)

[7] Respondent was privately reproved in 1968 for improperly stopping payment on a $500 check to another law firm for an agreed-upon share of fees from a client's settlement. (Exh. 46.) Per standard 1.7(a), Standards for Attorney Sanctions for Professional Misconduct ("stds.") (Trans. Rules Proc. of State Bar, div. V), the hearing judge decided that this reproval was too remote in time to merit "significant" weight on the issue of degree of discipline. The examiner has not objected and the judge's decision was appropriate in the circumstances. However, the judge did consider aggravating respondent's 1987 suspension for two years, stayed, on conditions including three months actual suspension. (D. pp. 52-54.) That suspension was based on respondent's stipulation that between 1978 and 1979, he received $119,775 of funds on behalf of his clients, the Korchins, in another eminent domain action. He commingled those funds with his personal funds. In July 1981, he repaid the clients just over $70,000, which represented the clients' proceeds from that eminent domain action less respondent's fees and costs. The parties did not stipulate that respondent had misappropriated any of the Korchins' funds. As we have seen, restitution to the Korchins came from funds respondent was holding for Dane. (See also D. pp. 17, 26 and 38.)

II. DEGREE OF DISCIPLINE

The hearing judge analyzed the issue of discipline largely under the standards. Concluding that aggravating circumstances weighed much greater than mitigating ones, he recommended disbarment. We exercise our independent review of the judge's disciplinary recommendation. As we shall see, his analysis is eminently sound on this record.

[8a] Before analyzing the issue of discipline, we pause to resolve respondent's contention urged upon us at oral argument: that the claimed passage of time in the conduct of this proceeding makes disbarment unfair. Respondent contends that the procedural history of the Dane matter permitted it to be consolidated with the Korchin matter. Had that been done, contends respondent, he would not likely be facing the current disciplinary recommendation enhanced by prior discipline five years earlier. **[9]** Because respondent did not brief his contention, we have considered it reluctantly. **[8b]** We deem it without merit. First, while consolidation of matters is preferred when reasonably possible and when not prejudicial (see Trans. Rules Proc. of State Bar, rule 262), it is not mandatory and "it is apparently common for disciplinary matters involving the same member to be handled independently." (*Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 57.) While Dane's complaint was filed with the State Bar in 1985, investigation by the district attorney's office attempting to trace the flow of funds through respondent's accounts was ongoing well into 1986. (Exh. 40.) State Bar investigation required an additional two years (see exh. 47) and the notice to show cause was not issued until April 1989. This chronology would not have permitted consolidation with the Korchin proceeding. There the notice to show cause issued in July 1985 and the parties' stipulated disposition was reached in September 1986. (Exh. 46.) Second, even if it had been possible to have consolidated the different proceedings, we cannot assume that suspension, instead of disbarment, would have been the recommendation, given the far greater seriousness of the misconduct in the Dane matter, compared to the Korchin matter. Finally, respondent has shown no prejudice whatever by the passage of time in the Dane matter. If anything, he seems to have benefited since he has been able to practice continuously except for a brief suspension in 1987. (Compare *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774.)

[10a] Viewing the standards as guidelines in recommending the degree of discipline (see, e.g., *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 506), we note that standard 2.2 calls for disbarment for wilful misappropriation of entrusted funds, unless the misappropriation is "insignificantly small" or the "most compelling mitigating circumstances clearly predominate." Here, neither exception applies. Respondent's misappropriation was large, occurred over many years in many transactions, and was surrounded by a number of aggravating circumstances in his utter disregard of his fiduciary duties to Dane, his duty to the superior court to keep Dane's money intact and his trust account duties under rule 8-101. His culpability began with his incompetent representation even before receiving Dane's funds and continued over five years later with his pursuit of a lawsuit for Dane without Dane's consent. **[5b]** Given the many aggravating circumstances, we agree with the hearing judge that respondent's favorable character evidence, mainly from those who work with him, does not serve to show that disbarment is excessive.

Consideration of relevant Supreme Court opinions also convinces us that disbarment is the appropriate recommendation here. *Rimel* v. *State Bar* (1983) 34 Cal.3d 128, cited by the examiner, bears several similarities to the case before us. Rimel involved an attorney with no prior record of discipline in about 13 years of practice up to the time of misconduct. He committed misconduct in two matters. In one case, he held over $110,000 of trust funds to be used to wind up a business. Rimel represented his clients incompetently, allowing two default judgments to be entered; he failed to pay $12,000 in taxes owed by the clients; misled them about their affairs; issued checks without sufficient funds; misappropriated over $47,000 of their funds and entered into several business transactions with the clients without complying with the Rules of Professional Conduct. In the other matter, Rimel misappropriated $11,748 from his legal secretary who had asked that he collect some escrow funds while she was away from the area. In ordering disbarment, the Supreme Court majority emphasized the lack of any compelling

mitigation and several factors which indicated that continued practice would increase the risk that Rimel would repeat his misconduct. These factors involved the selfish disregard of client interests displayed by Rimel's misdeeds, that his offenses were "inextricably interwoven" with the practice of law and that he violated other important standards of conduct in addition to misappropriating client funds. (*Id.* at pp. 131-132.)

Although one matter was involved here, respondent has a recent prior record of suspension, making it at least as serious as Rimel's misconduct in two matters. Significantly, the factors which led the one justice to dissent in *Rimel* do not appear in the present case.

Since *Rimel*, the Supreme Court has decided several cases of attorney misappropriation of significant amounts of trust funds. Where the circumstances of the misappropriation have been sufficiently serious, the Supreme Court has disbarred the attorney even if the attorney had no prior record of discipline. (See *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067 [misappropriation of $29,000 of law firm funds in numerous transactions; unanimous Supreme Court vote for disbarment notwithstanding lack of prior record; far greater amount of favorable character testimony than the present case, and personal stress and family illness not urged here]; *Chang* v. *State Bar* (1989) 49 Cal.3d 114 [misappropriation of over $7,000 of trust funds in an apparently isolated transaction; disbarment notwithstanding lack of prior record; Court noting that attorney never acknowledged misconduct, made no restitution and displayed a serious lack of candor to the State Bar. Justice Mosk, while acknowledging the "devious and unprincipled nature" of Chang's misappropriation, emphasized that it was but one transaction involving one client and one law firm in opining that disbarment was excessive in that case]. See also *Grim* v. *State Bar* (1991) 53 Cal.3d 21.)

While respondent did represent a difficult client who was apparently convinced of an unrealistically high value of his realty and was unwilling to yield to the City's eminent domain power, had respondent not wished to serve this client, there were plenty of ethical choices open to respondent. These included withdrawal upon due notice before trial; or, in the alternative, preserving Dane's rights at trial and leaving his money intact in a proper trust account, if necessary calling on the courts' aid to help him if Dane refused to accept the recovery to which he was entitled. Instead, respondent clearly took advantage of Dane, who appeared to be disaffected by the legal system, to self-deal in a very large amount of trust funds. His 1987 suspension was for commingling of a large sum of trust funds in another eminent domain case and a large portion of his misappropriation of Dane's funds constituted restitution to his earlier victim. Since respondent was aware of Dane's financial pressures, respondent's misuse of his funds was especially tragic and harmful. **[10b]** His commencement of a civil lawsuit on behalf of his client without the client's knowledge or authority is unexplained. It only emphasizes, along with respondent's lack of competent representation of Dane, that, despite his many years as an attorney, respondent lacks basic understanding of the most fundamental responsibilities of an attorney as embodied in the provisions of the Business and Professions Code and the Rules of Professional Conduct.

When we consider that in recommending lawyer discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession" (*Snyder* v. *State Bar* (1989) 49 Cal.3d 1302, 1307), we are additionally convinced as to the need to follow the hearing judge's recommendation of disbarment.

III. RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Daye Shinn, be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys in this state. We further recommend that he 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 Supreme Court's order. We also recommend that costs be awarded the State Bar.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KENNETH LAWRENCE CARR

A Member of the State Bar

Nos. 86-C-19520, 86-C-19521, 87-C-15714

Filed June 5, 1992

SUMMARY

A hearing panel of the former, volunteer State Bar Court found that respondent's convictions of several Vehicle Code violations relating to driving a vehicle without a valid license did not involve moral turpitude but did involve other misconduct warranting discipline. The panel recommended that respondent be suspended from the practice of law for two years, concurrent with any existing suspension, with the execution of the suspension stayed and with two years probation on conditions. (Merritt L. Weisinger, Diane Karpman, Walter Rochette, Hearing Referees.)

A different hearing panel found that respondent's separate conviction for being under the influence of phencyclidine did not involve moral turpitude but did involve other misconduct warranting discipline. The panel recommended that respondent be suspended from the practice of law for two years, concurrent with the suspension in the Vehicle Code cases, with the execution of the suspension stayed, and with probation concurrent with and on the same terms and conditions as the probation in the Vehicle Code cases except that respondent be actually suspended for six months. (Jay C. Miller, Irving Willing, Patrick E. Hughes, Hearing Referees.)

The review department consolidated the matters for purposes of a single aggregate disciplinary recommendation to the Supreme Court. It held that respondent's history of substance abuse and his violations of his earlier criminal probation constituted a sufficient nexus with the practice of law to warrant discipline for the misconduct underlying the convictions. It concluded that the hearing panels' decisions and disciplinary recommendations were supported by the record and, with modifications to the conditions of probation and other incidents of discipline, adopted them as its recommendation.

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] **130 Procedure—Procedure on Review**

Failure to file an opening brief by the party requesting review may result in dismissal of the request for review or in the requesting party not being permitted to participate at oral argument.

[2] **130 Procedure—Procedure on Review**
142 Evidence—Hearsay
146 Evidence—Judicial Notice
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding

Record of respondent's criminal conviction, which had been judicially noticed by hearing department, was admitted into evidence by review department in order to make it part of record in disciplinary proceeding for Supreme Court review, but was considered solely for purpose of establishing criminal complaint, charges, plea, and conviction.

[3] **130 Procedure—Procedure on Review**
141 Evidence—Relevance
169 Standard of Proof or Review—Miscellaneous
204.90 Culpability—General Substantive Issues

Hearing department findings that were based on evidence admitted in discipline phase of trial were considered by review department solely with respect to discipline and not culpability.

[4] **162.11 Proof—State Bar's Burden—Clear and Convincing**
565 Aggravation—Uncharged Violations—Declined to Find

Where no evidence was introduced establishing that respondent knew his out-of-state driver's license was not valid at the time he presented it to police, and where respondent's explanation of his failure to disclose all of his driving under the influence convictions on his application for such license was unrebutted and not inherently incredible, examiner failed to establish by clear and convincing evidence that respondent's use or obtaining of the license were aggravating factors.

[5 a, b] **1519 Conviction Matters—Nature of Conviction—Other**
1527 Conviction Matters—Moral Turpitude—Not Found

An attorney's convictions of several Vehicle Code violations relating to driving a vehicle without a valid license did not per se establish moral turpitude and the review department concluded that the surrounding circumstances did not establish moral turpitude. Although the convictions involved driving, and the potential for harm was significant given the attorney's operation of a motor vehicle while intoxicated, no actual harm had occurred, and the paucity of facts presented did not permit the review department to conclude that moral turpitude was involved. Furthermore, insufficient facts were presented to conclude that the attorney's violation of his prior criminal probation orders was in either subjective or objective bad faith.

[6 a-d] **1519 Conviction Matters—Nature of Conviction—Other**
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

Convictions of several Vehicle Code violations relating to driving a vehicle without a valid license, though not involving moral turpitude, did involve other misconduct warranting discipline. The respondent's failure to conform his conduct to the requirements of the criminal law and of the court orders imposed on him in connection with his previous criminal probation called into question his integrity as an officer of the court and his fitness to represent clients and thereby established a nexus

between the practice of law and the misconduct. Moreover, respondent's conviction of two substance abuse related crimes within a relatively short period of time of his arrest for the Vehicle Code violations indicated a problem with substance abuse that was clearly affecting the attorney's private life, which also established a nexus between the practice of law and the misconduct.

[7] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes
1519 Conviction Matters—Nature of Conviction—Other
1691 Conviction Cases—Record in Criminal Proceeding

It is appropriate for disciplinary purposes to consider any criminal charges that were dismissed as well as the charges for which the attorney was actually convicted. Thus, where the criminal complaint in a Vehicle Code violation matter charged respondent with being under the influence of phencyclidine, and clear and convincing evidence was presented establishing that respondent was under the influence of phencyclidine, that circumstance could be considered in the disciplinary proceeding even though respondent was not convicted of being under the influence of phencyclidine.

[8 a-c] **1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes**
1527 Conviction Matters—Moral Turpitude—Not Found
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

A conviction of being under the influence of phencyclidine did not per se establish moral turpitude and the review department concluded that the sparse facts presented regarding the surrounding circumstances did not establish moral turpitude. No actual harm occurred to anyone and insufficient facts were presented to conclude that respondent's violation of his prior criminal probation was in either subjective or objective bad faith. However, the conviction did involve other misconduct warranting discipline, because respondent's failure to conform his conduct to the requirements of the criminal law and the court orders imposed on him in connection with his criminal probation called into question his integrity as an officer of the court and his fitness to represent clients and thereby established a nexus between the practice of law and the misconduct. In addition, respondent's conviction of a total of four substance abuse offenses within a relatively short period of time indicated a problem with substance abuse that was clearly affecting respondent's private life, which also established a nexus between the practice of law and the misconduct.

[9] **172.11 Discipline—Probation Monitor—Appointed**
172.20 Discipline—Drug Testing/Treatment
176 Discipline—Standard 1.4(c)(ii)
584.50 Aggravation—Harm to Public—Declined to Find
720.10 Mitigation—Lack of Harm—Found
750.10 Mitigation—Rehabilitation—Found
806.59 Standards—Disbarment After Two Priors
1554.10 Conviction Matters—Standards—No Moral Turpitude

The Standards for Attorney Sanctions for Professional Misconduct provide that the appropriate discipline for culpability for professional misconduct where the member has a record of two prior impositions of discipline is disbarment unless the most compelling circumstances clearly predominate. Application of this standard was not appropriate where the attorney's criminal convictions and prior discipline, which were caused by an extensive history of drug and alcohol abuse, did not directly involve clients or the practice of law, and did not cause specific harm to the public or courts, and where the attorney had taken steps to address the underlying substance abuse problem, and had

already been under suspension for five years as a result of previous discipline. Continued probation monitoring with substance abuse conditions, and a requirement that the attorney demonstrate rehabilitation and fitness to practice, would ensure that the substance abuse was controlled prior to the attorney's resuming the practice of law.

[10] **1554.10 Conviction Matters—Standards—No Moral Turpitude**
Under the Standards for Attorney Sanctions for Professional Misconduct, the discipline for conviction of a crime which does not involve moral turpitude but does involve other misconduct warranting discipline should be that which is appropriate to the nature and extent of the misconduct.

[11] **176 Discipline—Standard 1.4(c)(ii)**
Where respondent had not yet complied with a prior discipline order to demonstrate rehabilitation and present fitness to practice before being relieved of the actual suspension in that prior proceeding, no useful purpose would be served by requiring respondent to comply with this requirement twice; one showing would satisfy the requirement as to both the prior and subsequent proceedings.

[12] **172.20 Discipline—Drug Testing/Treatment**
172.30 Discipline—Alcohol Testing/Treatment
A requirement that a respondent with a drug and alcohol abuse history submit to warrantless searches by police and to blood, breath or urine testing was not an appropriate condition of probation, and the review department replaced it with the State Bar Court's standard substance abuse probation conditions.

[13] **175 Discipline—Rule 955**
Where respondent had been continuously suspended from the practice of law for several years as a result of previous discipline, it was not appropriate to recommend that respondent be required to comply with rule 955, California Rules of Court as part of the recommended discipline in a subsequent matter.

[14] **173 Discipline—Ethics Exam/Ethics School**
Where respondent had timely complied with the requirement in a previous disciplinary matter that respondent take and pass the Professional Responsibility Examination, by passing the exam less than three years earlier, the review department declined to recommend that respondent be required to take and pass the exam again in connection with subsequent discipline.

ADDITIONAL ANALYSIS

Aggravation

Found

511 Prior Record

Discipline

1613.08 Stayed Suspension—2 Years
1615.04 Actual Suspension—6 Months
1617.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1023.10 Testing/Treatment—Alcohol
1023.20 Testing/Treatment—Drugs
1630 Standard 1.4(c)(ii)

Other

110 Procedure—Consolidation/Severance

OPINION

NORIAN, J.:

In this matter we review three cases involving respondent, Kenneth Lawrence Carr, which arose from several criminal convictions. Respondent was admitted to the practice of law in California in 1976. State Bar Court trials in all three cases were before hearing panels of the former volunteer State Bar Court.

Case numbers 86-C-19520 (Bar Misc. 5262) and 86-C-19521 (Bar Misc. 5282) (the Vehicle Code cases) were consolidated prior to trial. The hearing panel found that respondent's convictions of several Vehicle Code violations relating to driving a vehicle without a valid license did not involve moral turpitude but did involve other misconduct warranting discipline, and recommended that respondent be suspended from the practice of law for two years concurrent with any existing suspension, with the execution of the suspension stayed and with two years probation on conditions. In case number 87-C-15714 (Bar Misc. 5347) (the PCP case), the hearing panel found respondent's conviction for being under the influence of phencyclidine (PCP) did not involve moral turpitude but did involve other misconduct warranting discipline, and recommended that respondent be suspended from the practice of law for two years, concurrent with the suspension in the Vehicle Code cases, with the execution of the suspension stayed, and with probation concurrent with and on the same terms and conditions as the probation in the Vehicle Code cases except that respondent be actually suspended for six months.[1]

We have independently reviewed the records in these matters, have consolidated them for decision, and have concluded that the hearing panels' decisions and disciplinary recommendations are supported by the record. With the modifications discussed below we adopt them as our own.

BACKGROUND

[1a] Respondent's initial requests for review of the hearing panels' decisions in the Vehicle Code cases and the PCP case were dismissed because he failed to file opening briefs. Thereafter, we notified the parties that we had reviewed the records ex parte (rule 452, Trans. Rules Proc. of State Bar) and had determined that respondent was culpable of other misconduct warranting discipline in both matters and, absent a further request for review, we intended to consolidate the matters and remand them to the hearing department for a trial de novo on the issue of the appropriate aggregate discipline to recommend. Respondent again requested review, objecting to consolidation and remand of the matters and indicating that he believed the hearing panels' recommendations as to discipline were fair.

We thereafter invited the parties to brief certain issues, including the issue of whether the within cases should be consolidated for purposes of a single aggregate recommendation to the Supreme Court.[2] **[1b - see fn. 2]** Respondent stated at oral argument before this department that he was not opposed to consolidation of the cases as long as the recommended discipline did not depart from the hearing panels' recommendations that the discipline be concurrent. The examiner indicated at oral argument that he also was not opposed to consolidation. In light of our disposition of these matters, we hereby consolidate case numbers 86-C-19520 and 86-C-19521 (the Vehicle Code cases) with case number 87-C-15714 (the PCP case).[3]

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1. The hearing panel in the PCP case concluded after the culpability phase of the trial that the misconduct involved moral turpitude. (R.T. Aug. 29, 1989, pp. 39-40.) However, without explanation, the panel's written decision concluded that the conduct did not involve moral turpitude but did involve other misconduct warranting discipline. As indicated below, after our review of the record, we conclude that the conduct did not involve moral turpitude but did involve other misconduct warranting discipline.

2. **[1b]** Respondent did not file his opening brief again and as a result was not permitted to participate at oral argument, although he was present and did answer questions posed by the review department.

3. Although we consolidate these cases for purposes of a single aggregate recommendation to the Supreme Court, we shall discuss the individual cases separately for ease of reference.

In the Vehicle Code cases, the hearing panel made no findings of fact in its decision other than a recitation of the convictions themselves and of the evidence submitted regarding mitigation and aggravation. In the PCP case, the hearing panel's findings of fact are sparse because the only evidence introduced on the issue of culpability was the records of the various convictions alleged in the criminal matter. We augment the hearing panels' findings as set forth below based on the record. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 571.)

FACTS

First Vehicle Code Case (No. 86-C-19520)

Respondent was arrested by California Highway Patrol officers in November 1984. Respondent's vehicle was travelling around 30-35 miles per hour on a freeway in Los Angeles. (R.T. Apr. 21, 1987, pp. 38-39.) The officers activated the patrol car's red light and respondent eventually came to a stop partially blocking the slow lane on the freeway. (*Ibid.*) One officer used his public address system in an effort to get respondent to move to the shoulder. (R.T. Apr. 21, 1987, p. 40.) When that was unsuccessful, one of the officers got out of the patrol car and went to the car respondent was driving in an effort to get respondent to pull onto the shoulder. (*Ibid.*) Respondent moved the vehicle, but remained partially in the slow lane. (R.T. Apr. 21, 1987, p. 41.) The officer had to return to respondent's car to get him to move completely onto the shoulder, which he finally did. (*Ibid.*)

At an officer's direction, respondent got out of the car and when he did so, he was extremely unbalanced. Respondent worked his way to the front of the car, using his hand on the car for balance. (R.T. Apr. 21, 1987, pp. 42-43.) The officer had a very difficult time speaking with respondent because respondent's speech was very slurred, sluggish and very hard to understand. (R.T. Apr. 21, 1987, p. 44.) The officer concluded that respondent was under the influence of PCP because of respondent's uncoordinated and unbalanced condition, his bloodshot and watery eyes, his slurred and thick speech, his fumbling through his wallet looking for his driver's license, and the extreme chemical odor of his breath. (R.T. Apr. 21, 1987, pp. 46, 59.) Respondent was arrested, and because of his unbalanced condition an officer had to help respondent back to the patrol car for transport to the police station. (R.T. Apr. 21, 1987, pp. 59-60.) A breath test revealed that respondent's blood alcohol level was .03 percent. (R.T. Apr. 21, 1987, p. 61.)

In May 1985, a four-count misdemeanor complaint was filed charging respondent with violating Vehicle Code section 23152, subdivision (a) (driving under the influence (DUI))[4]; Health and Safety Code section 11550, subdivision (b) (being under the influence of PCP); and Vehicle Code sections 14601.2 and 14601.1, relating to driving in knowing violation of a license suspension, revocation or restriction. (Exh. 2.) Counts one and two (driving under the influence and being under the influence of PCP, respectively) were dismissed on respondent's motion on the ground of delay. (*Ibid.*) The complaint was subsequently amended and the case was submitted to the jury alleging violations of Vehicle Code sections 14601.2, subdivision (a) and 14601.2, subdivision (b). In August 1985, the jury found respondent guilty on the subdivision (a) charge (driving while license suspended or revoked on account of prior DUI conviction with knowledge of the suspension or revocation), and was unable to reach a verdict on the subdivision (b) charge, which was thereafter dismissed. (*Ibid.*)

Second Vehicle Code Case (No. 86-C-19521)

Respondent appeared as a defendant in a Los Angeles court in April 1986. (R.T. Apr. 21, 1987, p. 78.) During the course of that proceeding, the judge advised respondent that respondent's driver's license had previously been suspended and he was not

4. The term "driving under the influence" is used throughout this opinion in the generic sense for convenience. Vehicle Code section 23152 has two subdivisions relevant to this opinion. Subdivision (a) prohibits driving under the influence of alcohol and/or drugs. Subdivision (b) prohibits driving with a specified blood alcohol content.

to drive. (R.T. Apr. 21, 1987, p. 80.)[5] After the proceeding ended, respondent left the courthouse, followed by the bailiff from the courtroom in which respondent had appeared. (*Ibid.*) The bailiff followed respondent for approximately three blocks at which time respondent entered a vehicle and drove away. (*Ibid.*) The bailiff followed respondent and placed him under arrest. (*Ibid.*)

Sometime thereafter a misdemeanor complaint was filed against respondent alleging violations of Vehicle Code sections 14601.2, subdivision (a), 14601.1, subdivision (a), and 14601, subdivision (a), all relating to driving in knowing violation of a license suspension, revocation, or restriction, and 12500, subdivision (a), relating to driving without a valid license. In August 1986, respondent pled guilty to the complaint as charged. (Exh. 3.)[6] **[2 - see fn. 6]**

The PCP Case (No. 87-C-15714)

The hearing panel found that respondent was arrested late at night in July 1984 in Los Angeles by the California Highway Patrol for driving under the influence, and use of, or being under the influence of, PCP. (Decision, p. 2.) At the time of arrest, respondent had been convicted of three prior DUI offenses (1982, 1983 and 1984), and was on criminal probation as a result of the 1984 conviction. (*Ibid.*) One of the conditions of that probation was that respondent obey all laws. (*Ibid.*) Also at the time of his arrest, respondent had stipulated to State Bar discipline which included probation conditions that prohibited his use of drugs, and had been convicted in 1982 in federal court of possession and transportation of a controlled substance relating to the manufacture of PCP.[7] **[3 - see fn. 7]** (Decision, pp. 2-3.) Although the above facts are the extent of the panel's findings that we adopt, the record discloses additional information.

The police found a vial containing a brown powder in the car. (Exh. 1, respondent's notice of motion to dismiss, signed by respondent in October 1984, p. 2.) The vial was tested by the prosecution and no restricted drugs were identified.[8] (Exh. 1, superior court appellate department memorandum of judgment, p. 3.) Respondent was given a breath test which indicated no alcohol in his blood. (*Id.* at p. 2.) At the time of respondent's arrest, a police officer smelled an odor which he associated with the odor of ether emitting from the car in which respondent was riding. (Exh. 1, appellant's reply brief, p. 5.) Respondent also exhibited signs of being under the influence of a controlled substance at the time of his arrest. (*Ibid.*)

In or about October 1984, a two-count misdemeanor criminal complaint was filed alleging that respondent violated Vehicle Code section 23152, subdivisions (a) and (b) (driving under the influence), with allegations of three prior convictions for the same offense in May 1981, May 1982 and December 1983 (count one); and of violating Health and Safety Code section 11550, subdivision (b) (being under the influence of PCP) (count two). (Exh. 1.) Count one was dismissed on motion of the prosecuting attorney. (*Ibid.*) On January 9, 1986, a jury found respondent guilty of being under the influence of PCP. (*Ibid.*)[9]

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5. The judge's statement to respondent was admitted for the limited purpose of showing respondent's knowledge of the suspension. (R.T. Apr. 21, 1987, pp. 79-80.)

6. **[2]** Exhibit 3, the criminal court record of respondent's conviction in the second Vehicle Code case (no. 86-C-19521), was marked for identification but was not introduced into evidence. Instead, the record was judicially noticed by the hearing panel. (R.T. Apr. 21, 1987, p. 76; R.T. Mar. 8, 1989, pp. 9-10.) In order to make the exhibit part of the record for the Supreme Court's review, we admit exhibit 3 into evidence. However, we consider it solely for the purpose of establishing the criminal complaint, the charges therein, respondent's plea and the resulting conviction.

7. **[3]** We consider the hearing panel's findings regarding the State Bar probation and the 1982 federal conviction solely with respect to discipline and not culpability as the evidence establishing these findings (exhs. 4(a), 4(b)) was introduced in the discipline phase of the trial.

8. We delete the hearing panel's finding that a small quantity of PCP was found in the car. (Decision, p. 2.)

9. The jury actually found unlawful use *or* being under the influence of PCP. This finding was an issue in respondent's criminal appeal, and the appellate court held that the evidence only supported a finding of being under the influence. (Exh. 1.)

Aggravation/Mitigation

Respondent has a record of prior discipline. (Exhs. 6 and 7 in the Vehicle Code cases and exhs. 4(a) and 4(b) in the PCP case.) In July 1984, the Supreme Court suspended respondent for two years, with the execution of the suspension stayed, and two years probation on conditions, including 60 days actual suspension, as a result of his April 1981 conviction for possession of PCP (Health & Saf. Code, § 11377, subd. (a)), and March 1982 conviction for knowingly and intentionally possessing approximately one gallon of piperidine, which he knew and had reasonable cause to believe would be used in the unlawful manufacture of PCP (21 U.S.C. § 841(d)(2)). (Bar Misc. 4426, 4575, State Bar case nos. 81-C-17 LA, 83-C-2 LA.) Respondent agreed that the above two convictions involved moral turpitude in a stipulation to facts and discipline.

In December 1986, the Supreme Court revoked respondent's State Bar probation and suspended him for the full two years of the above stayed suspension as a result of his failure to cooperate with, and answer questions from, his State Bar probation monitor. (State Bar case no. 85-P-04 LA.)

In October 1988, the Supreme Court suspended respondent for two years, execution of which was stayed, with five years probation on conditions including six months actual suspension as a result of his convictions in 1983 and 1984 of separate counts of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)). (*In re Carr* (1988) 46 Cal.3d 1089, 1091.) The Supreme Court concluded that the facts and circumstances surrounding the convictions did not involve moral turpitude but did involve other misconduct warranting discipline. The Court also ordered that before respondent was to be relieved of his actual suspension he show satisfactory proof of his rehabilitation, fitness to practice, and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, Transitional Rules of Procedure of the State Bar, division V (standard[s]). (*Ibid.*) State Bar records indicate that no hearing has been held pursuant to standard 1.4(c)(ii) to date. Accordingly, respondent remains on the actual suspension imposed in *In re Carr*, *supra*.

In an attempt to present further aggravating circumstances in the Vehicle Code cases, the examiner elicited evidence regarding a Nevada driver's license respondent presented to the police at the time of his arrest and the circumstances under which respondent obtained that license. A Nevada driver's license inquiry printout and respondent's application for the Nevada license were introduced in evidence. (Exh. 5.) The inquiry printout indicates that respondent's Nevada license had been withdrawn on September 13, 1984, which was prior to the time he presented the license to the police in the first Vehicle Code case (November 15, 1984). Respondent testified that he had a valid California license when he moved to Nevada. After he obtained the Nevada license, California revoked his license and Nevada then withdrew the Nevada license based on "comity." (R.T. May 8, 1989, pp. 106-107.) Respondent also testified he had not been notified of the Nevada withdrawal at the time of his arrest in November 1984. (*Ibid.*) Respondent's testimony was not rebutted.

The examiner also attempted to establish that respondent obtained the Nevada license under false pretenses by not listing all his DUI convictions. The Nevada application asked for the names and locations of DUI convictions and respondent listed one, in May 1982 (exh. 5), when he had four at that time (R.T. May 8, 1989, p. 64). Respondent testified that he told the clerk at the time he prepared the application that he had more convictions, but there was not enough space on the form. (R.T. May 8, 1989, pp. 71-72.) According to respondent, the clerk told him he could put down one conviction and they would run it through the computer and any other convictions would be identified. (*Ibid.*) Respondent's explanation was not rebutted.

[4] We conclude that the examiner failed to establish by clear and convincing evidence that respondent's use of the Nevada driver's license at the time of his arrest in November 1984 or the circumstances under which he obtained that license are aggravating factors. No evidence was introduced establishing that respondent knew his Nevada license was not valid at the time he presented it to the police in the first Vehicle Code case. The application instructs the applicants to answer the questions com-

pletely and fully but does not indicate what should be done if more space is needed. (Exh. 5.) It is not improbable for respondent to have asked the clerk for direction. While respondent's explanation may be subject to doubt, it is not so incredible, in our view, that it requires rejection in the absence of rebuttal evidence.

In mitigation, from the time of his arrest in the second Vehicle Code case (April 1986) until the time of the State Bar trial (May 1989), respondent had "not had so much as a speeding ticket, no arrest, no traffic tickets" (R.T. May 8, 1989, p. 90); he had a valid California license at the time of the trial (*id.*); he had completed a 120-day inpatient chemical dependency program in 1988, for which he was given credit against his criminal sentence (R.T. May 8, 1989, pp. 91-92; see also exh. A); he was attending one to two meetings per week of Alcoholics Anonymous (AA) pursuant to the terms of his existing State Bar probation (R.T. May 8, 1989, pp. 93-95); and he had not consumed any alcohol since 1986 and had not had any drugs since May 1987 (R.T. May 8, 1989, p. 96). The record also reveals that there was no harm to a client or other person. (Standard 1.2(e)(iii).)[10]

DISCUSSION

The Vehicle Code Cases

[5a] As the Supreme Court's orders referring the Vehicle Code cases indicate, respondent's convictions do not per se establish moral turpitude and we conclude that the sparse facts presented regarding the surrounding circumstances do not establish moral turpitude. Although the current convictions involved driving, no actual harm occurred to anyone. Thus, the present case is distinguishable from *In re Alkow* (1966) 64 Cal.2d 838. We recognize that the potential for harm was significant given respondent's operation of a motor vehicle while intoxicated, but the paucity of facts presented does not permit us to conclude that respondent's "conduct showed a complete disregard for the conditions of his probation, the law, and the safety of the public." (*Id.* at p. 841.)

[5b] Respondent was ordered to obey all laws as a condition of his separate criminal probations in January 1984 (exh. 4) and August 1985 (exh. 2). His convictions herein indicate that he did not comply with those orders and that conduct could involve moral turpitude. Nevertheless, insufficient facts were presented to conclude that the court orders were violated in either subjective or objective bad faith. (Cf. *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 951 [bad faith is established if no plausible ground for noncompliance exists or the attorney did not believe he had plausible grounds for noncompliance, even if such grounds arguably existed].)

[6a] We do, however, conclude that the convictions involve other misconduct warranting discipline under *In re Kelley* (1990) 52 Cal.3d 487. Kelley had been convicted of driving under the influence (Veh. Code, § 23152, subd. (b)), with a prior conviction for the same offense, and of violating the terms of her probation imposed in the first conviction (Pen. Code, § 1203.2). (*Id.* at pp. 491-492.) The prior conviction occurred some 31 months before the second conviction. (*Id.* at 492.) The Supreme Court noted that it had previously disagreed about the application of the "other misconduct warranting discipline" standard, but that disagreement had focused on whether a nexus was required between the misconduct and the practice of law. (*Id.* at p. 495.) The Court concluded that resolution of that issue was unnecessary in *Kelley* because a nexus had been established in two ways. (*Ibid.*)

First, the Court concluded that Kelley violated a court order when she violated the conditions of her probation. (*Ibid.*) "Disobedience of a court order, whether as a legal representative or as a party,

10. Respondent's attempt to present mitigating evidence in the PCP case, which apparently dealt with a rehabilitative program, was rejected by the hearing panel. (R.T. Aug. 29, 1989, pp. 36-55.) We notified respondent that we had tentatively determined that he had been denied a fair hearing in the discipline phase of his trial as a result of the hearing panel's failure to allow him to present mitigating evidence. (Notice of intent to remand, filed October 9, 1991.) Respondent thereafter waived this error because he believed the recommended discipline was fair. (Respondent's request for review, filed November 13, 1991.)

demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court." (*Ibid.*) As indicated above, Kelley had been found by the criminal court to be in violation of the conditions of her probation. Our record in the present proceeding contains no such finding. **[6b]** Even so, respondent was ordered to obey all laws and he did not. His failure to conform his conduct to the requirements of the criminal law and the court orders imposed on him calls into question his integrity as an officer of the court and his fitness to represent clients.

The second way a nexus was 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. (*Ibid.*) "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.*)

[7] Although the convictions herein do not directly involve substance abuse, it is appropriate for disciplinary purposes to consider any criminal charges that were dismissed as well as the charges for which respondent was actually convicted. (*In re Langford* (1966) 64 Cal.2d 489; see also *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 102.) The criminal complaint charged respondent with being under the influence of PCP and clear and convincing evidence was presented establishing that respondent was under the influence of PCP at the time of his arrest in the first Vehicle Code case. The police officer's conclusion that respondent was under the influence of PCP was credible and was not rebutted by credible evidence. In January 1984 respondent was convicted of driving under the influence with a prior conviction for the same offense in May 1982. (Exh. 4.) **[6c]** Thus, respondent had been convicted of two substance abuse related crimes within a relatively short period of time of his arrest in the first Vehicle Code case. In our view, the facts and circumstances of the present convictions indicate a problem with substance abuse that is clearly affecting respondent's private life.

[6d] For the above reasons, we find that a nexus is established between respondent's criminal conduct and the practice of law under *In re Kelley*, *supra*. Accordingly, we conclude the Vehicle Code convictions involved other misconduct warranting discipline.

The PCP Case

[8a] As in the Vehicle Code cases, the Supreme Court referral order in the PCP case demonstrates that respondent's conviction for being under the influence of PCP does not per se establish moral turpitude. Also as in the Vehicle Code cases, the PCP case is distinguishable from *In re Alkow*, *supra*, because no actual harm resulted, and insufficient facts were presented to conclude that the court order was violated in either subjective or objective bad faith. Thus, we conclude that the facts and circumstances surrounding respondent's conviction in the PCP case do not involve moral turpitude.

[8b] We also conclude that the record supports the conclusion that this conviction involved other misconduct warranting discipline under *In re Kelley*, *supra*. As a result of the January 1984 DUI conviction, respondent was placed on three years probation on conditions, which included a court order that he obey all laws. Six months later respondent was under the influence of PCP in violation of the Health and Safety Code and in violation of the criminal court order imposing probation. Respondent's failure to conform his conduct to the requirements of the criminal law and the court order again calls into question his fitness to represent clients. (*In re Kelley*, *supra*, 52 Cal.3d at p. 497.)

[8c] At the time of the criminal offense, respondent had been convicted of three prior substance abuse offenses (1982, 1983, 1984). Clearly, respondent's substance abuse is adversely affecting his private life and we cannot and should not wait until the substance abuse problems affect his practice of law. (*In re Kelley*, *supra*, 52 Cal.3d at p. 495.)

DISPOSITION

[9a] Respondent is before us with an extensive history of drug and alcohol abuse which has directly or indirectly led to several criminal convictions and the imposition of professional discipline. Although

respondent's record is lengthy, none of the offenses directly involved clients or the practice of law. It seems clear that respondent has substance abuse problems, but those problems have apparently not, as yet, affected any clients. The additional mitigating evidence indicates that respondent has made some efforts at addressing his substance abuse by completing the inpatient chemical dependency program, attending AA meetings, and abstaining from the use of alcohol and drugs.

The standards provide guidance in making a disciplinary recommendation, although we are not compelled to follow them in every case. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) **[10]** Standard 3.4 provides that for conviction of a crime involving other misconduct warranting discipline, the discipline should be appropriate to the nature and extent of the misconduct. **[9b]** Standard 1.7 provides that for culpability for professional misconduct where 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 circumstances clearly predominate. The nature of the present offenses and the facts and circumstances surrounding them indicate that application of standard 1.7 would not be appropriate.

As noted above, *In re Kelley*, *supra*, 52 Cal.3d 487, involved a second conviction for DUI, which constituted a violation of the conditions of the criminal probation imposed in the first DUI conviction. The Supreme Court concluded that relatively minimal discipline was warranted because the convictions and the violation of the court order did not cause specific harm to the public and courts and because several mitigating factors were present, including a lack of prior discipline. (*Id.* at p. 498.) The Court imposed a public reproval with conditions. (*Id.* at p. 499.) *In re Carr*, *supra*, 46 Cal.3d 1089, similarly involved two DUI convictions which did not cause specific harm to the public and courts, but Carr had been previously disciplined twice. As indicated above, the Court imposed a stayed suspension of two years with five years probation on conditions, including six months actual suspension and a requirement that Carr comply with standard 1.4(c)(ii) before being relieved of his actual suspension. (*Id.* at p. 1091.)

[9c] Although the present convictions are not minor and involved the threat of harm to the public, they also did not cause specific harm to the public or courts. Respondent's convictions, both current and past, and his State Bar discipline all appear to be the direct or indirect result of respondent's substance abuse. Respondent has been under continuous suspension for approximately five years as a result of his prior discipline. We take his current status into account. Continued probation monitoring that includes compliance with substance abuse conditions of probation coupled with the requirement that respondent demonstrate his rehabilitation and present fitness to practice pursuant to standard 1.4(c)(ii) before being relieved of his actual suspension will, in our view, ensure that respondent's substance abuse is sufficiently controlled prior to his return to the practice of law. The hearing panel recommendations in the present matters provide for both requirements.

[11] We note, however, that respondent has not yet complied with standard 1.4(c)(ii) as ordered in *In re Carr*, *supra*, 46 Cal.3d 1089. No useful purpose would be served by requiring him to comply twice with this standard. Therefore, we recommend to the Supreme Court that respondent be required to comply with standard 1.4(c)(ii) only once in satisfaction of the requirement in both the prior matter and the current proceeding.

In addition, the hearing panels did not have our standard conditions of probation available at the time they made the disciplinary recommendations in the present matters. Consequently, the recommended conditions vary from our standard conditions and we modify the recommended conditions by substituting our corresponding standard conditions. **[12]** In particular, the hearing panels recommended as a condition of probation that respondent be required to submit his person to search by any duly authorized police officer at any time of day or night, with or without a warrant, and to submit his person to blood, breath or urine testing as indicated by any police officer. We do not find this requirement an appropriate condition of disciplinary probation and instead, we recommend that respondent be required to comply with our standard substance abuse probation conditions as set forth below.

Finally, the hearing panels recommended that respondent comply with rule 955, California Rules of Court, and that he take and pass the Professional Responsibility Examination (PRE) as conditions of probation. **[13]** As respondent has been continuously suspended from the practice of law since November 1988, we delete the recommendation that he comply with rule 955. **[14]** We also delete the PRE requirement because respondent timely complied with the PRE requirement ordered in *In re Carr*, *supra*, by passing the examination in August 1989.

RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that as aggregate discipline in case numbers 86-C-19520, 86-C-19521 and 87-C-15714, respondent, Kenneth Lawrence Carr, be suspended from the practice of law in this state for a period of two (2) years; that execution of said suspension be stayed; and respondent be placed on probation for a period of two (2) years prospective to the effective date of the Supreme Court order in the present matter and concurrent with the existing probation ordered in *In re Carr* (1988) 46 Cal.3d 1089 on the following conditions:

1. That during the first six (6) months 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, respondent shall be suspended from the practice of law in the State of California, provided, however, that respondent's compliance with standard 1.4(c)(ii) as ordered in *In re Carr* (1988) 46 Cal.3d 1089, shall satisfy the requirement that he comply with the standard as set forth in this paragraph. The period of actual suspension shall be prospective to the effective date of the Supreme Court order in the present matter. If at the time of the effective date of the Supreme Court order in the present matter respondent is still suspended pursuant to the Supreme Court's order in *In re Carr*, *supra*, the period of actual suspension in this paragraph shall be concurrent with the existing suspension ordered in *In re Carr*, *supra*;

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 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) 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 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 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 respondent shall abstain from use of any alcoholic beverages, and shall not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription. A prescription shall be presumed invalid unless prescribed by a licensed physician who attests in writing that he/she has read this opinion and that the prescription was appropriate at the time it was given;

8. That respondent shall attend meetings of Alcohol Anonymous at least two (2) meetings per week for a period of six (6) months and at least one (1) meeting per week for an additional six (6) months. Respondent shall provide satisfactory proof of attendance during each month to the Probation Department on the tenth day of the immediately following month;

9. That respondent shall participate in the State Bar's Program on Alcohol Abuse and the State Bar Alcohol Abuse consultant shall report in writing to the Office of the Clerk, State Bar Court, Los Angeles, the compliance or non-compliance of the respondent with each of the terms of said program at the time that any reports of the respondent set forth in these conditions of probation are due; provided that said consultant shall immediately so report the failure of the member to comply with any of said terms;

10. That 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;

11. That 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 abstained from alcohol and/or drugs. 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;

12. 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;

13. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

14. 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.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CHARLES EMILE TADY

A Member of the State Bar

No. 91-O-06041

Filed July 6, 1992; as modified, July 10, 1992

SUMMARY

Respondent was charged with violating the prohibition against unauthorized practice of law by rendering legal services to his wife in a probate matter while on voluntary inactive status. He moved to dismiss the notice to show cause for failure to state a disciplinable offense. The hearing judge denied the motion. (Hon. Jennifer Gee, Hearing Judge.)

Respondent requested review, raising two contentions. First, he argued that the notice to show cause should be dismissed because it did not allege a "serious offense" and the alleged misconduct was appropriate for resolution by admonition. The review department rejected this contention, noting that the Office of Trial Counsel has discretion to file formal charges even when a matter meets the criteria for issuance of an admonition.

Second, respondent argued that his provision of legal services to his wife did not constitute unauthorized practice of law. The review department concluded otherwise, noting that the conduct alleged in the notice to show cause went beyond merely giving private legal advice. The review department therefore affirmed the denial of respondent's motion to dismiss.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Charles Emile Tady, 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] **106.10 Procedure—Pleadings—Sufficiency**
135 Procedure—Rules of Procedure
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous

On review of a facial challenge to the legal sufficiency of charges in the notice to show cause, the sole issue presented is whether the facts alleged in the notice, if proven, would constitute a disciplinable offense. For the purpose of such review, the review department treats the factual allegations of the notice as true, but draws independent conclusions regarding the legal import of those facts. (Trans. Rules Proc. of State Bar, rule 554.1.)

[2] **169 Standard of Proof or Review—Miscellaneous**
194 Statutes Outside State Bar Act

Where there is no precedent regarding the standard of review to be applied in a matter coming before the review department in a certain procedural posture, the review department proceeds by analogy to the closest civil and criminal rules.

[3] **106.10 Procedure—Pleadings—Sufficiency**
119 Procedure—Other Pretrial Matters
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
169 Standard of Proof or Review—Miscellaneous
194 Statutes Outside State Bar Act

The Transitional Rules of Procedure of the State Bar, unlike equivalent California and federal rules, provide for review as of right following the denial of a motion to dismiss, as well as the grant of such a motion. However, this does not affect the type of review to be afforded on the merits. (Trans. Rules Proc. of State Bar, rule 554.1.)

[4 a, b] **106.10 Procedure—Pleadings—Sufficiency**
119 Procedure—Other Pretrial Matters
130 Procedure—Procedure on Review
146 Evidence—Judicial Notice
159 Evidence—Miscellaneous
169 Standard of Proof or Review—Miscellaneous

Both at hearing and on review, the court considering a motion to dismiss a notice to show cause for failure to state a disciplinable offense should disregard all factual matters outside the ambit of the notice, except for judicially noticeable facts. Accordingly, the review department considered respondent's uncontroverted statement that the alleged client referred to in the notice to show cause was respondent's spouse, and also considered respondent's date of admission to the bar and lack of any prior disciplinary record. However, respondent's other factual assertions in support of his motion to dismiss were not suited for judicial notice and were not considered on review.

[5] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
106.90 Procedure—Pleadings—Other Issues
119 Procedure—Other Pretrial Matters
131 Procedure—Procedural Issues re Admonitions
135 Procedure—Rules of Procedure
199 General Issues—Miscellaneous
1094 Substantive Issues re Discipline—Admonition

The Office of Trial Counsel has discretion whether or not to file formal charges in a matter eligible for disposition by admonition. The State Bar Court cannot dismiss a proceeding prior to hearing on the ground that it meets the criteria for admonition, unless a case for selective prosecution is established. (Trans. Rules Proc. of State Bar, rule 415.)

[6] **106.10 Procedure—Pleadings—Sufficiency**
213.10 State Bar Act—Section 6068(a)
230.00 State Bar Act—Section 6125

Under section 6125 of the Business and Professions Code, members of the State Bar who are on inactive status may not practice law in California. Section 6068(a) makes violation of section 6125 a disciplinable offense. A member on inactive status who is alleged to have committed acts constituting the practice of law is properly charged with violating sections 6125 and 6068(a).

[7] **106.10 Procedure—Pleadings—Sufficiency**
220.00 State Bar Act—Section 6103, clause 1
220.10 State Bar Act—Section 6103, clause 2

Section 6103 of the Business and Professions Code does not provide a basis for charging an attorney with any misconduct other than violating a court order. Where respondent who was charged with unauthorized practice of law while inactive had transferred to inactive status voluntarily and not as a result of a court order, section 6103 charge should have been dismissed.

[8 a-c] **106.10 Procedure—Pleadings—Sufficiency**
204.90 Culpability—General Substantive Issues
230.00 State Bar Act—Section 6125

A broad scope of activities may be held to constitute the practice of law, but the unauthorized practice of law outside of court appearances is difficult to define. Where respondent, while on inactive status, allegedly referred to a family member as respondent's client in a letter to another lawyer and expressed an intention to seek statutory fees in a probate matter involving the family member, respondent was properly charged with unauthorized practice of law.

ADDITIONAL ANALYSIS

Culpability

Not Found

220.05 Section 6103, clause 1
220.15 Section 6103, clause 2

Other

106.20 Procedure—Pleadings—Notice of Charges
196 ABA Model Code/Rules

OPINION

PEARLMAN, P.J.:

This case poses the question whether, as a matter of law, an inactive member of the State Bar is chargeable with a disciplinable offense by rendering legal services to his wife in a probate matter, referring to her as his "client" in correspondence with another lawyer, and expressing an intent to request statutory fees for the services rendered in the probate matter. The procedural posture in which this matter is presently before us is that, pursuant to rule 554.1 of the Transitional Rules of Procedure of the State Bar, respondent moved to dismiss the notice to show cause for failure to charge a disciplinable offense; the motion was denied by the hearing judge; and respondent timely requested review of the hearing judge's order.[1] For the reasons stated below, we affirm the hearing judge's denial of the motion to dismiss, but express no opinion as to the appropriate outcome of the proceeding.

STANDARD OF REVIEW

[1a] As already noted, we review the dismissal of a facial challenge to the legal sufficiency of the charges set forth in the notice to show cause. The sole issue presented, therefore, is whether the facts alleged in the notice, *if proven*, would constitute a disciplinable offense.

[2] There is no published State Bar Court or Supreme Court precedent regarding the standard of review to be applied in a matter coming before the review department in this procedural posture. Accordingly, we proceed by analogy to the closest civil and criminal rules. (See, e.g., *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536; *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 437; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168.) The review of a decision regarding a California general civil demurrer, or a federal motion to dismiss for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure, appears most closely akin to the review provided for under rule 554.1 of the Transitional Rules of Procedure.[2] **[3 - see fn. 2] [1b]** Thus, for the purpose of our review, we treat the factual allegations of the notice as true, but draw our own independent conclusions regarding the legal import of those facts. (See, e.g., *Tyco Industries, Inc.* v. *Superior Court* (1985) 164 Cal.App.3d 148, 153; *Bane* v. *Ferguson* (7th Cir. 1989) 890 F.2d 11, 13.)

FACTS TO BE CONSIDERED

[4a] Both at hearing and on review, the court considering a motion to dismiss of this type should disregard all factual matters outside the ambit of the notice to show cause, since the purpose of the motion is to test the sufficiency of the notice, not to contest the charges. (See *Stencel Aero Engineering Corp.* v. *Superior Court* (1976) 56 Cal.App.3d 978, 987, 987-988, fn. 6.) However, judicially noticeable facts outside the scope of the notice are an exception to this rule, and are cognizable. (*Ibid.*; see also *United States* v. *Wood* (7th Cir. 1991) 925 F.2d 1580, 1581-1582.)

[4b] In that connection, we note that in a declaration filed in the hearing department in support of his motion to dismiss, respondent averred that the alleged client referred to in the notice to show cause, Barbara L. Tady, is his wife. The examiner made no objection to the filing of respondent's declaration and does not contest respondent's statement regard-

1. Rule 554.1 of the Transitional Rules of Procedure of the State Bar provides in pertinent part: "No later than ten (10) days prior to the pre-trial conference set by the State Bar Court, the respondent may file and serve a motion to dismiss the notice to show cause on the ground that it fails to state a disciplinable offense as a matter of law. . . . The ruling of the [judge] on said motion shall be reviewed by the Review Department under rules 450-453 of these rules."

2. **[3]** Our Transitional Rules of Procedure, unlike the equivalent California and federal rules, provide for review as of right following the denial of a motion to dismiss, as well as the grant of such a motion. (Trans. Rules Proc. of State Bar, rule 554.1.) Thus, unlike the California courts of record and the federal courts (see, e.g., *Babb* v. *Superior Court* (1971) 3 Cal.3d 841; *Fluor Ocean Services, Inc.* v. *Hampton* (5th Cir. 1974) 502 F.2d 1169, 1170), we are required to grant review at this stage of the proceedings. However, this difference does not affect the type of review to be afforded on the merits.

ing the identity of Ms. Tady. We will therefore treat her relationship to respondent as established for the purpose of this review even though it is not pleaded in the notice to show cause. (Cf. Evid. Code, § 452, subd. (h).) We will also take judicial notice that respondent was admitted to practice law in California in June of 1950 and has no prior record of discipline. The remainder of the facts asserted by respondent in support of the motion to dismiss, however, are not properly suited for judicial notice, and we decline to consider them on review. Assuming the notice to show cause properly charges a disciplinable offense, the appropriate time for respondent to present evidence in defense or mitigation will be at the hearing on the merits, unless the mitigation evidence is not disputed and the parties can reach a stipulation of the facts in advance of the hearing.

SUBSTANCE OF THE CHARGES

The material factual allegations of the notice to show cause may be summarized as follows. Respondent has been on voluntary inactive membership status with the State Bar since January 1, 1982. After that date, respondent provided legal assistance to Barbara L. Tady in connection with two probate matters pending in Los Angeles County Superior Court. On March 18, 1991, respondent wrote a letter to an attorney admonishing the attorney to cease communicating with respondent's client, Barbara L. Tady, in connection with one of the probate matters, pursuant to rule 2-100 of the Rules of Professional Conduct.[3] In a letter dated April 1, 1991, respondent indicated that he intended to petition for statutory fees in conjunction with the same probate matter.

The notice to show cause goes on to allege that by his actions, respondent practiced law in the State of California during a period when respondent was not qualified by law to do so, and that respondent thereby wilfully violated his oath and duties as an attorney "under disciplinary case law and/or California Business and Professions Code sections 6068(a), 6103 and 6125." The validity of these conclusions of law is the issue we must decide at respondent's request.

APPLICATION OF RULE 415

Before proceeding to review the legal sufficiency of the notice, we dispose of an additional argument raised by respondent. In his motion at hearing and again on review, respondent argues that this matter should be dismissed because the notice to show cause does not allege a "serious offense" as defined in the last paragraph of rule 415 of the Transitional Rules of Procedure of the State Bar, and the matter otherwise meets the criteria set forth in that rule.[4] Respondent misconstrues the import of rule 415.

[5] Rule 415 provides that under the circumstances defined therein, the Office of Trial Counsel or the State Bar Court *may* dispose of certain nonserious disciplinary matters by admonition. Assuming arguendo that disposition by admonition would be appropriate in this matter (an issue we do not decide), rule 415's permissive language gives the Office of Trial Counsel *discretion* to decide whether or not to file formal charges in a matter eligible for disposition by admonition. The court cannot dismiss the proceeding prior to hearing unless a case for selective prosecution is established which has not been done here. A notice to show cause may issue for minor offenses as well as serious offenses and the ultimate disposition will vary according to the proof. (See, e.g., *In the Matter of Aguiluz* (Review Dept. 1992) 2

3. Rule 2-100 prohibits members of the State Bar from communicating with a party whom the member knows to be represented by another lawyer, without the other lawyer's consent.

4. Rule 415 provides in pertinent part as follows: "When the subject matter of the investigation, or the charge in a formal proceeding, does not involve a matter which is, or probably is, a client security fund matter, or a serious offense, . . . the Office of Trial Counsel . . . may dispose of the matter before it by an admonition to the member, if it concludes (a) the violation or violations were not intentional or occurred under mitigating circumstances, and (b) no pecuniary loss resulted. . . . The giving of an admonition does not constitute imposition of discipline upon the member. . . . [¶] As used in this rule, 'serious offense' is dishonest conduct [or] a dishonest act, . . . and conduct or acts constituting bribery, forgery, perjury, extortion, obstruction of justice, burglary or offenses related thereto, intentional fraud and intentional breach of a fiduciary relationship."

Cal. State Bar Ct. Rptr. 32.) The court may dismiss the matter after the hearing if the charges are not proved (cf. *In the Matter of Respondent A* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 255); it may decide upon hearing the evidence that an admonition is appropriate instead of discipline (cf. *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439); or it may conclude that discipline is appropriate. (See, e.g., *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 241-242.) What we address here as a matter of law is only the legal sufficiency of the charges.

THE LEGAL SUFFICIENCY OF THE CHARGES

[6] Under section 6125 of the Business and Professions Code, members of the State Bar who are on inactive status may not practice law in California.[5] Section 6068 (a) makes violation of section 6125 a disciplinable offense. (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487; *In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 236-237.) Accordingly, if the acts respondent is alleged to have committed constituted the practice of law, he was properly charged with having violated sections 6125 and 6068 (a). **[7]** The charge of violation of section 6103, however, should have been dismissed. Section 6103 does not provide a basis for charging an attorney with any misconduct other than violating a court order. (*Read* v. *State Bar* (1991) 53 Cal.3d 394, 406, 407, fn. 2.) No such charge was made. Indeed, in this case, as expressly acknowledged in the notice to show cause, respondent transferred to inactive status voluntarily, not as the result of a court order. (See Bus. & Prof. Code, § 6005.)

With regard to the question what constitutes "practicing law" in violation of section 6125, the examiner has relied on six cases: *In re Cadwell* (1975) 15 Cal.3d 762; *People* v. *Sipper* (1943) 61 Cal.App.2d Supp. 844, disapproved on another point in *Murgia* v. *Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11; *Farnham* v. *State Bar* (1976) 17 Cal.3d 605; *In re Naney* (1990) 51 Cal.3d 186; *Morgan* v. *State Bar* (1990) 51 Cal.3d 598; and *In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. 229.

All of the situations in the cited cases were far more serious than that which is alleged to have occurred here. Indeed, all but one of these cases involved attorneys suspended for disciplinary violations, who were found to have violated a Supreme Court order prohibiting them from practicing law or holding themselves out as practicing law. The final case, *People* v. *Sipper, supra*, involved a criminal conviction for the practice of law by a real estate agent. We also note that in *In re Naney, supra*, and *In re Cadwell, supra*, the Supreme Court focused on the respondent's violation of the prohibition in Business and Professions Code section 6126 against an unqualified person "holding himself or herself out as entitled to practice law." Thus, in *In re Cadwell*, the Supreme Court found it unnecessary to resolve the question whether Cadwell had given legal advice to a client. (*Id.* at p. 771.) Respondent herein was not charged with violation of section 6126, but only of violating section 6125. He cannot be disciplined for a violation not alleged in the notice to show cause. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928-929.)

[8a] While the cases cited above provide some insight into the broad scope of activities that may be held to constitute the practice of law, we note that the unauthorized practice of law outside of court appearances is not easy to define. No case resolves the specific question of what constitutes the unauthorized practice of law in a probate matter or whether an inactive member of the State Bar violates the ban on unauthorized practice by giving legal assistance to a family member in a probate matter. This issue is analogous to one which has been raised in connection with California judges who, upon ascension to the bench, cease being members of the State Bar (*State Bar* v. *Superior Court* (1929) 207 C. 323, 337) and cannot practice law. (Cal. Const., art. VI, § 17.) There is unofficial authority stating that it "would be hard to criticize a judge . . . for giving private [legal]

5. Unless otherwise stated, all statutory references hereafter are to the Business and Professions Code.

advice to a child, spouse, or parent. But, it is certainly improper to appear or advocate on their behalf." (Rothman, California Judicial Conduct Handbook (Cal. Judges Assn. 1990) § 210.811, fn. omitted.)

Canon 4G of the revised Code of Judicial Conduct adopted by the ABA in 1990 provides as follows: "A judge shall not practice law. Notwithstanding this prohibition, a judge . . . may, without compensation, give legal advice to and draft or review documents for a member of the judge's family."[6] This language has been deleted from the proposed revised California Code of Judicial Conduct which will be considered for adoption by the California Judges' Association at its 1992 annual meeting. The accompanying note by the Committee on Judicial Ethics states that it has proposed to delete from Canon 4G the ABA exception for legal advice to family members because it considers the scope of the California constitutional prohibition against judges practicing law to be an issue of law and not a matter for the Code of Judicial Conduct.

[8b] We do not decide, on this review, whether giving legal advice privately to a member of one's immediate family, *without more*, constitutes a violation of the prohibition against practicing law while an inactive member of the State Bar, nor whether the authorities cited above regarding judges apply to inactive members. The authorities which make exception for such activities by judges consistently draw the line at *appearing* or *acting as an advocate* on behalf of the family member.

[8c] In this matter, the notice to show cause plainly charges that respondent went beyond merely advising his wife privately regarding her rights and duties in connection with the referenced probate matters, including referring to his wife as his "client" in a letter admonishing another attorney to cease communicating with her directly. He is also alleged to have expressed an intention to petition for statutory fees in one of the probate matters. Respondent, in his motion papers, asserts that he did not in fact receive any compensation for his assistance and at all times acted in good faith. We cannot resolve such issues at this stage of the proceedings.

CONCLUSION

The hearing judge's order denying respondent's motion to dismiss is affirmed. However, given the limited scope of the charges, we urge the parties to stipulate to the facts insofar as possible to reduce the time and expense of resolving this matter. Nothing in this opinion shall be construed to limit the State Bar or respondent in presenting relevant evidence at the hearing, or to preclude dismissal of one or more charges, after the hearing, if the facts alleged in the notice to show cause are not proven by clear and convincing evidence, or to preclude ultimate disposition of this matter by admonition at the instance of the hearing judge if such appears appropriate after hearing.

We concur:

NORIAN, J.
STOVITZ, J.

6. The official commentary to this section notes that the activities permitted by the section do not include "act[ing] as an advocate or negotiator for a member of the judge's family in a legal matter."

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD K. CACIOPPO

A Member of the State Bar

No. 87-O-11458

Filed July 20, 1992; reconsideration denied, September 24, 1992

SUMMARY

Respondent handled several legal matters for members of a family of which he was a longtime friend, including obtaining a personal injury settlement for an adult daughter of the family. Believing that he was authorized to do so, respondent applied the client's share of the proceeds of the settlement to pay a small portion of his fees for legal services rendered to the client and her parents in other matters. The daughter obtained a small claims court judgment for the settlement proceeds, but respondent did not pay it, and the clients complained to the State Bar. After the complaint was made, but before formal charges were filed, respondent met with the clients and paid the small claims judgment plus interest.

The State Bar charged respondent with misappropriation, misrepresentation to one of the clients, trust account violations, failure to account, failure to communicate with the clients, and obtaining a pecuniary interest adverse to the personal injury client without the client's written consent. At the trial, the father of the family retracted most of his complaint, and testified that, although he had forgotten the fact, he had actually authorized respondent, with his daughter's consent, to apply the personal injury settlement proceeds to respondent's bill. Respondent corroborated this testimony and produced a letter from the father authorizing the payment. The hearing judge disbelieved both respondent and the father, and termed the letter "suspicious." She held that respondent had violated his duty to the daughter by not ensuring that the father had actual authority to authorize the payment, and therefore found respondent culpable of misappropriation by unilateral fee determination. She also found him culpable of misrepresentations and other rule violations, and recommended one year of actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, arguing that he was culpable at most of minor rule violations. The review department, while deferring to the hearing judge's credibility determinations, found that the substantial conflicts in the evidence precluded finding that there was clear and convincing evidence of misappropriation or misrepresentations. It found respondent culpable only of failing to render a proper accounting and failing to communicate. In light of respondent's significant mitigating evidence and his prior disciplinary record, which consisted of a public reproval, the review department recommended a six-month stayed suspension and one year of probation with trust accounting and law office management conditions.

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 Weiner

For Respondent: Richard K. Cacioppo, in pro. per.

HEADNOTES

[1 a, b] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
162.20 Proof—Respondent's Burden
755.52 Mitigation—Prejudicial Delay—Declined to Find

Where a fire which destroyed some of respondent's files did not occur until over a year after respondent had promised the State Bar to check his files in response to a client complaint, respondent demonstrated no prejudice from the State Bar's delay in bringing formal charges arising out of the complaint.

[2 a-c] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden

Under Supreme Court precedent and the State Bar Rules of Procedure, before entering into a stipulation resolving a disciplinary matter, the State Bar should notify the respondent of any other pending investigations or complaints. However, where respondent had been notified of a second JFM complaint before respondent entered into a stipulation to a public reproval in an earlier, separate matter, respondent demonstrated no prejudice from the failure of the earlier stipulation to refer to the pendency of the second complaint. (Rules Proc. of State Bar, rule 406.)

[3 a, b] **162.20 Proof—Respondent's Burden**
166 Independent Review of Record

The standard of review applied by the Supreme Court and the review department is independent review of the record, giving deference to the credibility determinations of the hearing judge. Unlike in the Supreme Court, in the review department the respondent does not have the burden of demonstrating that the hearing decision is erroneous. The review department makes its own independent determination whether there is clear and convincing evidence to support culpability, giving great weight to the hearing judge's findings resolving issues pertaining to testimony, but also taking into account the hearing judge's evaluation of the believed witness's general credibility.

[4] **162.11 Proof—State Bar's Burden—Clear and Convincing**
165 Adequacy of Hearing Decision
166 Independent Review of Record

Testimony disregarded by the hearing judge which provides a plausible explanation of the respondent's conduct may be considered on de novo review as evidence that the hearing judge's fact findings were not supported by clear and convincing evidence. On independent review of the record, both the Supreme Court and the review department resolve all reasonable doubts and inferences in favor of the respondent.

[5] **241.00 State Bar Act—Section 6147**

Respondent's oral contingent fee agreement with a personal injury client was voidable by the client under section 6147, but respondent was entitled to a reasonable fee. Where the reasonable value of respondent's services exceeded the amount of the contingency fee, the hearing judge properly found that respondent was entitled to the contingency fee amount.

[6] **159 Evidence—Miscellaneous**
161 Duty to Present Evidence
162.90 Quantum of Proof—Miscellaneous
Where the 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.

[7] **142 Evidence—Hearsay**
It was error to sustain the examiner's objection to respondent's testimony about statements made by the complaining witness at a meeting, where the complaining witness had been asked about the meeting on cross-examination and given an opportunity to explain or deny respondent's testimony.

[8] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
148 Evidence—Witnesses
159 Evidence—Miscellaneous
Even if it was error for hearing judge to allow examiner to ask leading questions of complaining witness on direct examination, and to admit testimony as to witness's state of mind when such state of mind was not relevant, such errors were not prejudicial where complaining witness's testimony was clearly insufficient to establish State Bar's case and was not relied on in hearing judge's findings.

[9 a, b] **120 Procedure—Conduct of Trial**
142 Evidence—Hearsay
148 Evidence—Witnesses
Where respondent's testimony regarding statements made to respondent by complaining witness was offered to impeach complaining witness on a crucial issue, at a time when complaining witness was still subject to recall for further testimony, such testimony should not have been excluded except in the interests of justice. Exclusion of the testimony might have been justified by the length of the proceedings and respondent's lack of an explanation for failing to cross-examine complaining witness regarding statements at issue.

[10] **120 Procedure—Conduct of Trial**
159 Evidence—Miscellaneous
192 Due Process/Procedural Rights
State Bar disciplinary proceedings are unique—not criminal, civil or administrative. Nonetheless, the respondent is entitled to a guarantee of a fair hearing, one of the elements of which is the right to offer relevant and competent evidence on a material issue. Denial of such right is almost always reversible error.

[11] **148 Evidence—Witnesses**
162.11 Proof—State Bar's Burden—Clear and Convincing
165 Adequacy of Hearing Decision
Where State Bar's chief witness exhibited poor memory, repeatedly testified inconsistently on key issues, admittedly had misrepresented facts to insurance company and State Bar, and admittedly was motivated by anger and economic stress at time of complaint to State Bar, hearing judge's findings based solely on selected portions of such witness's inconsistent testimony were not supported by clear and convincing evidence in light of the record as a whole.

[12 a-c] **159 Evidence—Miscellaneous**
162.11 Proof—State Bar's Burden—Clear and Convincing
165 Adequacy of Hearing Decision
166 Independent Review of Record

No deference was due to hearing judge's reliance on letters from complaining witness to State Bar, since such letters were not testimony but documentary evidence. Findings based on selected portions of the witness's testimony, which were contradicted in other portions of such testimony, and on the witness's demonstrably untrustworthy hearsay statements in the letters to the State Bar, were not supported by clear and convincing evidence in the record as a whole.

[13] **159 Evidence—Miscellaneous**
165 Adequacy of Hearing Decision

Assuming hearing judge disbelieved testimony of all witnesses as to facts exculpating respondent, this was not a basis to find culpability. Testimony not worthy of belief does not reveal the truth itself or warrant an inference that the truth is the converse of the rejected testimony.

[14] **159 Evidence—Miscellaneous**
162.11 Proof—State Bar's Burden—Clear and Convincing
162.90 Quantum of Proof—Miscellaneous

State Bar has burden to prove culpability by clear and convincing evidence. Where respondent's version of the facts is plausible, even if controverted, it supports a reasonable inference of lack of misconduct.

[15 a, b] **145 Evidence—Authentication**
162.19 Proof—State Bar's Burden—Other/General

Documents must be authenticated before they can be introduced into evidence. Authentication means establishing by evidence or other means that the document is the writing which its proponent claims it is. By admitting a document into evidence, hearing judge initially concluded that there was sufficient evidence that it was what it was claimed to be. By allowing the document to be admitted as an authenticated exhibit and not offering affirmative evidence of fabrication, examiner provided court with no basis to find that document was in fact fabricated.

[16 a, b] **162.11 Proof—State Bar's Burden—Clear and Convincing**
166 Independent Review of Record

Given conflicting documentary evidence and unreliable and inconsistent testimony by complaining witness, review department may conclude on independent review, without attempting to resolve such evidentiary conflicts, that State Bar did not meet its burden to show culpability by clear and convincing evidence to a reasonable certainty.

[17 a, b] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**

Invoice to client for hourly fees should not have included time spent on personal injury matter which was covered by a separate contingency fee agreement, because of potential client confusion. More importantly, respondent should have given clients an opportunity to review such bill before, not after, receiving authorization to pay portion of bill out of client's share of proceeds of personal injury matter.

[18] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
410.00 Failure to Communicate

Respondent violated duty to communicate with client where, after receiving notice that client disputed respondent's use of client's settlement proceeds to pay respondent's bill for services to

client's family, respondent failed to communicate with client to ensure that client's father had been authorized to discharge family's indebtedness for fees out of client's personal injury recovery. Such failure to communicate violated the duty to perform legal services competently.

[19] **273.00 Rule 3-300 [former 5-101]**

Where client's father authorized respondent in advance to apply client's share of recovery in personal injury matter to respondent's fees for services to client and family in other matters, this did not establish that respondent obtained a pecuniary interest in the recovery adverse to that of client, in violation of rules governing business transactions with clients. Even if a pecuniary interest was acquired, respondent was not culpable of knowingly requiring such interest, where respondent did not rely on the initial authorization, and specifically sought authorization to apply the recovery to fees at the time the personal injury settlement proceeds were distributed.

[20] **162.11 Proof—State Bar's Burden—Clear and Convincing**
165 Adequacy of Hearing Decision
545 Aggravation—Bad Faith, Dishonesty—Declined to Find

The State Bar must prove aggravating factors as well as culpability by clear and convincing evidence to a reasonable certainty. Accordingly, finding in aggravation of bad faith could not be predicated on selected portions of complaining witness's unreliable correspondence and inconsistent testimony.

[21 a, b] **191 Effect/Relationship of Other Proceedings**
582.50 Aggravation—Harm to Client—Declined to Find
595.90 Aggravation—Indifference—Declined to Find

Findings in aggravation of harm to client and indifference to rectification of misconduct, based on delay in restitution of funds, could not be supported where there was no clear and convincing evidence that respondent had originally acted improperly in applying such funds to respondent's fees based on good faith belief that client had authorized such payment. Client's small claims court judgment against respondent did not operate as res judicata on issue of obligation to make restitution.

[22 a-c] **615 Aggravation—Lack of Candor—Bar—Declined to Find**

Finding in aggravation of lack of candor with State Bar was not justified, where respondent's testimony was not implausible, and contrary testimony of complaining witness contained repeated self-contradictions. Respondent's failure to respond to client's small claims complaint did not establish that respondent was not candid, nor did respondent's lapses in memory.

[23] **148 Evidence—Witnesses**
162.11 Proof—State Bar's Burden—Clear and Convincing

Proof by clear and convincing evidence to a reasonable certainty means that irreconcilable conflicts in the testimony of the chief State Bar witness by their very nature severely undermine the State Bar's case.

[24] **611 Aggravation—Lack of Candor—Bar—Found**

Where respondent answered one letter from State Bar, but ignored two others before answering a fourth, and was not diligent in responding the State Bar's inquiry, lack of full cooperation with State Bar was a factor in aggravation.

[25] **120 Procedure—Conduct of Trial**
162.20 Proof—Respondent's Burden
615 Aggravation—Lack of Candor—Bar—Declined to Find
Although not constituting a factor in aggravation, respondent's trial tactics in not revealing exhibits to examiner in advance undermined respondent's credibility with hearing judge, created risk that exhibits would be excluded, and unnecessarily prolonged hearing.

[26 a, b] **174 Discipline—Office Management/Trust Account Auditing**
511 Aggravation—Prior Record—Found
805.10 Standards—Effect of Prior Discipline
Where reproval would ordinarily have been appropriate for misconduct involving minor rule violations, but respondent had a prior public reproval and appeared to need to reorganize law practice, appropriate discipline was six months stayed suspension with probation conditions including trust accounting and completion of a law office management class.

[27] **173 Discipline—Ethics Exam/Ethics School**
Review department declined to recommend that respondent take California Professional Responsibility Examination where respondent had recently taken and passed Professional Responsibility Examination in compliance with earlier public reproval.

ADDITIONAL ANALYSIS

Culpability
Found
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
Not Found
221.50 Section 6106
273.05 Rule 3-300 [former 5-101]
280.05 Rule 4-100(A) [former 8-101(A)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.55 Misappropriation—Valid Claim to Funds
Aggravation
Declined to Find
525 Multiple Acts
Mitigation
Found
740.10 Good Character
765.10 Pro Bono Work
Discipline
1013.04 Stayed Suspension—6 Months
1017.06 Probation—1 Year
Probation Conditions
1022.10 Probation Monitor Appointed
1025 Office Management
1026 Trust Account Auditing
Other
103 Procedure—Disqualification/Bias of Judge

OPINION

PEARLMAN, P.J.:

This case illustrates why extended legal services performed for close friends require the same strict adherence to professional rules and recordkeeping as services for regular clients. It involves a lengthy hearing on a single count charging misappropriation by respondent, Richard Cacioppo, of $1,100 in settlement proceeds due a client who was the adult daughter of a longtime family friend, and alleging misrepresentations in connection therewith. Respondent claimed he was authorized to apply the money in satisfaction of more than $13,000 in previously unbilled legal services rendered to the client and her parents. He, nonetheless, belatedly paid a small claims default judgment obtained by them and they thereafter asked to have the charges dismissed. At trial, the client's father, Michael Laurita, was ruled a hostile witness to both sides under Evidence Code section 776 and contradicted most of the allegations in the two letters he wrote which initiated the State Bar proceeding. Indeed, as noted by the examiner in his opposition to respondent's motion to dismiss: "The testimony of the Laurita's [sic] at the hearing was inconsistent in many respects with the statements made in the letters written earlier to the State Bar.... Without examining each paragraph of the letters individually at this point the sum and substance of the Lauritas' testimony at the hearing countered specific statements in the letters as well as being inconsistent with the entire tone, tenor and conclusion reached in the letters."

The hearing judge denied respondent's motion to dismiss the charges, but indicated at the close of the culpability hearing in May of 1990 that the evidence of authorization by Mr. Laurita appeared far more plausible than the evidence of misappropriation. Upon further consideration after receipt of post-hearing briefs, the hearing judge reached the opposite conclusion. In her written decision filed in August of 1991, she concluded that both Mr. Laurita's testimony and respondent's testimony on the issue of authorization were not credible. She found respondent culpable of misappropriation by unilateral fee determination and also culpable of misrepresentations in violation of Business and Professions Code section 6106. She also found several rule violations and various aggravating factors. In mitigation, she found that respondent had made belated restitution and, more significantly, had presented "an extremely impressive array of evidence, both testimonial and by letter, from a wide range of references in the legal and general communities attesting to his good character." (Decision, p. 29.) She recommended one year of actual suspension as the minimum applicable discipline for misappropriation under the Standards for Attorney Sanctions for Professional Misconduct ("the standards") (Trans. Rules Proc. of State Bar, div. V). No reference was made in the decision to Supreme Court decisions distinguishing unilateral fee determination from wilful misappropriation. (See, e.g., *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 329; *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092.)

The respondent's request for review seeks dismissal of the charges or, at most, a finding of culpability of only minor rule violations justifying no actual suspension. The request for review presents a number of evidentiary issues. The examiner argues that, although the hearing judge was required to find proof by clear and convincing evidence, the standard on review of the hearing judge's decision is that all factual findings should be sustained if there is substantial evidence to support them. The examiner further argues, among other things, that the hearing judge impliedly found one key trial exhibit to have been fabricated for the hearing by respondent and Mr. Laurita.

We address all of the issues raised and conclude that, even deferring to all of the credibility determinations made below, due to substantial conflicting evidence, including contradictory testimony of Mr. Laurita on all of the key issues, there was insufficient proof of misappropriation and misrepresentations. However, we do find sufficient evidence to support the judge's conclusion that respondent failed to render a proper accounting to the client and failed to communicate with the client for a period of time following the settlement in violation of former rules 8-101(B)(3) and 6-101(A)(2).[1]

1. The current Rules of Professional Conduct became operative on May 27, 1989. Former rule 8-101(B)(3) was readopted as rule 4-100(B)(3) and former rule 6-101(A)(2) was readopted as rule 3-110(A). 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.

If respondent's misconduct were a first offense by a practitioner of 17 years, it would ordinarily justify a reproval, especially in light of the extremely impressive array of character evidence found by the hearing judge. However, respondent was previously reproved in 1989. Pursuant to the standards, we therefore recommend that the Supreme Court impose a six-month stayed suspension and that respondent be placed on probation for a period of one year on conditions including trust accounting and law office management provisions.

DISCUSSION

Prejudicial Delay in Prosecution

[1a] Respondent argues that there was prejudicial delay by the State Bar in bringing this proceeding which impaired his ability to defend against the charges because of a fire in 1988 which destroyed many of his files. **[2a]** He contends that this proceeding should have been consolidated in 1987 with an earlier-initiated State Bar proceeding (83-O-11550) which was resolved by stipulation to a public reproval approved by the volunteer review department in 1988.

[2b] The stipulation in 83-O-11550 recited that it was executed in accordance with former rules 405 through 408 of the State Bar Rules of Procedure, but did not refer to the pendency of any other investigation. The investigation which resulted in this proceeding was in fact then pending. Former rule 406 states that proposed stipulations "shall set forth . . . [¶] (vi) the disposition to be made of other pending investigations . . . ." In *Smith* v. *State Bar* (1985) 38 Cal.3d 525 the Supreme Court specifically addressed the effect on the validity of a stipulation of other unmentioned pending investigations. It rejected the petitioner's claim of prejudice because he was aware of the pending investigation at a point when he could have taken steps to withdraw or modify the stipulation. The Court nonetheless stated that "the State Bar is strongly encouraged to inform an attorney that other complaints have been received before the attorney enters into stipulations which he or she might expect will dispose of all pending disciplinary matters." (*Id.* at p. 533, fn. 7.)

[2c] No explanation appears in this record for the State Bar's failure to mention the pending investigation into the Lauritas' complaint in the stipulation disposing of the matters set forth in 83-O-11550. Nonetheless, unlike the situation in *Smith* v. *State Bar*, *supra*, respondent had been notified of the Lauritas' complaint before he entered into the stipulation in 83-O-11550 by letters from the investigator in June and July of 1987 (State Bar exhibits 13 and 15) and again by letter in December of 1987 (State Bar exhibit 16). Thus, no prejudice has been demonstrated from the failure to include the pendency of this action in the stipulation in 83-O-11550. **[1b]** Nor has prejudice been established by the delay of proceedings in this case. The fire did not occur until a year and five months after respondent promised to check his files to respond to the State Bar complaint. If he had attempted to retrieve his files promptly, the files presumably would still have been intact.

The Standard of Review

[3a] The standard of review applied by the Supreme Court and the applicable standard in the Review Department of the State Bar Court is independent review of the record, giving deference to credibility determinations of the hearing judge. In the Supreme Court upon review of a decision recommending disbarment or suspension, "the burden is upon the [attorney] to show wherein the decision or action is erroneous or unlawful." (Bus. & Prof. Code, § 6083 (c).) "In meeting this burden [the attorney] must demonstrate that the charges are not sustained by convincing proof and to a reasonable certainty." (*Lee* v. *State Bar* (1970) 2 Cal.3d 927, 939; see also *Calvert* v. *State Bar* (1991) 54 Cal.3d 765, 781.)

[3b] No similar burden of showing error is placed on the respondent in seeking review before the

review department under Business and Professions Code section 6086.65 (d) or any other authority. "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." (Rule 453, Trans. Rules Proc. of State Bar.) In making our own independent determination whether there is clear and convincing evidence to support culpability of the charges, we must give great weight to findings of the hearing judge resolving issues pertaining to testimony. (*Id.*) In so doing, however, we also take into account the hearing judge's evaluation of the believed witness's general credibility. (Cf. *Lubetzky* v. *State Bar* (1991) 54 Cal.3d 308, 312.)

The examiner relies principally on *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 931 as establishing a more deferential standard on review. There, the Supreme Court repeated the statement it has sometimes included in its opinions in disciplinary cases that the petitioner bears the burden on review before the Supreme Court of showing that the findings were unsupported by substantial evidence. (See also *Harris* v. *State Bar* (1990) 51 Cal.3d 1082, 1087.) But the Supreme Court has never considered this burden on the petitioner to lower the standard of proof required to uphold culpability of the State Bar charges. Thus, the Court in *Van Sloten* cited to *Dixon* v. *State Bar* (1982) 32 Cal.3d 728, which explained that the petitioner's burden in this regard is to demonstrate lack of convincing proof to a reasonable certainty. (*Id.* at p. 736, citing *Himmel* v. *State Bar* (1971) 4 Cal.3d 786, 794.) Like respondent, Van Sloten contended on review that the State Bar's witness displayed a poor recollection and repeatedly contradicted herself. But Van Sloten only pointed to one minor testimonial inconsistency (*Van Sloten*, *supra*, 48 Cal.3d. at p. 930) and the charge of abandoning the client was held supported by Van Sloten's admitted failure either to proceed with the case *or* to withdraw. (*Id.* at p. 931.) However, the Supreme Court, in independently reviewing the record, did accept Van Sloten's claim that his inaction was based on an honest belief that he was not obligated to act and therefore gave little weight to a finding in aggravation made by the volunteer review department and reduced the amount of discipline accordingly from two years stayed suspension to a six-month stayed suspension. (*Id.* at p. 933.)

[4] *Van Sloten* v. *State Bar*, *supra*, thus is an example of a case in which disregarded testimony providing a plausible explanation of the respondent's conduct was considered by the Supreme Court on de novo review as evidence that adverse findings by the original fact finder were not supported by clear and convincing evidence. The Supreme Court also has repeatedly stated that, when it conducts its own independent review of the record, it resolves "all reasonable doubts in favor of the accused and if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." (*Lee* v. *State Bar*, *supra*, 2 Cal.3d at p. 939; see also *Zitny* v. *State Bar* (1966) 64 Cal.2d 787, 790; cf. *Lubetzky* v. *State Bar*, *supra*, 54 Cal.3d at p. 318.) We do the same in conducting our intermediate de novo review of the record.

The Findings Below

The respondent does not challenge most of the evidentiary findings set forth in findings 1-17, 20-22, and 25-33 of the decision below. His primary focus on review is the asserted lack of evidentiary support for certain findings set forth in paragraphs 18 and 19 and the findings set forth in paragraphs 23, 24, 34 and 35 of the hearing judge's decision.

Undisputed Facts

Respondent was a longtime family friend of the Laurita family and was once engaged to one of their five daughters. He performed various legal services over the years for which no bill was sent.[2] Mr. Laurita was always the spokesperson for his family in handling legal matters. Mr. and Mrs. Laurita went through bankruptcy in 1984 and had continuing finan-

2. Respondent testified that he sent one bill to one of the daughters for services not at issue here, but it was never paid.

cial problems thereafter. When the issue of respondent's fees occasionally came up, respondent told Mr. Laurita not to worry about it. Mr. Laurita expected to sit down one day with respondent and make an arrangement to pay for the legal services respondent performed for his family. Mr. Laurita's testimony was in accord with respondent's testimony and the documentary evidence that from December of 1983 to June of 1986, respondent performed nearly 100 hours of work reflecting over $13,000 worth of services for the Lauritas in connection with the modification of a note and deed of trust for the benefit of Dana Laurita, one of their adult daughters (the Kanama matter),[3] consultation regarding Mr. and Mrs. Laurita's bankruptcy and regarding the effect of the Kanamas' bankruptcy on Dana's note, and representation of the Lauritas in an adversary proceeding in their bankruptcy (the Abramovitch complaint).

The Personal Injury Suit

In addition to the above services, respondent was hired in 1984 to handle a personal injury case on a contingent fee for Dana Laurita, who had been in a minor automobile accident in June of 1984. That case settled for $1,800 in July of 1986. Respondent was found by the hearing judge to be entitled to a one-third contingency fee of $600 and reimbursement of $100 in expenses which he received out of the settlement funds.[4] **[5 - see fn. 4]** Mr. Laurita signed Dana's name to the release and settlement check for $1,800 from the insurance company and gave them to respondent. The State Bar stipulated that Dana authorized her father to act on her behalf in dealing with respondent in bringing that case and that all of Mr. Laurita's actions were in fact authorized by Dana. Respondent took the entire $1,800 and placed it in a personal account for his own use.

The Lauritas complained to the State Bar and were advised to file a small claims action. The respondent found a copy of the small claims complaint on his doorstep but never appeared to defend the action, and a judgment for $1,100 was obtained against him in early 1987.[5] The judgment was served by mail on respondent who testified that he met with Mr. Laurita and a new attorney representing Mr. Laurita for three hours in September of 1987 primarily on another matter, but also on this matter.[6] **[6 - see fn. 6]** Respondent further testified that at that meeting he explained to the new attorney that he was authorized by Mr. Laurita to apply the $1,100 to outstanding services. Respondent also offered testimony that Mr. Laurita disclaimed responsibility for the State Bar complaint and shook hands with respondent at the end of the meeting[7] **[7 - see fn. 7]** and that, based on that meeting, respondent believed the State Bar complaint would not be pursued. No collection efforts were thereafter undertaken on the small claims judgment. It remained unpaid until December of 1989 when, after notifying the State Bar prosecutor that he wanted to meet with the Lauritas and inviting the prosecutor to be present, respondent paid

3. The note and deed of trust were intended as partial repayment to Dana Laurita for contributing her earnings as a child actress to her family's living expenses.

4. **[5]** Mr. Laurita testified that respondent was to receive a 40 percent contingency. Respondent testified that it was one-third. The agreement was not in writing as required by Business and Professions Code section 6147, rendering it voidable at the option of the plaintiff in which case respondent would be entitled to a reasonable fee. The time value of his services in the case exceeded the fee earned under either contingency.

5. Respondent testified that he believed the complaint to have been improperly served, that he was out of state at the time of the hearing and that after receiving the judgment he intended to move to set it aside but never got around to doing so.

6. **[6]** The hearing judge made no reference to the testimony regarding this September meeting in her findings. Where the 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.)

7. **[7]** The hearing judge sustained the examiner's objection to respondent's testimony as to statements made by Mr. Laurita at the September meeting. (R.T. 792.) This was error. (*Calvert* v. *State Bar* (1991) 54 Cal.3d 675, 777.) Mr. Laurita was asked about the meeting on cross-examination and said he could not recall it. Evidence Code sections 770 and 1235 permit evidence of a statement made by a witness if he is given an opportunity to explain or deny it. The witness had that opportunity.

the judgment plus $400 in interest to Dana Laurita at a meeting with Dana and Michael Laurita. Afterward, the Lauritas declined to be deposed and sought to have the State Bar complaint dismissed.

Objections to the Client's Testimony

Respondent objected to numerous questions put to Dana Laurita on direct examination by the examiner as calling for hearsay and to others as leading the witness. The hearing judge overruled the hearsay objection to consider the answers for state of mind. (R.T. pp. 46, 69-71, 81, 84.) Respondent took exception to these rulings on the basis that Dana Laurita's state of mind was not relevant to the proceeding. The judge also overruled respondent's objection to leading questions on direct examination, stating that she was giving the examiner leeway because the witness had demonstrated an unclear memory. (R.T. p. 67.) This is also challenged as an abuse of discretion.

[8] While the examiner indicated in his pretrial brief that he might seek to call Dana Laurita under Evidence Code section 776, at trial he never asked the court to declare her a hostile witness and no such finding was made. "The dangers of improper suggestion are obvious, and [leading] questions are normally excluded on direct examination." (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1820, p. 1779.) Evidence of a witness's mental state is also properly excluded if not relevant. (See generally 1 Witkin, *supra*, The Hearsay Rule, § 596, p. 569.) However, as noted in *People* v. *Nealy* (1991) 228 Cal.App.3d 447, 452, evidence properly excludible under a vague "state of mind" argument may in fact be admissible under another, more precise theory. Even assuming arguendo that the judge erred in these rulings, however, no prejudice appears because Dana Laurita's sketchy testimony was clearly insufficient to establish the State Bar's case and was not relied upon by the hearing judge in the challenged findings.

Dana Laurita testified to the accident she experienced in June of 1984 and the oral authorization she gave her father to take care of everything for her. She testified that she knew respondent most of her life and hired respondent to represent her; that she did not remember if she met with respondent on this case, what the fee arrangement was or what it settled for except her father told her at some point that "maybe I was going to get $1,100 back. . . . Something to that effect." (R.T. p. 58.) Exhibit 19 was shown to her—a letter purportedly written by her to complain to the State Bar that she never received her share of the proceeds of the settlement of the personal injury action. It did not refresh her recollection. She testified that it was her father's handwriting and that he had full power of attorney "for all my dealings" as well as "regarding this case." (R.T. pp. 57-58.) This included the ability to act without consulting her. She also testified that the two signatures (witness and releasing party) on the release (State Bar exh. 9) were both her father's handwriting, as was her purported signature on the back of the settlement check. (State Bar exh. 10.)

After getting her father's advice she signed the small claims complaint (State Bar exh. 12) and appeared with her father at the small claims court. He gave evidence;[8] she did not recall if she talked at all and did not remember the result of the small claims action. She received $1,500 from respondent by check in December of 1989 at a meeting at her sister's home, but she did not recall what she said or he said. Her father mostly spoke with respondent. She did not remember whether from June of 1986 through the date of trial she ever instructed her father to tell respondent that he should apply any portion of the settlement proceeds to legal fees her family may have owed to respondent.

The Challenged Findings

The central issue below was whether respondent was authorized by the client's father, Michael Laurita, to take the client's share of the personal injury settlement ($1,100) in satisfaction of the Lauritas' obligation to pay for past legal services. Respondent testified that he had orally agreed with

8. This testimony directly contradicted her father's testimony that Dana Laurita presented all of the evidence at the small claims court and that he just sat in the back as an observer. The hearing judge did not address this conflict in their testimony.

Mr. Laurita on several occasions that when the personal injury action settled respondent could pay himself for his prior services. Mr. Laurita testified that until the trial he had forgotten that he had orally agreed in 1985 to the payment of the Kanama fees out of the contemplated recovery in the personal injury action and had followed that discussion with written authorization. The trial judge disbelieved the testimony of both witnesses on this point because she was unable to square it with circumstantial evidence of their conduct in 1986 and 1987 and other testimony of Mr. Laurita. As indicated above, a key issue is whether the hearing judge found that the written authorization (exhibit F) was fabricated, as urged by the examiner in his post-hearing brief below. The challenged findings and a summary of the evidence with respect to each are set forth below.

Findings 18 and 19

Based solely on excerpts from Michael Laurita's testimony, the hearing judge found as follows: "18. Sometime prior to August 1, 1986, Respondent advised Mr. Laurita that he had settled Dana Laurita's claim. On August 1, 1986, Mr. Laurita met Respondent at the courthouse in Van Nuys and signed his daughter Dana's name to both the release of claims and settlement draft. Mr. Laurita was in a hurry and did not closely examine the documents because he trusted Respondent. Only Respondent and Mr. Laurita were present at the time that these documents were signed. Mr. Laurita believed at the time that the settlement was $2,000 because Respondent had previously advised him that he believed he could settle Dana's claim for approximately that figure. (1 R.T. 171:2-173:5, 174:4-6, 2 R.T. 242:20-243:13, 3 R.T. 414:15-415:3 (Testimony of Michael Laurita).) [¶] 19. Mr. Laurita told Respondent at the courthouse to deduct the fees and expenses that were due to him and to send the rest of the settlement proceeds to Dana. Mr. Laurita understood that Dana's share of the settlement proceeds amounted to $1,100. (2 R.T. 243:15-18, 3 R.T. 443:16-444:11, 446:23-447:9 (Testimony of Michael Laurita).)" (Decision, pp. 13-14, fns. omitted.)

Hearing Judge's Statements Regarding Michael Laurita's Credibility

In crediting Mr. Laurita's version of the events at the courthouse on August 1, 1986, the hearing judge nonetheless stated on the record that Mr. Laurita had serious credibility and memory problems. (R.T. pp. 455, 459.) The record also reflected that Mr. Laurita, who was 71 years old when he testified, had a hearing problem which was diagnosed in 1984 or 1985. (R.T. p. 226.) In summarizing Mr. Laurita's testimony in its entirety after the case was submitted on the issue of culpability, the hearing judge stated: "[I]t appeared to me that Mr. Laurita's character is one of swaying whichever way the wind blows at the moment to absolve himself of any wrongdoing." (R.T. p. 874.)

Indeed, in crediting Mr. Laurita's cited testimony in making findings 18 and 19, the hearing judge had to reject contradictory testimony of the same witness. Mr. Laurita testified elsewhere upon cross-examination that respondent never told him that Dana would receive $1,100 from the settlement. (R.T. p. 379.)[9] That was just an unstated assumption on Mr. Laurita's part. (R.T. pp. 380-381.) The hearing judge made no reference in her decision to this testimony, although she did expressly reject the credibility of Mr. Laurita's testimony on February 2, 1990. On that date, Mr. Laurita testified that he had previously authorized respondent to take fees out of the personal injury recovery to compensate respondent for his handling of the Kanama matter and authenticated a note he had sent to respondent in 1985 (exh. F) confirming that authorization. The hearing judge placed no reliance on this exhibit, but admitted it into evidence. (See discussion *post*.) Mr. Laurita testified that until he was shown his prior written authorization at trial he had forgotten about the prior authorization. On a previous day of trial, he testified that he was

9. As he did with Dana Laurita's testimony, respondent raised a standing objection to the admissibility of testimony of Mr. Laurita's understanding that Dana would get $1,100 and other testimony as to his state of mind. In light of our conclusion that the record, including such challenged testimony, did not support culpability of the charges on which such testimony was admitted, we do not need to determine this issue.

completely satisfied as of the hearing that there had been a misunderstanding and no misappropriation by respondent. (R.T. pp. 220-221, 288.)

Other Evidence with Respect to the Facts Underlying Findings 18 and 19

In making findings 18 and 19, the hearing judge rejected respondent's testimony that he handed the settlement documents to Mr. Laurita at the courthouse and instructed him to get Dana's signature on the release and settlement check and that Mr. Laurita returned several hours later with the signed documents; that respondent was unaware that Mr. Laurita signed his daughter's name to both documents; that Mr. Laurita reaffirmed his prior agreement that respondent could pay himself for other services rendered the family out of the client's share of the recovery; and that respondent promised to send the Lauritas a statement of all services to which the funds would be applied. Respondent testified that he then sent the Lauritas a detailed statement (State Bar exh. 23) and cover letter three days later listing more than $15,000 in services rendered, including the hours spent on the personal injury case. The hearing judge accepted exhibit 23 into evidence, but made no express determination that it was sent as respondent testified. (See decision, p. 19, finding 33.)

The decision below also does not address the import of Mr. Laurita's admission that he signed Dana's name to the release and settlement check. The purported signatures were improper whether he wrote them in a hurry without realizing what the documents were, as he testified, or whether he did so after several hours had lapsed, as respondent testified. Mr. Laurita had no written power of attorney at the time of signing these documents. (See Code Civ. Proc., § 2475.) Although Dana Laurita testified and the State Bar stipulated that Mr. Laurita at all times was authorized by his daughter to act on her behalf, the insurance company sought Dana's signature on both documents and was never notified that Dana Laurita's signature on the release and settlement were actually written by her father. Respondent urged below that Mr. Laurita could have been accused of forgery and therefore had a strong motivation to testify falsely that he signed the documents hurriedly without knowing what they were. Evidence was also introduced by the State Bar that Mr. Laurita had earlier represented to the State Bar and the insurance company that he *never* saw the settlement check which—unbeknownst at the time to both entities—he had in fact executed in his daughter's name.

Even accepting the finding that Mr. Laurita signed the papers in a hurry, his testimony that he did not know what they were is not credible. (Cf. *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 155-156.) Both he and respondent testified, and the hearing judge found, that respondent met Mr. Laurita at the courthouse after respondent had informed Mr. Laurita that he had finally settled the personal injury case. No other reason for meeting on that date was ever offered into evidence except to get the release and settlement check signed. The release handed to Mr. Laurita by respondent stated in bold print right above the signature line that "THE UNDERSIGNED HAS READ THE ABOVE AND FULLY UNDERSTANDS IT TO BE A FULL AND FINAL RELEASE OF ALL CLAIMS." It provided for the signature of the releasing party on the right and of a witness and the witness's address on the left. Mr. Laurita signed his own name on the witness line and wrote his daughter's name on the signature line. (State Bar exh. 9.) The check itself was signed on the back "Dana Laurita." The court accepted Mr. Laurita's testimony that respondent was told by Mr. Laurita at the courthouse to deduct his fees and send the remainder to Dana. This had to be predicated on respondent cashing the settlement check and paying himself his contingent fee and cost reimbursement. The hearing judge made no finding as to whether Mr. Laurita knew what he was signing. We find, under the circumstances, that Mr. Laurita had to be aware that the documents he signed were the release and settlement check.

[9a] Respondent also raises on review the hearing judge's ruling sustaining the examiner's objection to respondent's testimony as to statements made by Mr. Laurita at the courthouse on August 1, 1986, which were offered for impeachment. (Cf. *Calvert* v. *State Bar*, *supra*, 54 Cal.3d at p. 777 [error to refuse to allow impeachment of State Bar witness].) The examiner objected on grounds of hearsay, and on the grounds that Mr. Laurita was not asked about the

particular alleged statements on cross-examination when Mr. Laurita testified about the conversation at the courthouse. (See Evid. Code, § 770.) Respondent asked the court to bring Mr. Laurita back for further questioning which the court had already indicated it would do if necessary when Mr. Laurita was excused. (R.T. p. 524.) The court declined to permit respondent to testify to the alleged statements or to recall Mr. Laurita.

[10] Although these proceedings are unique—not criminal, civil or administrative (*Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300)—respondent is entitled to the same guarantee of a fair hearing. (*Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, 633-634.) "One of the elements of a fair trial is the right to offer relevant and competent evidence on a material issue. . . . [D]enial of this fundamental right is almost always considered reversible error." (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1681, p. 1642.) **[9b]** The impeachment testimony offered by respondent was on a crucial issue in the case and the witness he sought to impeach—Mr. Laurita—had not been completely excused from giving any further testimony in the action. The Law Revision Commission comment to Evidence Code section 770 states in pertinent part that "unless the interests of justice otherwise require, Section 770 permits the judge to exclude evidence of an inconsistent statement only if the witness . . . has been unconditionally excused and is not subject to being recalled as a witness." (See Cal. Law Revision Com. com., West's Ann. Evid. Code, § 770, p. 123.) On the other hand, the interests of justice exception was arguably met. The culpability phase of the hearing had already lasted far longer than had been anticipated which the hearing judge attributed in large part to unnecessary prolongation of the proceedings by respondent and respondent provided no explanation for his failure to cross-examine Mr. Laurita regarding these particular alleged inconsistent statements.

In any event, even on the record as it stands without the excluded testimony, we find no clear and convincing evidence that Mr. Laurita instructed respondent to send the balance of the settlement proceeds to Dana, since Mr. Laurita himself testified to the contrary at a later point in his testimony. When he was asked subsequently while still on direct examination whether he told respondent how he should disburse the settlement proceeds in Dana's case Mr. Laurita testified: "No. I didn't tell him how. I told him to disburse—to take care of all—." (R.T. p. 314.) This different version of the conversation given by Mr. Laurita on the second day of the hearing was not addressed by the hearing judge in her decision.

Evidence Code section 780 sets forth the general rules for establishing the credibility of a witness, including the following: "(c) The extent of his capacity to perceive, to recollect or to communicate any matter to which he testifies. . . . [¶] (f) The existence or non-existence of a bias, interest or other motive. . . . [¶] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. [¶] (i) The existence or non-existence of any fact testified by him."

[11] Even on a cold record, Michael Laurita cannot be considered a convincing witness under these criteria. (Cf. *Lubetzky* v. *State Bar*, *supra*, 54 Cal.3d at p. 322.) In *Lubetzky*, the hearing panel itself noted that the testimony of the State Bar's chief witness was substantially "impeached and discredited." (*Ibid.*) Here, too, the trial judge noted that Mr. Laurita, the State Bar's chief witness, exhibited a poor memory and repeatedly testified inconsistently on key issues. He admittedly signed his daughter's name to legal documents and letters without disclosing his role as agent, thereby misrepresenting material facts to the insurance company and the State Bar. Moreover, almost all of the "facts" he asserted in his letters to the State Bar were proved untrue at the hearing or contradicted by his own testimony at the hearing. He also admitted to being motivated by great anger and severe emotional and economic stress at the time he accused respondent of stealing his daughter's money. We are simply unpersuaded that those parts of findings 18 and 19 which are based solely on selected portions of Mr. Laurita's inconsistent testimony are supported by clear and convincing evidence in light of the record as a whole. (See *Zitny* v. *State Bar*, *supra*, 64 Cal.2d at p. 790; *Davidson* v. *State Bar*, *supra*, 17 Cal.3d at p. 574; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 725-726; *Lubetzky* v. *State Bar*, *supra*, 54 Cal.3d at p. 324.)

Findings 23 and 24

Based on other portions of trial testimony of Michael Laurita and his unsworn letters to the State Bar (State Bar exhibits 19 and 20), the hearing judge found as follows: "23. When Dana's share of the proceeds from the settlement had not arrived within a couple of weeks, Mr. Laurita telephoned Respondent and asked him about the money. Respondent told Mr. Laurita that he had mailed Dana a check but that it must have been lost in the mail. Respondent promised to cancel the check at the bank and send a second check to Dana, but he didn't do so. (1 R.T. 178:16-179:3, 2 R.T. 231:23-232:14, 234:5-13, 303:19-305:5 (Testimony of Michael Laurita); State Bar Exhibit 20.) [¶] 24. Mr. Laurita had only one or two conversations with Respondent after August 1, 1986 regarding Respondent's failure to transmit Dana's share of the settlement proceeds. Each of these conversations occurred shortly after the case was settled. Thereafter, the communications ceased. (2 R.T. 226:23-228:10, 3 R.T. 522:3-22 (Testimony of Michael Laurita); State Bar Exhibit 19.)" (Decision, pp. 14-15, fn. omitted.)

State Bar Exhibits 19 and 20

State Bar exhibit 19, the handwritten letter addressed to the State Bar dated March 19, 1987, purportedly written by Dana Laurita, was objected to by respondent as hearsay but he later withdrew his objection to the document's admissibility for purposes of impeachment or any other purpose. The letter asserted that respondent settled Dana Laurita's personal injury action for a proposed sum of $1,800 on July 24, 1986, and further stated in pertinent part: "He said his fee was 40% plus $100 for expenses and the balance of $1100 would be due me. I never saw the check and to this day have never received the $1100. My dad questioned him around August of '86 and Cacioppo said he mailed a certified check but it was lost in the mail. He claimed he would have to go to the bank and reissue another check. That was the last correspondence we had with Richard Cacioppo. [signed] Dana Laurita."

[12a] No deference is due the hearing judge's reliance on this letter since it was not testimony but documentary evidence. (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90.) We conclude that it is highly unreliable evidence. First of all, it is internally inconsistent. If respondent's fee was 40 percent of $1,800 then he would have been entitled to $720 in fees plus $100 for expenses, leaving a balance due the client of $980, not $1,100. Dana Laurita's memory was not refreshed by exhibit 19 and she had no recollection of the facts it recited. The hearing judge found that the contingency was 33 1/3 percent as testified to by respondent, not 40 percent as set forth in the letter; that Mr. Laurita wrote exhibit 19 and that, contrary to the statement in the letter, its author had in fact signed the check which was presented to him at the courthouse.

The examiner conceded at oral argument that, as an unsworn statement, the letter would have been inadmissible hearsay if it had not been authenticated at trial. It was not written at the time of the events, was self-serving, was not under oath and purported to be written by someone other than its author. The document recited as facts certain information, discussed above, which was contrary to findings made at the hearing. Moreover, its author, Mr. Laurita, when placed under oath, testified inconsistently as to all of the key allegations against respondent set forth in the document except the admitted fact that the $1,100 was not received by Dana Laurita. Exhibit 19 was properly admitted for impeachment of its author (Evid. Code, § 1235) but did not provide clear and convincing proof to the contrary of his testimony and that of respondent.

[12b] Nor is any deference due the hearing judge's reliance on exhibit 20. Exhibit 20 was written July 4, 1987, in Mr. Laurita's own name. It is a four-page handwritten letter which, like exhibit 19, would have been inadmissible hearsay had not its author testified at trial, making it admissible for impeachment of his testimony. The examiner took Mr. Laurita through the letter line by line and Mr. Laurita retracted almost every accusatory statement in the letter, claiming that he believed it to be true at the time, but had since realized that it was not. In fact, he admitted that he knew one accusation to be false at the time he wrote the letter. One of the main concerns voiced in the letter was regarding a commission Mr. Laurita claimed for sale of a house in probate which respondent, as attorney for the estate, had arranged

for Mr. Laurita to occupy and offer for sale. Mr. Laurita stated in the letter to the State Bar that his commission amounted to a minimum of $2,000 and concluded "Richard Cacioppo owes me! I or my daughter Dana owe him nothing!!!" (State Bar exh. 20.) Respondent testified that respondent had deliberately steered clear of the dispute between Mr. Laurita and the administratrix of the estate. At trial, Mr. Laurita admitted that he "*always* knew" that respondent was not responsible for the money he claimed from the estate. (R.T. p. 377, emphasis added; see also *id.*, pp. 376-377.)

In finding 24, the hearing judge found that Mr. Laurita had only one or two conversations with respondent shortly after the settlement. Yet in finding 23, she relied on exhibit 20 which in part stated that: "After a week or so, when the check had not arrived, I contacted Richard and advised him that I had not received the check for Dana. He claimed it must have been lost in the mail and that he would go to the bank to cancel that check and re-issue another. *For the next three months we corresponded by mail, we talked in person and by telephone. The excuse was always the same, he couldn't get to the bank. Since then there has been no contact.*" (Exh. 20, emphasis added.) In finding 24, the hearing judge thus rejected the truth of these statements of Mr. Laurita in exhibit 20 describing numerous conversations she found never took place and correspondence which did not exist.

Other Evidence Pertaining to the Facts Underlying Findings 23 and 24

In contrast to the testimony of Mr. Laurita cited in finding 23 that respondent had promised him a check for Dana, Mr. Laurita changed his testimony at a later point on direct examination stating: "I can't remember this very clearly, but he said to the effect [sic] that he was sending *something* in the mail to me." (R.T. p. 232, emphasis added.) This was not inconsistent with respondent's testimony that he had promised to send and did immediately prepare and send an invoice for the legal services to which the $1,100 was applied. (State Bar exh. 23.) Later on cross-examination, Mr. Laurita testified that he had no independent recollection of respondent ever telling him that he had mailed him a check for Dana and it was lost in the mail. (R.T. p. 422.) The Lauritas also testified that they had just moved from the address to which the invoice and cover letter were addressed, had not told respondent of their move and did not receive the invoice. Mr. Laurita testified that he and his daughter lost a good deal of mail during this period. The hearing judge admitted the invoice into evidence, but made no finding as to whether it was in fact sent.

[12c] We cannot conclude that findings 23 and 24, which rely solely on selected testimony of Mr. Laurita and his prior hearsay statements to the State Bar, are supported by clear and convincing evidence in the record as a whole, given the lack of trustworthiness of the "facts" set forth in the hearsay statement and the repeated contradictory testimony from the same witness.

Findings 34 and 35

The hearing judge concluded her findings as follows: "34. The Court finds that there is conflicting testimonial and documentary evidence regarding whether Respondent had authority from the Lauritas to apply the proceeds from Dana's settlement to Respondent's attorney fees in other matters. The Court resolves these conflicts in the testimony by finding that neither Respondent's nor Mr. Laurita's February 2, 1990 testimony regarding such authorization were credible and that, in fact, Respondent had not been authorized by either Michael or Dana Laurita to apply Dana's share of the proceeds to any attorney fees that may have been owed to Respondent by the Lauritas in other matters. [¶] 35. Respondent misappropriated Dana Laurita's share of the settlement proceeds from the action entitled *Laurita* v. *Doheny*, L.A. Super. Ct. Case No. NWC 09260, in the amount of $1,100." (Decision, pp. 19-20.)

In making findings 34 and 35, the hearing judge cited no evidence on which she affirmatively relied in finding misappropriation and appeared to place the burden on respondent to prove his authority to apply the funds to other legal services he had rendered the Lauritas rather than on the State Bar to prove lack of such authority. She also did not address testimony of authorization on other dates besides February 2 on which both witnesses gave testimony. There were

seven days of proceedings in the culpability phase of the hearings—January 17, January 18, February 2, March 1, March 22, April 16 and May 8, 1990. On the second day of the hearing—January 18—Mr. Laurita testified that there was a misunderstanding and he believed that no misappropriation had occurred. Respondent described the authority he received not only on February 2, but also in his testimony on subsequent days.

[13] Assuming the hearing judge disbelieved all of the testimony of Mr. Laurita and of respondent on this issue, the hearing judge was left with no witnesses who testified to the facts on which she found culpability. Even if their testimony was 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.) **[14]** Assuming the hearing judge believed selected parts of inconsistent testimony of Mr. Laurita, it was still the State Bar's burden to prove culpability by clear and convincing evidence. Where the respondent's version is plausible, even when controverted, it supports a reasonable inference of lack of misconduct. (*Davidson* v. *State Bar*, *supra*, 17 Cal.3d at pp. 573-574.) It is not implausible that respondent was authorized to take $1,100 in satisfaction of over $13,000 in previously rendered legal services, particularly in light of exhibit F which the hearing judge admitted into evidence after it was authenticated by its author.

Exhibit F

On cross-examination on February 2, 1990, Mr. Laurita was shown respondent's exhibit F, a copy of a note dated June 6, 1985. Exhibit F reads as follows: "June 6, 1985, Rich: Please file Dana's complaint and take out of the settlement anything we owe you for the work you did for us on the Kanama matter. I'll try to get you the filing fee soon. [signed] Mickey Laurita." The examiner originally objected to the document under the best evidence rule (R.T. p. 449), but withdrew any objection and let respondent lay a foundation for the document. (R.T. pp. 461-462.) Mr. Laurita testified that he had not seen the document since June of 1985, but that he had typed and signed it and delivered it to respondent's office after writing respondent's name on it. (R.T. pp. 452, 463-469.) He also testified that the note refreshed his recollection of the conversation he had with respondent on August 1, 1986, and that they had discussed that respondent had authority to take monies due him out of the personal injury recovery. (R.T. pp. 464-465.)

[15a] Documents must be authenticated before they can be introduced into evidence. (Evid. Code, § 1401, subd. (a); see 2 Witkin, Cal. Evidence (3d ed. 1986) Documentary Evidence, § 903, p. 869, and cases cited therein.) Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law. (Evid. Code, § 1400.) By admitting exhibit F into evidence, the hearing judge initially had concluded that there was sufficient evidence that it was what it was claimed to be.

On the last day of the culpability phase of the hearing, the examiner indicated that he was going to argue that exhibit F was fabricated by respondent for the State Bar proceedings. (R.T. p. 865.) In response, the judge stated that the wording of exhibit F was more suggestive of the way Michael Laurita did business than suggestive of a fabrication; she expressed doubt as to whether there was clear and convincing evidence of culpability of misappropriation and tentatively concluded that "the only way" that "all of the evidence can be harmonized and made plausible" was to assume that Mr. Laurita did authorize respondent to take the money but that it was done without sufficient information and in derogation of the rights of the true client—Dana Laurita. (R.T. pp. 875-880.) The hearing judge asked both parties to address this hypothesis in post-hearing briefs, noting that under this scenario, a breach of fiduciary duty may have occurred, but that "it's probably not a misappropriation; it's something else." (R.T. p. 884.) She also indicated that until the briefs were received she had not decided the case and was not wedded to this view of the evidence. (R.T. p. 880.)

The examiner urges on review that the hearing judge impliedly found in her decision filed in August of 1991 that exhibit F was fabricated. There is language in her decision suggestive of grave misgivings about exhibit F. At pages 33-35, she states that "the Court

finds it inconceivable that Respondent simply 'forgot' about the existence of such a crucial piece of evidence and is suspicious of Respondent's explanation that he happened to find it in the file of a largely unrelated probate case." But this suspicion falls short of a determination that the document was in fact fabricated which depended not only on disbelief of respondent's and Mr. Laurita's testimony but of a belated conspiracy between them to commit perjury and defraud the court with false evidence. Indeed, although the hearing judge also characterized exhibit 23 as "suspicious," the examiner does not argue that it was fabricated. Fabrication of evidence is a very serious charge. (See *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 243.) There, disbarment was recommended by the former volunteer review department for misappropriation, coupled with perjury and attempt to manufacture evidence. Three years actual suspension was ordered in lieu of disbarment only because of a 20-year blemish-free prior record and a determination that the conduct was aberrational.

[15b] By allowing exhibit F to be admitted as an authenticated exhibit in the record and not offering affirmative evidence of fabrication, the examiner provides us with no basis to find that the document was in fact fabricated. **[16a]** Thus, even taking into account the hearing judge's misgivings about exhibit F, we have to independently weigh exhibit F and exhibit 23 and exhibits 19 and 20 all of which constitute conflicting documentary evidence.

[16b] Given the judge's statement as to the unreliability and inconsistency of Mr. Laurita's testimony, and the record taken as a whole, we cannot independently conclude that there is clear and convincing evidence in the record to support findings 23, 24, 34 and 35. Indeed, as noted above, the hearing judge, when she was closest to the facts, voiced the same tentative assessment of the evidence as we conclude here. While we do not attempt to resolve the evidentiary conflicts in the record at this stage of the proceedings, we find that the State Bar simply was unable to meet its burden by clear and convincing evidence to a reasonable certainty. (*Calvert* v. *State Bar*, *supra*, 54 Cal.3d 765, 781; *Zitny* v. *State Bar*, *supra*, 64 Cal.2d at p. 790.)

Alleged Violation of Section 6106

In light of the absence of clear and convincing evidence that respondent was not authorized in taking the $1,100 or that he lied to Mr. Laurita about sending a check to Dana, no violation of Business and Professions Code section 6106 was proved.

Alleged Violation of Rule 8-101(A)

Since there is no clear and convincing evidence to support findings 18, 19, 23, 24, 34 and 35, there is likewise no basis for concluding that respondent was ever obligated to put the funds in a trust account, since if he was authorized to apply the money to payment for his past services, it was proper for him to deposit the funds directly into his own family bank account.

Alleged Violation of Rule 8-101(B)(3)

The hearing judge never found that the invoice (exhibit 23) was not sent, she just concluded that it was "suspicious." She based her finding of a rule 8-101(B)(3) violation on her conclusion that "Respondent had an affirmative duty to appropriately account to his clients for the work that he had performed and for his handling and disposition of the settlement funds. Respondent failed to render such accounting . . . ." (Decision, pp. 27-28.)

[17a] As noted above, the State Bar does not assert on review that the invoice was fabricated after the fact as it asserts with respect to exhibit F. Rather, the examiner argues that the invoice was an improper accounting because it included time spent on the contingency fee matter. The invoice stated the exact amount of billed time spent on each matter listed, the description of what services were rendered, and respondent's hourly rate. The time spent on the contingency case was separately listed under its own case heading. It clearly should not have been included on the same invoice because it was covered by a separate contingent fee agreement. While it did not render the accounting for other services incomplete, it could have caused client confusion.

[17b] Of greater concern than the content of the accounting is its timing. Respondent testified that as a sole practitioner his billing practices were more informal than those of most lawyers, and that because

the Lauritas were family friends, he was even more casual in handling this billing. This entire proceeding might have been avoided if respondent had followed a more orthodox billing procedure to ensure informed consent of the client to the application of her recovery to his fees. Respondent had never sent any prior bill to the Lauritas for these services and had performed only some of them for Dana Laurita and others exclusively for her parents. Although respondent was only seeking payment for a small percentage of the time value of his services, he still should have given the client and her father, as her representative, an opportunity to review the bill *before* he received authorization to pay himself out of Dana Laurita's recovery, not *after*. We agree with the hearing judge that respondent did not render an appropriate accounting to the client and therefore violated rule 8-101(B)(3). However, in light of the fact that more than $1,100 in services were admittedly performed for Dana Laurita's benefit, and since she later received all of the money back through the small claims action, no significant harm resulted to the client.

Alleged Violation of Rule 8-101(B)(4)

The premise of the alleged violation of rule 8-101(B)(4) is the delay in payment to Dana Laurita. However, since there was insufficient evidence that respondent was unauthorized in taking the $1,100 for fees he had earned, there is insufficient proof he acted improperly in putting the money to his own use.

Alleged Violation of Rule 6-101(A)(2)

The hearing judge found this violation on the basis of lack of adequate communication. As discussed above, she credited Mr. Laurita's testimony that he contacted respondent within a couple of weeks after August 1, 1986, to ascertain why he had not received Dana's share of the proceeds. This was disputed by respondent, but it was undisputed that Mr. Laurita paid repeated visits to respondent's home in the fall of 1986, knocking loudly on the door late at night. Respondent testified that he thought Mr. Laurita's visits were for the purpose of blaming respondent for the administratrix's failure to pay Mr. Laurita for his services in repairing the house in probate which Mr. Laurita had rented and for the administratrix's alleged breach of an exclusive real estate brokerage agreement. Respondent admitted at the hearing that he sought to avoid any contact with Mr. Laurita on that dispute and that he did not thereafter have any contact with the Lauritas until the fall of 1987, after the State Bar investigation had commenced.

Even though the personal injury case had settled, respondent had a duty to communicate in response to any client concerns regarding the settlement distribution and belated accounting. Since he had never sent a billing in three years he should have expected that he might have to discuss the accounting with Mr. Laurita and should not have avoided him. Nevertheless, as of the fall of 1986, Dana Laurita had not communicated any concern to respondent regarding the application of the fees and Mr. Laurita's actions at that time might have been subject to misinterpretation. However, by January of 1987, respondent had no basis for attributing Mr. Laurita's unhappiness solely to an unrelated claim against the administratrix. Respondent admittedly received the Lauritas' small claims action in January 1987 alleging that Dana was entitled to the $1,100 that he took from the personal injury settlement. Sometime during this period he also received a telephone call from the insurance agent reporting that the Lauritas had called him complaining they had not received the insurance check.

[18] Even if respondent justifiably relied on Mr. Laurita acting on Dana's behalf prior to January of 1987, when he received the small claims complaint and telephone call he was clearly put on notice that Dana apparently did not know about the use to which the settlement proceeds had been put. Thus, even crediting respondent's version of events, respondent at that point had substantial reason to believe that Mr. Laurita's earlier acts might not have been authorized by his daughter. Respondent's duty to Dana Laurita as his client included a duty to communicate with her to ensure that her father had in fact been authorized to discharge the family's indebtedness for respondent's other fees out of the personal injury recovery. His failure to communicate supports the hearing judge's determination of a rule 6-101(A)(2) violation. (*Lister* v. *State Bar* (1990) 51 Cal.3d 1117, 1124-1126; *Layton* v. *State Bar* (1990) 50 Cal.3d 889, 904; *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1149-1150.)

Alleged Violation of Rule 5-101

After the close of the culpability hearing the examiner moved to amend the notice to show cause to allege violation of rule 5-101 on the theory that if the court concluded that exhibit F was authentic, it evidenced an agreement between Michael Laurita and respondent whereby respondent obtained a pecuniary interest in the personal injury settlement adverse to Dana Laurita without her informed written consent. This amendment was predicated on colloquy between counsel and the judge during trial. Respondent answered, denying any violation of rule 5-101 and alleging, among other things, that the indebtedness to him was a joint obligation of both Lauritas, that Dana Laurita authorized Michael Laurita to represent her interests in these matters and that respondent reasonably believed all of Michael Laurita's actions were with the consent and knowledge of Dana Laurita. The hearing judge permitted the amendment, but in her decision, she found respondent not culpable of violating rule 5-101 because she found no authorization from Michael or Dana Laurita to apply the client's share of the settlement funds to any past legal fees. (Decision, pp. 21-22.) Since we find that there was evidence of authorization, we must revisit this issue.

Respondent testified that he considered both Dana and her parents to be the clients in the Kanama matter for which he had completed more than $1,100 in services. Dana was admittedly the beneficiary of his efforts. The State Bar never established that she was not a joint client with her parents in the modification of the Kanama note for her benefit. Nor did it establish that she did not authorize the use of her settlement proceeds to pay fees her family owed respondent. She testified that she could not recall whether or not she had done so.

[19] Although we conclude that the testimony and writing evidencing prior oral and written authorization by Mr. Laurita were plausible, they do not amount to clear and convincing evidence of a rule 5-101 violation. First of all, no fixed amount of fees for past services was agreed upon in advance of the actual settlement. The State Bar does not contend that a lien was created, but merely a pecuniary interest. However, it has pointed to no case law construing "pecuniary interest" in rule 5-101 to include a situation like the one here. All that was introduced in this record was evidence of unenforceable promises of future payment of an unquantified sum by the client's agent which the agent repeated in writing. Indeed, even if we assumed arguendo that exhibit F was evidence of a pecuniary interest in the personal injury recovery, the State Bar had the burden of proving by clear and convincing evidence that respondent "knowingly acquired" a pecuniary interest adverse to his client in violation of rule 5-101. Respondent did not make any use of exhibit F and instead, according to his testimony, specifically sought authorization for his application of $1,100 of the settlement proceeds to past fees at the time of distribution in 1986. On this record, the State Bar did not establish a rule 5-101 violation. (Cf. *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 452.) We therefore affirm the dismissal of the charged violation of rule 5-101.

Mitigation and Aggravation

The finding in mitigation as to respondent's excellent reputation and good character was well supported by testimony and letters from numerous persons of high standing in the community. These included a priest, a state senator, and a number of California trial and appellate judges who were aware of the charges and the culpability determination made by the court but considered them completely out of character. All attested to his selfless devotion to community service and reputation for high moral character in his practice and in social settings. The judges who had observed him in court also had high praise for his courtroom conduct. Among other activities in his career since admission in 1973, respondent co-founded the National Italian American Bar Association and was its first president. He estimated that 30 to 40 percent of his time in the mid-1980's was devoted to community service.

In aggravation, respondent had a prior public reproval imposed by stipulation on January 10, 1989, for failure to perform services in one matter in 1984 and for practicing law while suspended for nonpayment of dues during part of 1984. In mitigation at that time it was found that he was in severe economic straits and also under great emotional stress from the death of his father.

[20] There is no clear and convincing evidence in the record to support the findings in aggravation under standards 1.2(b)(ii) and 1.2(b)(iii). (Decision, pp. 30-31.) It is the State Bar's burden to prove aggravating factors as well as culpability by clear and convincing evidence to a reasonable certainty. (See, e.g., *Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at p. 933.) The hearing judge thus could not predicate a finding in aggravation of bad faith based on selected portions of Mr. Laurita's unreliable letters (exhs. 19 and 20) or inconsistent testimony or on grave doubts about the authenticity of exhibits F and 23. **[21a]** Nor is there a basis for a finding in aggravation under standard 1.2(b)(iv) for delay in restitution to Dana Laurita. The small claims judgment did not operate as res judicata on this issue. (See *Sanderson* v. *Niemann* (1941) 17 Cal.2d 563; see generally 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 202, p. 639.) While respondent ultimately paid the small claims judgment because it was never contested or set aside, Dana Laurita testified that she could not remember whether she authorized her father to pay respondent out of her recovery and that, in any event, all of her father's actions were within his authority, and Mr. Laurita testified that he did authorize respondent to pay himself. While his testimony was disbelieved, there was no clear and convincing evidence to meet the State Bar's burden in aggravation.

[21b] Nor was there clear and convincing evidence in support of the standard 1.2(b)(v) finding in aggravation of indifference toward rectification. Since the clients never disputed respondent's right to be compensated for the services he had rendered them and the State Bar never proved he was not authorized to apply the $1,100 to such services, there was no proof that respondent was indifferent toward rectification. Indeed, the clients admittedly benefitted from their receipt of substantial services for which they never paid. As in *Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at p. 933, we have no reason to find respondent did not have a good faith belief that his inaction was justified.

[22a] We also cannot adopt the hearing judge's finding in aggravation based on lack of candor under standard 1.2(b)(vi). She reached this determination based on the same resolution of "crucial issues of credibility" which she had initially resolved at the culpability phase in the respondent's favor. The decision states that the turnabout is predicated on the fact that "it is impossible to harmonize both Respondent's version of the event and the testimony and documentary evidence presented by the State Bar." (Decision, p. 32.) Nonetheless, at trial, she concluded that the most plausible explanation of all of the contradictory evidence in the culpability phase was that Mr. Laurita never told his daughter he had authorized respondent to pay other bills out of the recovery and lied about respondent misappropriating the funds to save face.

[22b] In contrast to Mr. Laurita's repeated self-contradictions, respondent's testimony was not implausible. He admitted that he was remiss for failing to appear to contest the small claims proceeding, and that he originally planned to appear despite improper service, and to cross-complain for fraud, but that he was out of state presiding over a national lawyers' meeting on the date of the hearing. He further testified that he thought he could still move to set aside any judgment for improper service, but soon thereafter became aware of the complaint to the State Bar. He did not know whether he would be faulted for suing impecunious clients who were apparently misrepresenting what occurred. He had never sued a client before and he was hesitant that any action he brought might be misconstrued. (R.T. pp. 839-841.)

[22c] His regrettable inaction in response to the small claims proceeding resulted in a judgment which he paid. However, it does not amount to clear and convincing evidence that he was not candid in his dealings with the clients or the State Bar. His letter to the State Bar investigator (exhibit 14) did not show lack of candor. The letter was expressly an attempt to respond from memory and referred to payment he believed was authorized by the client for past bankruptcy services. This was not inconsistent with exhibit 23 which included both the Kanama matter and the bankruptcy services. Nor is it implausible that, by the time this proceeding was brought in 1989, respondent forgot about the 1985 note from Mr. Laurita (exhibit F) since he testified that their basic agreement was oral and had been reiterated numerous times culminating in their meeting at the courthouse in August of

1986. The fact that authorization for payment was on one occasion confirmed in writing does not negate oral authorization. Indeed, Mr. Laurita himself testified that he forgot about exhibit F but, when it was shown to him at the hearing, it refreshed his recollection of repeated conversations on the subject.

It is Mr. Laurita's inconsistent acts and testimony that are not reconcilable no matter how respondent's actions are viewed. Nothing can adequately explain Mr. Laurita's conduct and testimony even on matters which clearly did not involve respondent, such as who testified at the small claims hearing. **[23]** Proof by clear and convincing evidence to a reasonable certainty means that irreconcilable conflicts in the testimony of the chief State Bar witness by their very nature severely undermine the State Bar's case. (Cf. *Lubetzky* v. *State Bar*, *supra*, 54 Cal.3d at p. 322.) Absent strong circumstantial evidence of culpability, the State Bar cannot be considered to have met its burden. It clearly did not do so here.

[24] Nevertheless, we do find lack of full cooperation with the State Bar as a finding in aggravation under standard 1.2(b)(vi). Respondent answered one of the State Bar's letters but ignored two other letters completely before answering the fourth.[10] In defending himself in this proceeding, respondent belatedly appears to have learned to take State Bar investigations seriously, to check his records and to respond timely to charges instead of letting the matter get stale and hoping that it would not require his attention. This prolonged, contested proceeding might have been avoided if respondent had been diligent in responding to the original State Bar inquiry.

[25] Although it is not a factor in aggravation, we also note that respondent's trial tactics obviously undermined his credibility with the hearing judge. By designating all of his trial exhibits for impeachment and not sharing them in advance with opposing counsel, he might have been precluded from offering those which contradicted his pretrial statement had the examiner objected. (See generally 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 55, p. 63.) He also unnecessarily prolonged the hearing and made the judge suspicious of his exhibits because of his tactics of surprise confrontation of the State Bar's chief witness.

We note that respondent also raises on review a request that we order further proceedings to investigate alleged prosecutorial and judicial misconduct. The declaration filed by respondent on these two issues is controverted by the examiner. No motion for disqualification of the hearing judge was ever made. We also note that the hearing judge made very favorable findings in mitigation which clearly did not demonstrate bias. In any event, since respondent's allegations have no bearing on the outcome of this proceeding, we see no basis to order further proceedings herein with respect to these claims.

RECOMMENDED DISCIPLINE

In light of the major modifications we have made to the culpability findings, we must also revisit the discipline recommendation.

The heart of this case is a dispute over authorization to pay fees out of a recovery. In *Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d 1092, two attorneys were found to have interpreted an ambiguous statement by their clients as authorization to pay themselves out of the clients' ultimate recovery. After they paid themselves over $5,000 in fees, the clients objected and the attorneys initially promised to return the money but then refused to make restitution of the money for the entire pendency of the State Bar proceeding, claiming the clients reneged on their promise of payment. The hearing panel found a violation of rule 8-101(A) based on acceptance of the

10. As indicated above, respondent testified that two months after the State Bar's second letter he met with Mr. Laurita and an attorney acting on the Lauritas' behalf in September of 1987 regarding both the claim against the estate for a real estate commission and the $1,100 claimed misappropriation. His erroneous belief that the matter would be dropped as a result of the September 1987 meeting does not excuse respondent's failure to respond to the State Bar's letter in December 1987.

clients' testimony that they had not in fact given permission for the attorneys to pay themselves, but the panel also found that the lawyers honestly believed that they did have such permission. The Supreme Court decided that the appropriate sanction was a public reproval for violation of rule 8-101(A), which included an order for restitution plus interest.

Here, in contrast to *Dudugjian* v. *State Bar*, there is insufficient evidence of lack of authorization for payment for services which nonetheless were ultimately uncompensated. However, there are other minor rule violations.

In *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, we considered a similar case in which the State Bar also alleged misappropriation, but the referee found the respondent culpable only of violating rule 8-101(B)(1) for failure to notify the client of receipt of a partial settlement and recommended a public reproval. We concluded that the attorney had also violated rule 8-101(B)(3) and increased the discipline to two months stayed suspension and one year of probation including periodic auditing of respondent's trust account. Here, as in *Lazarus*, respondent improperly accounted to the client for client settlement funds. However, respondent's violation of rule 8-101(B)(3) appears unintentional, unlike in *Lazarus*, and he had far more favorable evidence in mitigation.

Lewis v. *State Bar* (1981) 28 Cal.3d 683 is also instructive. There, a lawyer was found to have violated rules 5-101, 6-101 and 8-101(B)(3) in handling the administration of an estate. He received a 30-day stayed suspension and one year of probation because the court found that his misconduct was the result of negligence and not motivated by bad faith or greed. Here, we found no rule 5-101 violation but we did find violations of rules 6-101 and 8-101(B)(3). Respondent's negligent conduct is less egregious than that of Lewis and his mitigation is far greater. Moreover, the client did not suffer harm but instead received substantial benefit from services for which no fee was paid.

[26a] Ordinarily, a reproval would likely be in order. Nonetheless, respondent has a prior public reproval which reflected a period of inattention in 1984 to proper management of cases, albeit when under great emotional stress from the death of his father. Respondent's prior public reproval indicates that greater discipline is appropriate here under standard 1.7(a). Respondent also testified to a long period in which he kept files in several locations which made it difficult for him to retrieve relevant records in response to the State Bar investigation. He indicated that prior to trial he had started to review all of his files and reorganize his practice. Such reorganization appears essential to avoid future problems.

[26b] Considering all of the factors in the record in light of relevant case law, we recommend six months stayed suspension on the probation conditions set forth below including trust accounting and completion of a law office management course. **[27]** We decline to recommend that respondent take the California Professional Responsibility Examination since he took and passed the Professional Responsibility Examination recently in compliance with the terms of his public reproval. We adopt the recommendation of the hearing judge that the State Bar be awarded costs pursuant to Business and Professions Code section 6086.10.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for six 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 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 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. 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. 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 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;

7. That respondent provide satisfactory evidence of completion of a course on law office management which meets with the approval of his probation monitor within six months from the date on which the order of the Supreme Court in this matter becomes effective.

8. 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 six months shall be satisfied and the suspension shall be terminated.

AWARD OF COSTS

It is 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:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KENNETH E. HAGEN

A Member of the State Bar

No. 84-O-15530

Filed July 30, 1992; reconsideration denied, September 24, 1992; as modified, November 5, 1992

SUMMARY

Based on a six-count notice to show cause, the hearing judge found that respondent misappropriated client funds in two matters, failed to return client funds after demand in four matters, was grossly negligent in issuing insufficiently funded checks to clients in four matters, and entered into improper business transactions with clients in two matters. Finding few mitigating factors and several aggravating factors, including a prior public reproval, the hearing judge recommended that respondent be suspended from the practice of law for four years, that the execution of the suspension be stayed, and that he be placed on probation for a period of four years on conditions including an actual suspension of eighteen months. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, contending that the actual suspension recommended by the hearing judge should be reduced to not more than 90 days because the misconduct occurred under strong mitigating circumstances and was the result of gross negligence as opposed to intentional wrongdoing. The review department concluded, among other things, that respondent was culpable of fewer acts of intentional dishonesty and his misconduct was surrounded by fewer aggravating and more mitigating circumstances than the hearing judge found. Based on its findings and conclusions, the review department recommended that respondent be suspended from the practice of law for a period of three years, stayed, that he be placed on probation for a period of three years, and that he be actually suspended for one year and until he makes restitution.

COUNSEL FOR PARTIES

For Office of Trials: Victoria Molloy

For Respondent: Ellen A. Pansky, R. Gerald Markle

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] **273.00 Rule 3-300 [former 5-101]**
The absence of security for a loan, when security would ordinarily be considered essential to the client, is an indication of unfairness in a business transaction between an attorney and a client. Thus, respondent's admission that he should have provided security for a loan from his client was an indication that the transaction was not fair and reasonable to the client.

[2 a, b] **273.00 Rule 3-300 [former 5-101]**
The characterization of a transaction between an attorney and a client as a loan or an investment is not critical to whether there was a violation of the rule governing attorneys' business transactions with clients. The rule prohibits attorneys from entering into business transactions with clients or acquiring an adverse interest in a client's property without compliance with the rule.

[3] **162.20 Proof—Respondent's Burden**
273.00 Rule 3-300 [former 5-101]
When an attorney-client business transaction is involved, the attorney bears the burden of showing that the dealings between the parties were fair and reasonable and were fully known and understood by the client. Attorneys are subject to discipline for inducing clients to invest in business enterprises without fully apprising them of the risks. Where respondent admitted entering into a business transaction with a client and failed to show full disclosure to the client regarding the risks involved in the transaction, a violation of the rule was established.

[4] **273.00 Rule 3-300 [former 5-101]**
The Supreme Court has not overruled or otherwise negated the requirement that an attorney advise a client to seek independent counsel before entering into a business transaction with the attorney.

[5] **204.90 Culpability—General Substantive Issues**
Violations of standards of professional conduct not yet clarified by case law are less reprehensible than violations of more clear-cut and well-established rules.

[6] **273.00 Rule 3-300 [former 5-101]**
One of the purposes of the rule of professional conduct governing business transactions with clients is to protect clients from their attorneys' personal use of financial information gained from confidences disclosed during the attorney-client relationship.

[7] **410.00 Failure to Communicate**
An attorney's failure to communicate with and inattention to the needs of a client are proper grounds for discipline.

[8] **162.11 Proof—State Bar's Burden—Clear and Convincing**
410.00 Failure to Communicate
Where a client had difficulty communicating with respondent for a short period of time, but respondent did reply in some limited fashion to the client's status inquiries, and where it was not clear from the record whether any significant developments occurred with regard to the client's litigation during that period of time, there was not clear and convincing evidence of a failure to communicate.

[9] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
A conclusion that an attorney engaged in acts of moral turpitude does not necessarily follow from a finding that the attorney misappropriated client funds.

[10 a-e] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
An attorney's appropriation of client funds based on an unreasonable but honest belief of entitlement to the funds constitutes only a violation of the rule of professional conduct regarding client trust funds, and not an act of moral turpitude or dishonesty. However, where respondent could not have held an honest belief that he was entitled to some of the money he withdrew from a client trust account, his misappropriation of those funds not only violated the rule governing client trust funds, but also involved moral turpitude.

[11] **280.00 Rule 4-100(A) [former 8-101(A)]**
An attorney's withdrawal of client funds after the client disputed the attorney's right to receive that money was a violation of the rule of professional conduct requiring disputed client funds to be held in trust.

[12] **221.00 State Bar Act—Section 6106**
430.00 Breach of Fiduciary Duty
An attorney's gross carelessness and negligence constitute violations of the attorney's oath to faithfully discharge duties to clients to the best of the attorney's knowledge and ability, and involve moral turpitude in that they breach the fiduciary relationship attorneys owe to clients.

[13] **204.20 Culpability—Intent Requirement**
221.00 State Bar Act—Section 6106
An attorney's gross negligence in handling his clients' funds, which resulted in the issuance of several trust account checks that were not honored due to insufficient funds, involved moral turpitude even though there was no evidence of intentional wrongdoing or dishonest motive.

[14 a-c] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
An attorney's unjustified delay of over two months in paying client funds to the client after demand violated the rule of professional conduct requiring client funds to be paid promptly upon demand. Conversely, where a delay in payment to another client was minimal and not intentional, no violation of the rule occurred.

[15] **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
Even though notice to show cause did not expressly charge violation of rule requiring client funds to be held in trust, respondent could be found culpable of violating such rule by misappropriating client funds, where such charge was clearly encompassed within allegations in support of moral turpitude charge.

[16] **740.51 Mitigation—Good Character—Declined to Find**
Testimony by three character witnesses was not entitled to significant weight in mitigation since it was not an extraordinary demonstration of good character attested to by a wide range of references.

[17] **755.52 Mitigation—Prejudicial Delay—Declined to Find**
Respondent was not prejudiced by inability to corroborate testimony regarding trust account practices, due to destruction of respondent's trust account bank records, because hearing judge essentially accepted respondent's testimony regarding trust account practices, and respondent admitted gross negligence in handling clients' funds. Accordingly, delay in prosecution was not a mitigating factor.

[18] **710.10 Mitigation—No Prior Record—Found**
Even though an attorney has a record of prior discipline, it is appropriate to consider a lengthy period of blemish-free practice prior to the attorney's first act of misconduct as a mitigating circumstance, where the prior misconduct occurred during the same time period as the present misconduct and both the prior and current misconduct occurred within a narrow time frame.

[19] **513.10 Aggravation—Prior Record—Found but Discounted**
Whenever discipline is imposed, consideration is properly given to the presence of a prior disciplinary record, even where the facts giving rise to the prior discipline occurred during the same time period as the present misconduct. However, the aggravating force of the prior discipline is diminished when it occurred during the same time period as the present misconduct and thus did not provide the attorney with an opportunity to heed the import of that discipline.

[20 a, b] **165 Adequacy of Hearing Decision**
802.61 Standards—Appropriate Sanction—Most Severe Applicable
1092 Substantive Issues re Discipline—Excessiveness
Where two or more acts of professional misconduct are found, the discipline should be the most severe of the several applicable sanctions, not the sum of the applicable standards. Accordingly, it was not appropriate to recommend 18-month actual suspension based on conclusion that one-year actual suspension was appropriate for misappropriation and six-month actual suspension was appropriate for writing insufficiently funded checks.

[21 a-d] **822.34 Standards—Misappropriation—One Year Minimum**
833.40 Standards—Moral Turpitude—Suspension
The appropriate discipline for wilful misappropriation is disbarment in the absence of extenuating circumstances. However, extenuating circumstances sufficient to warrant less than disbarment have been found both in the attorney's background, demonstrating that the misconduct was aberrational and hence unlikely to recur, and in the facts relating to the misappropriation, recognizing that more severe discipline is warranted for intentional theft as opposed to negligent acts unaccompanied by evil intent. Where respondent's extensive misconduct, which included multiple acts of gross negligence in handling client funds as well as misappropriation and improper business transactions with clients, occurred during a three-year period after a 28-year blemish-free record, and was surrounded by circumstances indicating that the misconduct was aberrational, a one-year actual suspension and three years stayed suspension and probation were adequate discipline.

[22] 171 Discipline—Restitution

It was appropriate to order respondent to make restitution to client of client's funds which were applied to respondent's fees without client's authorization, even though respondent performed substantial legal services for client, because restitution would effectuate respondent's rehabilitation and protect public from similar future misconduct.

ADDITIONAL ANALYSIS

Culpability

Found

221.12 Section 6106—Gross Negligence
221.19 Section 6106—Other Factual Basis
273.01 Rule 3-300 [former 5-101]
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.13 Misappropriation—Wrongful Claim to Funds

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
320.05 Rule 5-200 [former 7-105(1)]

Aggravation

Found

521 Multiple Acts
582.10 Harm to Client

Declined to Find

545 Bad Faith, Dishonesty

Mitigation

Found

750.10 Mitigation—Rehabilitation—Found

Found but Discounted

745.31 Remorse/Restitution

Discipline

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

Probation Conditions

1021 Restitution
1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge of the State Bar Court that respondent, Kenneth E. Hagen, be suspended from the practice of law for four years, that the execution of the suspension be stayed, and that he be placed on probation for a period of four years on conditions, including that he be actually suspended for a period of eighteen months. The hearing judge found, based on a six-count notice to show cause, that respondent misappropriated client funds in two matters, failed to return client funds after demand in four matters, was grossly negligent in issuing insufficiently funded checks in four matters, and entered into improper business transactions with clients in two matters. Finding few mitigating factors and several aggravating factors, including a prior public reproval, the hearing judge concluded that a substantial period of actual suspension was warranted.

Respondent requested review, arguing that the actual suspension recommended by the hearing judge should be reduced to not more than 90 days because the misconduct occurred under strong mitigating circumstances and was the result of gross negligence as opposed to intentional wrongdoing. The State Bar examiner disputes each of respondent's contentions, arguing that the hearing judge's findings should be sustained and that the actual suspension recommended by the hearing judge is the minimum warranted and, in the alternative, should be increased to three years.

We have independently reviewed the record and have concluded, among other things, that respondent is culpable of fewer acts of intentional dishonesty and his misconduct is surrounded by fewer aggravating and more mitigating circumstances than the hearing judge found. Based on our conclusions, we recommend that respondent be suspended from the practice of law for a period of three years, with the execution of the suspension stayed, and that he be placed on probation for a period of three years on the conditions specified below, including actual suspension for one year and until he makes restitution as set forth below.

FACTS AND FINDINGS

The hearing judge made the following factual findings and legal conclusions. The factual findings are for the most part undisputed by the parties and supported by the record. Accordingly, we adopt them with the minor modifications discussed below. Our modifications of the hearing judge's legal conclusions are more extensive and are discussed below.

Respondent was admitted to the practice of law in California in 1956. From 1983 through 1986, respondent maintained two types of trust accounts: non-interest bearing general trust accounts (check writing accounts) and interest bearing trust savings accounts and certificates of deposit (savings accounts). Respondent's practice was to deposit client funds that were to be held for more than a brief period of time into a savings account. Usually he would set up a separate savings account for each client, but he occasionally had money from more than one client in the same account. Small amounts of client funds or funds that were to be disbursed relatively quickly would be deposited into the check writing account.

Even though respondent may have had a particular client's money in a particular savings account, he treated all of the accounts as a whole. For example, if respondent had $50,000 for client A in a savings account and $5,000 for client B in a check writing account and he needed to disburse $2,000 to or for the benefit of client A, he would do so by drawing the money from the check writing account. He would then balance the accounts at the end of the month. If client A needed $6,000, respondent would write a check drawn on the check writing account and transfer enough money into the check writing account from the savings account to cover the check.

Counts one, two and three involve respondent's relationship with Miller Dial corporation (Miller Dial), its two sole shareholders, Philip Rutten (Rutten) and Leonard Kranser (Kranser), and other entities in which Rutten and Kranser were associated, including Building Account, a partnership involving the family trusts of Kranser and Rutten. Respondent first met Rutten and Kranser in the mid-1970's, and over the years variously represented Miller Dial and Building Account as well as Rutten individually on a few minor

matters. In March 1986, the various individuals and entities involved in counts one, two and three filed a malpractice action against respondent, which was settled in January 1990 with respondent paying the plaintiffs $10,000 in full settlement of all claims.

Count One (Miller Dial)

In April 1985, Miller Dial hired respondent to handle a fee dispute between Miller Dial and a law firm relating to past due attorney fees owed by Miller Dial. Rutten instructed respondent to negotiate a discount of the amount owed and apply the difference, not to exceed $600, to his fees. In early July 1985, Miller Dial gave respondent a check in the amount of $7,201.80 for settlement of the dispute, which he deposited into his check writing account. On July 8, 1985, the balance in that account fell below the amount deposited; however, respondent had earmarked funds in a savings account sufficient to cover the difference.

In mid-September 1985, respondent informed Rutten about a proposed settlement and indicated that he was running up bills on other items. Rutten instructed respondent to negotiate a further reduction of $600 from the amount owed and apply that money to his fee. On September 23, 1985, respondent confirmed his understanding of the conversation with Rutten by letter, which indicated that if the law firm did not promptly execute a new release, the remaining funds would be applied to Miller Dial's outstanding attorney's fees owed to respondent. Between September 23, 1985, and December 30, 1985, respondent applied the entire amount of money to the fees owed his office by Miller Dial and other associated entities.

On December 16, 1985, an attorney then representing Miller Dial sent a letter to respondent confirming respondent's discharge from all representation of Miller Dial and requesting the return of all papers, documents and funds belonging to the client. On December 20, 1985, respondent returned some documents. By letter dated December 30, 1985, respondent rendered an accounting to Miller Dial, which indicated that since Miller Dial elected not to sign the release, respondent was authorized to and did apply the funds to the outstanding fees owed him in other matters. Neither Rutten or anyone authorized to speak for Miller Dial ever authorized respondent to apply more than $1,200 to his fees.

Count one of the notice to show cause charged that respondent failed to return the funds held in trust and misappropriated such funds, in wilful violation of sections 6068 (a), 6103 and 6106 of the Business and Professions Code[1] and former rule 8-101(B)(4) of the Rules of Professional Conduct.[2] The hearing judge concluded that respondent had no authority to apply the funds to past due fees, had a duty to return the money after the demand contained in the December 16, 1985 letter, and wilfully violated rule 8-101(B)(4) by intentionally applying trust funds to past due fees without authority. The judge further concluded that respondent's "improper conversion" of the trust funds was a wilful misappropriation which was an act involving moral turpitude in violation of section 6106.[3]

Count Two (Atari)

Sometime in 1984, a dispute arose between Miller Dial and Atari Corporation (Atari). Respondent was retained by Miller Dial to pursue a claim for money owed by Atari to Miller Dial. On October 11, 1985, pursuant to a settlement agreement, an Atari check in the amount of $1,900 was deposited into respondent's check writing account. Respondent was not authorized by Atari to disburse the proceeds of the settlement until all mutual releases had been executed and a dismissal of the action had been filed by Miller Dial. In addition, neither Rutten nor Miller

1. All further references to statutes are to the Business and Professions Code, unless otherwise noted.

2. 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.

3. All six counts charged respondent with violating sections 6068 (a) and 6103, which charges were rejected by the judge in all counts. The judge's conclusions in this regard are supported by the record and the case law and we adopt them as our own. (Cf. *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476.) As a result, no further discussion of these charges is contained in this opinion.

Dial authorized respondent to withdraw any of the Atari funds. By October 31, 1985, the balance in the check writing account fell well below $1,900. Respondent maintained sufficient funds in one of the interest bearing savings accounts to cover the difference.

Prior to finalization of the Atari settlement, respondent was discharged from representing Miller Dial and on December 16, 1985, Miller Dial's new counsel demanded that respondent release the Atari settlement money. Nevertheless, respondent continued to finalize the Atari settlement apparently with the approval of his client. By March 1986 the settlement was finalized with the signing of mutual releases and dismissal of the court action. On March 6, 1986, Miller Dial filed a civil action against respondent alleging that he had wrongfully withheld the Atari settlement funds. Shortly thereafter, respondent gave Miller Dial its share of the settlement money by check dated March 25, 1986. That check was returned for insufficient funds and on April 24, 1986, was redeposited and honored. Respondent was substituted out of the case in April 1986.

Count two of the notice to show cause alleged that respondent misappropriated the settlement funds and that the check he issued to Miller Dial was not honored due to insufficient funds in wilful violation of rule 8-101(B)(4) and section 6106. The hearing judge concluded that respondent's failure to "present Miller Dial with a sufficiently funded check" in March 1986 when he accomplished the dismissal of the Atari action was a violation of rule 8-101(B)(4). The judge also concluded that respondent was grossly negligent in not ensuring that sufficient funds were transferred from other accounts to cover the checks he had written and his conduct of repeatedly issuing insufficiently funded checks to his clients constituted moral turpitude and violated section 6106.

Count Three (Building Account)

Cajon Business Park (Cajon) was a limited partnership formed in 1981 which acquired title to a parcel of undeveloped real property in California for the purposes of building commercial buildings, a strip shopping center, and small single family residences or a mobile home park. Respondent and Charles King were the two general partners of Cajon and respondent served as general counsel. Cajon had a number of limited partners and respondent had a personal investment in the project in excess of $50,000.

The development of the property was contingent upon obtaining sewers. The only practical means of achieving this was through annexation of the property by the adjacent city. The annexation ran into delays and Cajon did not have the funds to pay the note on the property. At some point in time which is not clear from the record, Cajon filed a chapter 11 bankruptcy proceeding. Under the bankruptcy proceeding, as long as Cajon made an active effort to get the property developed and as long as it maintained the interest payments on the note, foreclosure of the property was stayed. In late 1984 Cajon needed money for the note payments.

In November 1984, respondent telephoned Rutten and requested that he and Kranser invest in Cajon. Respondent gave Rutten a prospectus-type brochure that outlined the investment and the property to be developed. Prior to Rutten and Kranser making an investment in Cajon, respondent advised them that a number of approvals were required to be obtained from various governing bodies of counties and cities in order to accomplish annexation; that respondent hoped to be getting those approvals very shortly; that the property needed to be annexed by the city in order to be developed further; and that the property was in foreclosure. Respondent gave them a land appraisal; a title report; a capital account sheet listing the names of the limited partners; and a disclosure of respondent's interest in Cajon. In December 1984, Building Account invested $80,000 in Cajon.

Prior to making the investment, Rutten and Kranser talked to an accountant and negotiated two amendments to the limited partnership agreement. Respondent did not advise Rutten or Kranser of their opportunity to obtain the advice of independent counsel relating to the Cajon transaction.

In January 1985, Building Account loaned Cajon $12,000, which was evidenced by a promissory note executed by respondent on behalf of Cajon. In April 1985, respondent issued two checks from his trust account to repay the loan. Respondent, as a general

partner and counsel for Cajon, disbursed funds on behalf of the partnership through his trust account. Thereafter, the two checks were not honored by the bank due to insufficient funds. Respondent explained that his bank put a hold on the funds to cover the checks because they were from out of state. Shortly thereafter, the checks were redeposited and were honored.

Count three alleged that respondent entered into a business transaction with Rutten without complying with rule 5-101, and that respondent issued two checks from his trust account knowing there were insufficient funds to cover the checks, in violation of rule 5-101 and section 6106. The hearing judge concluded that respondent wilfully violated rule 5-101 by failing to advise Rutten and Kranser of the opportunity to seek advice of independent counsel. As in count two, the judge also found respondent violated section 6106 by gross negligence in issuing insufficiently funded checks.

Count Four (Hwa)

Respondent represented Irving Hwa (Hwa) from time to time from the 1970's through Hwa's death in October 1985. In 1983, Hwa visited respondent's office in connection with another matter and observed maps related to the Cajon property and requested the opportunity to invest in the projects. At that time, respondent advised Hwa that there were no longer any partnership interests available because they all had been sold. In 1984, Hwa expressed a continued interest in investing in Cajon. As Cajon needed money for its interest payments, respondent described the Cajon investment to Hwa. Hwa indicated a potential interest in investing $25,000. After reviewing a three-quarters-of-an-inch portfolio, Hwa said perhaps he would invest in Cajon and would let respondent know. About a week later, Hwa telephoned and said he was coming to the office with a check to invest in Cajon. On September 6, 1984, respondent received $25,000 from Hwa and signed an unsecured promissory note in exchange for the investment. Respondent signed the note in his personal capacity because he had no authority from Cajon to issue a note on behalf of the partnership. Respondent used the Hwa money to pay the next interest installment on Cajon's note.

On November 1, 1984, respondent prepared a letter to Hwa which confirmed Hwa's investment and confirmed Hwa could withdraw the investment if the partnership did not obtain approval for annexation or if sewer services were not obtained, or should Hwa have an emergency requiring the return of funds before the two conditions (annexation and sewer services) became a reality. Further, the letter confirmed that if Hwa exercised his right to have the funds returned, respondent would have a reasonable amount of time to return the money and a reasonable amount of time to find an alternate investor, or respondent could pay Hwa from the cash flow from respondent's practice. Hwa signed this letter underneath the words "APPROVED, ACCEPTED, RATIFIED." Subsequently, respondent prepared a draft amendment to the partnership agreement to reflect Hwa's interest in the partnership based upon Hwa's investment. The amendment was not formalized because after November 1, 1984, Hwa had a family problem and requested his money back.

On July 6, 1985, respondent signed in his personal capacity a new unsecured promissory note to Hwa. On October 1985 and March 1986, respondent issued two checks, drawn on his check writing account, payable to Hwa, in accordance with the promissory note. These checks were not honored due to insufficient funds. In October 1985, Hwa died. Hwa's daughter ultimately retained counsel to commence collection efforts on behalf of her father's estate, and in May 1987, respondent stipulated to judgment and paid off the obligation over a period of time.

Count four alleged that respondent entered into a business transaction with Hwa without complying with and in violation of rule 5-101 and that he issued checks to Hwa knowing there were insufficient funds to cover the checks in violation of section 6106. The hearing judge found that respondent wilfully violated rule 5-101 because he failed to advise Hwa of the opportunity to seek the advice of independent counsel, and the terms of the transaction were not fair and reasonable because respondent failed to provide security for the loan from Hwa and respondent did not disclose to Hwa his (respondent's) financial condition. As in counts two and three, the judge also found respondent violated section 6106 by gross negligence in issuing insufficiently funded checks.

Count Five (Perry)

In May 1981, respondent was hired by Philip Perry to represent him in a civil matter. One of Perry's employees was involved in an automobile accident driving a truck that Perry was in the process of purchasing. Several actions were filed by the various parties, among which was an action respondent filed in September 1981 asserting that the ownership of the truck was still with the seller at the time of the accident and demanding rescission of the contract and the return of the purchase money.

In August 1983, Perry's insurance company paid respondent $6,000 in settlement of any claims against that carrier for the damage to the truck. Respondent deposited the money into his trust account pending final settlement with all parties. During September and October 1983, Perry tried to determine from respondent the status of the lawsuit. Respondent repeatedly indicated that the status had not changed. In early 1984, Perry hired attorney Schwartz to represent him in the matter and Schwartz immediately requested that respondent substitute out, transfer the funds held in trust, and return Perry's papers. Respondent advised Schwartz that if the substitution was processed, he would return the $6,000 to the carrier or interplead it with the court as respondent believed he had no authority to release the funds to Perry pending a final settlement because conflicting claims were made regarding ownership of the truck. Schwartz never proceeded with the substitution nor did he move to relieve respondent from representing Perry and respondent continued as Perry's attorney in the litigation through the settlement.

The money remained in respondent's trust account until disbursed pursuant to court order in a suit Schwartz filed in April 1984 on behalf of Perry against respondent for conversion, possession of personal property and damages. In October 1985, pursuant to court order in this suit, respondent disbursed $3,500 to Perry by check.[4] That same day, Perry and Schwartz went to respondent's bank to cash the check but were unable to do so because there were insufficient funds in the account. Respondent wrote the check knowing that there were insufficient funds in the account but with the intent to transfer sufficient funds from a savings account immediately. When Perry learned that he could not cash the check, he immediately went to the police. A day or two later, the police advised Perry that they had a cashier's check in the amount of $3,500. The officer advised Perry that he had contacted respondent, and that respondent was very upset and immediately went to the police station with the cashier's check.

Count five charged that respondent failed to communicate with Perry, misappropriated settlement funds, failed to substitute out of representation of Perry, failed to return documents and settlement funds to Perry, misrepresented to a court in a subsequent civil action that he continued to hold the settlement funds in trust, and issued a check to Perry pursuant to a court order knowing there were insufficient funds to cover the check, in violation of rules 2-111(A)(2), 6-101(A)(2), 7-105(1), and 8-101(B)(4), and section 6106. The hearing judge found that respondent wilfully violated rule 6-101(A)(2) by failing to communicate with Perry between September and November 1984; rule 8-101(B)(4) by failing to pay Perry part of the settlement funds promptly after being ordered by the court because he gave Perry an insufficiently funded check; and as in counts two through four, section 6106 by gross negligence in issuing insufficiently funded checks. No culpability was found on the remaining charges.

Count Six (Slater)

In July 1982, Shirley Slater (Slater) employed respondent to obtain an increase in her spousal support from her former husband, Dr. Slater. At that time Dr. Slater was already behind on spousal support. On July 13, 1982, Slater paid respondent $1,500 with the agreement that respondent would charge an hourly rate and would deduct his fee from the advance payment.[5] From December 1983 through late

4. The court ultimately ordered respondent to pay Perry all of the $6,000 except $359.

5. Slater paid respondent a total of $3,900 in attorney's fees: the $1,500 in July 1982, $2,000 in January 1984 and $400 in February/March 1984.

1985, respondent and Gabriel Poll, respondent's associate, represented Slater in this motion to increase support and in opposing a subsequent motion to decrease spousal support.

Prior to June 1984, respondent had some difficulty collecting past due attorney's fees from Slater. In June 1984, respondent received a cashier's check from Dr. Slater in the amount of $6,325 for past due spousal support for Slater, which respondent deposited into his trust account. At about the same time, respondent received $1,498 pursuant to a writ of execution on Dr. Slater's property, which he also deposited into his trust account. On or about July 3, 1984, Slater owed respondent's law office $6,894.57 in past due attorney's fees. At that time, respondent was holding $7,823 in trust for Slater.

In early August 1984, Slater had a meeting with Poll wherein he requested that Slater authorize the application of the trust funds to the past due fees. Shortly thereafter, Poll sent Slater a letter confirming this request and requested that she acknowledge and approve that action by signing a copy of the letter. Shortly thereafter and without waiting for Slater to sign and return the letter, respondent applied the $7,823 to his fees. Slater did not sign the letter. In late August 1984, Slater's father, Ben Staal, disputed the accounting of disbursements on Slater's behalf, including the amount of attorney's fees. Staal requested that the trust funds be released to Slater. From August 1984 through January 1985, Staal continued to request that respondent release Slater's funds and reduce his bill, but respondent refused. Respondent never sent any funds to Slater.

Count six alleged that respondent misappropriated client funds, that he misrepresented to Slater the amount of her money he was actually holding, and that after a fee dispute developed, he failed to maintain the disputed portion of the funds in trust until the dispute was resolved, in violation of rules 8-101(A)(2) and 8-101(B)(4), and section 6106. The hearing judge found that respondent wilfully violated: rule 8-101(A)(2) by failing to maintain the disputed portion of the Slater's money in trust after he was notified of a fee dispute in August 1984; rule 8-101(B)(4) by applying the trust funds to past due fees without authority; and section 6106 by "improper conversion" of the trust funds to pay his fees.

Mitigation and Aggravation

In mitigation, the hearing judge found: Respondent presented three character witnesses (one judge, one attorney and one client), attesting to his good character and expressing an awareness of the fact that respondent had been found culpable of misappropriation of client funds; respondent presented evidence that he can responsibly handle funds entrusted to him; and he repaid the funds he wrongfully withheld to all former clients except Slater. However, the hearing judge did not accord the restitution efforts significant weight in mitigation because they were made under pressure of the impending trial in the State Bar proceeding, or the potential of criminal prosecution, or as a result of the likelihood of a civil judgment after the expenditure of substantial client resources.

In aggravation, the hearing judge found: The misconduct found in the present proceeding involved multiple acts of wrongdoing towards four different clients; respondent's misconduct in counts four and six was surrounded by bad faith to the clients; Slater, Miller Dial, Hwa and Perry suffered harm from respondent's misconduct in that payments were delayed or not disbursed for substantial periods of time and some had to incur legal costs and attorneys' fees to recoup monies owed them by respondent; and respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct toward Slater in that even after the State Bar hearing judge found that he wrongfully withheld monies from Slater, respondent did not pay her any of the trust funds which he wrongfully withheld.

The hearing judge also found as a factor in aggravation that respondent has a record of prior

discipline, having been publicly reproved in December 1986. The record indicates that in 1984 respondent failed to turn over a client's case file after he was discharged. After repeated requests from the client and after a court order was obtained directing him to turn over the file and sanctioning him, respondent turned over the files and paid the sanctions. In mitigation, respondent practiced for 28 years with no prior discipline, was candid and cooperative and expressed remorse.

DISCUSSION

Respondent asserts on review that his violations of rule 5-101 were technical violations for which no actual suspension is warranted; there was no failure to communicate in count five; and the violations of rule 8-101 were the result of gross negligence and not wilful misappropriation. The examiner disputes each of respondent's contentions, arguing that the hearing judge's findings should be sustained and that the actual suspension recommended is the minimum warranted and in the alternative should be increased to three years. The examiner does not assert that culpability exists for any of the charges that were dismissed by the hearing judge and after independently reviewing the record, we concur with the dismissal of these charges.

Rule 5-101 Violations

Respondent's argument that the rule 5-101 violations do not warrant actual suspension is essentially twofold: First, that the transaction in the Hwa matter was not inherently unfair to Hwa as the judge found, and second, that the Supreme Court has retreated from the requirement set forth in *Ritter* v. *State Bar* (1985) 40 Cal.3d 595, 602, that in order to comply with rule 5-101 an attorney must affirmatively advise the client to seek independent counsel. Under respondent's analysis of the facts in counts three and four, the transaction in the Hwa matter was an investment in Cajon and not a personal loan to respondent, and he did all he could do to see that Hwa's money was returned, which included paying Hwa from his personal funds; and he complied with the Supreme Court's current view of rule 5-101 by providing the clients in both counts with ample opportunity to consult with independent counsel, even though he did not expressly advise them to do so. Thus, respondent asserts that if there is a violation of rule 5-101 at all, it is merely technical and does not warrant actual suspension. Respondent also parenthetically asserts that there was no attorney-client relationship with Hwa at the time of the investment and that fact should be taken into account in determining whether the transaction was fair and reasonable to Hwa.

The hearing judge characterized the Hwa transaction as a loan from Hwa to respondent which was converted into an investment in Cajon and then converted back to a loan to respondent. She based her conclusion that the transaction was not fair and reasonable on respondent's failure to disclose his personal financial condition to Hwa prior to the loan and his failure to provide security for the loan. Respondent conceded in his brief on review that he should have provided security. **[1]** The absence of security, when security would ordinarily be considered essential to the client, is an indication of unfairness. (*Hunniecutt* v. *State Bar* (1988) 44 Cal.3d 362, 373.) Thus, respondent's admission that he should have provided security for the loan is an indication that the transaction was not fair and reasonable to Hwa.

The problem with characterizing the Hwa transaction arises from the clear intent of the parties to the transaction and the vehicle they used to accomplish that intent. As the hearing judge's factual findings make clear, Hwa intended to invest in Cajon. From Hwa's initial inquiry regarding the project after he observed maps at respondent's office to respondent's letter confirming the transaction, Cajon was the object of the investment. However, because respondent did not have authority to issue a note on behalf of the partnership, he did so in his personal capacity. Nevertheless, the promissory note was a binding document. During that period of time prior to the formalization of the investment, the transaction was a loan from Hwa to respondent, evidenced by the note. In fact, the transaction was never converted to an investment and remained the personal obligation of respondent. **[2a]** Even though we agree with the hearing judge that the transaction was a loan from Hwa to respondent, the characterization of the transaction as a loan or investment is not critical to whether there was a violation of 5-101.

[2b] The hearing judge found based on the parties' written stipulation, filed April 30, 1990, that respondent entered into a business transaction with Hwa. Rule 5-101 prohibits attorneys from entering into business transactions with clients *or* acquiring an adverse interest in a client's property without compliance with the rule. Respondent has not requested that he be relieved of this stipulation and no reason for such relief appears from the record. Thus, the issue is whether the admitted business transaction complied with rule 5-101.

[3] Respondent asserts that the transaction was fair and reasonable to Hwa because he personally guaranteed the money and gave Hwa the option of withdrawing the funds if any of the contingencies regarding the property did not occur or if Hwa had an emergency requiring return of the money, and that he made substantial efforts to repay Hwa. "When an attorney-client transaction is involved, the attorney bears the burden of showing that the dealings between the parties were fair and reasonable and were fully known and understood by the client." (*Hunniecutt* v. *State Bar*, *supra*, 44 Cal.3d at pp. 372-373.) Attorneys are subject to discipline for inducing clients to invest in enterprises without fully apprising them of the risks. (*Beery* v. *State Bar* (1987) 43 Cal.3d 802, 812.) Respondent failed to show that he made full disclosure to Hwa regarding the risks involved in the loan to himself, no matter how temporary that was intended to be, or the risks involved in investing in Cajon, and thereby wilfully violated rule 5-101.

By his own admission, respondent personally guaranteed Hwa's money and therefore his ability to repay was material to the transaction. Respondent failed to establish that he disclosed to Hwa his personal financial condition prior to accepting the money. The personal guarantee, the option to withdraw and/or the substantial efforts to repay did not satisfy respondent's obligation to make full disclosure of his own financial condition to Hwa prior to the loan.

In addition, the only information he provided to Hwa regarding Cajon was the "portfolio" type document and an oral explanation of the project and the need for annexation. When contrasted with the information he provided Building Account, this single document and conversation do not establish full disclosure. Of critical importance was Cajon's pending bankruptcy and the possibility of foreclosure of the major asset of the partnership. Respondent offered no evidence that he advised Hwa of the bankruptcy or foreclosure action. Thus, whether the transaction is characterized as a loan or investment, respondent failed to show that he fully explained to Hwa the risks involved.

[4] Respondent's argument that the Court has retreated from the requirement that an attorney advise a client to seek independent counsel as held in *Ritter* v. *State Bar*, *supra*, is without merit. There is no indication that the court has overruled *Ritter* or otherwise negated the advice requirement and none of the cases cited by respondent so held.[6] **[5]** However, the rule 5-101 violations in both the Hwa and Building Account matters occurred in late 1984, which predates *Ritter*. Accordingly, respondent's failure to advise the clients is less reprehensible than would be the case for a violation of a more well-established rule. (*Hawk* v. *State Bar*, *supra*, 45 Cal.3d at p. 602 ["the fact that we have not previously held that an attorney who takes a note secured by a deed of trust automatically acquires an interest 'adverse' to his client, make[s] petitioner's conduct in this matter less reprehensible than would be a violation of a more clear-cut and well-established rule"].) Respondent's argument that no attorney-client relationship existed with Hwa at the time Hwa gave respondent the $25,000 is also without merit. Respondent stipulated on the record that at the time he received Hwa's money (September 1984) and prior thereto, he had an attorney-client relationship with Hwa. Again, respondent has not requested that he be relieved of this stipulation, which is supported by the record. Hwa apparently had an ongoing relationship with respondent and would periodically visit respondent's office for legal assistance. It was during

6. Respondent cites *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 949 (rule 5-101 does not require the recommendation of a specific attorney); *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 601 (attorney who secures payment of fees by taking a note and trust deed in client's property must comply with rule 5-101); and *Brockway* v. *State Bar* (1991) 53 Cal.3d 51, 62, fn. 10 (rule 5-101 does not require advice to seek independent counsel to be in writing).

an office visit that Hwa first learned of the project and during subsequent visits that further discussions regarding the project occurred culminating in the loan/investment.

Respondent also stipulated that he learned Hwa had funds available to invest in Cajon during the course of his representation of Hwa. **[6]** "One of the purposes of the rule is to protect clients from their attorneys' personal use of financial information gained from confidences disclosed during the attorney-client relationship. [Citation.]" (*Hunniecut* v. *State Bar*, *supra*, 44 Cal.3d at p. 370.) Thus, the facts of the Hwa transaction fall squarely within the parameters of the rule.

Failure to Communicate

Respondent's argument that there was no failure to communicate and therefore no violation of rule 6-101 in count five is well taken. The hearing judge found that respondent failed to act competently in violation of rule 6-101(A)(2) by failing to communicate with Perry between the end of August 1984 and November 1984 concerning why the settlement was not proceeding and why respondent could not disburse the $6,000. **[7]** The failure to communicate with and inattention to the needs of a client are proper grounds for discipline. (*Spindell* v. *State Bar* (1975) 13 Cal.3d 253, 260.)

The record indicates that from early September 1983 until early November 1983,[7] Perry tried on numerous occasions to contact respondent to find out the status of the litigation and had only limited success. Perry made numerous, and at one point daily, telephone calls to respondent's office and spoke with him on one occasion and respondent had "nothing to report at that time." In addition, Perry went to respondent's office a couple of times and was able to speak to respondent on only one of those occasions. Perry prepared a letter to respondent, dated October 5, 1983, which requested a response to several specific questions regarding the litigation. He hand delivered the letter to respondent's office on October 5, 1983, and he received a call from respondent shortly thereafter. Perry also testified that after mid-November 1983, he received some correspondence from respondent.

[8] It does appear from the record that for a relatively short period of time in the fall of 1983 Perry had difficulty communicating with respondent, but that respondent did reply in some limited fashion to Perry's status inquiries. It is not clear from the record whether any significant developments occurred with regard to the litigation during this period of time. We conclude that the evidence presented on this issue falls short of clear and convincing evidence of a failure to communicate.

Trust Fund Violations

Respondent argues that his trust fund violations resulted from gross negligence and warrant discipline, but that the violations do not constitute wilful misappropriations and therefore do not warrant the "harsh" discipline recommended by the hearing judge. Specifically, respondent asserts that his application of trust funds to satisfy the outstanding fees he was owed by the clients in counts one and six were not wilful misappropriations because he was owed the money and he had a good faith belief that the clients authorized his actions. With regard to counts two through five, respondent argues that his failure to promptly transfer sufficient funds from one trust account to another to cover the trust checks he wrote in those counts was the result of gross negligence and therefore does not constitute wilful misappropriation or moral turpitude.

As noted above, the hearing judge found in counts one and six that respondent wilfully misappropriated funds in violation of section 6106 and failed to

7. We correct what appears to be a typographical error in the hearing judge's decision with regard to the dates of the alleged failure to communicate. The judge cites to findings of fact numbers 119-122 in support of her conclusion. Those findings involve facts that occurred between when respondent received the $6,000 (August 1983) and when Perry hired new counsel (February 1984). Only finding number 120 relates to a failure to communicate and there, the judge found that between September 1983 and October 1983, Perry tried to determine the status from respondent of the lawsuit and respondent "repeatedly indicated it had not changed."

pay the clients their funds promptly after demand in wilful violation of rule 8-101(B)(4). Also in count six, the hearing judge found that respondent failed to maintain the disputed portion of trust funds in his trust account until the dispute was resolved in wilful violation of rule 8-101(A)(2). In counts two through five, the hearing judge found that respondent was grossly negligent in issuing insufficiently funded checks to his clients in violation of section 6106. Also in counts two and five, the hearing judge found that respondent failed to pay the clients their funds promptly after demand in wilful violation of rule 8-101(B)(4) because he presented the clients with insufficiently funded checks.

Respondent cites several cases in support of his argument that his conduct in counts one and six did not amount to wilful misappropriation, of which *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, and *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, are instructive.[8] Sternlieb had represented the wife in a divorce action and pursuant to the agreement of the parties, she placed income from the marital property in her trust account. Without approval from her client, the husband or his attorney, she withdrew money from the account for her own personal use. (*Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at pp. 324-328.) The State Bar Court referee found that the misappropriation was due to negligent inadvertence, and the former review department modified that finding after concluding that the misappropriation involved dishonesty. (*Id.* at p. 332.) The Supreme Court concluded that although Sternlieb's belief that she was entitled to the money was unreasonable, the evidence did not support the review department's finding that she acted dishonestly and therefore the Court concluded that she violated rule 8-101(A), but not section 6106. (*Id.* at p. 321.)

In *Dudugjian*, the attorneys deposited their clients' settlement check into their general account under an honest, but mistaken belief that the clients had given them permission to retain those funds. (*Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d at p. 1095.) The hearing panel found the attorneys violated rule 8-101(A), but not section 6106. The former review department increased the recommended discipline based on its conclusion that the violation of rule 8-101 was wilful. (*Id.* at pp. 1096-1098.) The Supreme Court found that the attorneys had an honest belief that they had permission to retain the money but that an honest belief is not a defense to a rule 8-101 charge. The Court adopted the hearing panel's recommended discipline after rejecting the review department's determination that the misconduct was wilful. "In context, the [review department's] statement is most reasonably read to mean that his behavior was not as mitigated as the hearing panel believed. The record is otherwise." (*Id.* at p. 1100.)

The present case, though factually similar to the above cases, comes to us in a slightly different posture. In both *Sternlieb* and *Dudugjian*, the hearing referees concluded that no violation of section 6106 occurred. The hearing judge herein found respondent culpable of the improper conversion of the clients' money which constituted wilful misappropriation and therefore an act of moral turpitude in violation of section 6106. However, it does not appear that the hearing judge based her conclusion on a finding of dishonesty as she specifically stated later in the decision that respondent's acts in these two counts were not dishonest. Thus, it appears she concluded that the mere fact of a conversion constituted moral turpitude. **[9]** *Sternlieb* and *Dudugjian* indicate that a moral turpitude conclusion does not necessarily follow from a finding of conversion of funds.

[10a] In the present case, as in *Sternlieb* and *Dudugjian*, there is no evidence respondent acted dishonestly in count one. In this count, respondent

8. Respondent also cites *Schultz* v. *State Bar* (1975) 15 Cal.3d 799 (misappropriation due to negligent loss of control over trust account); *Palomo* v. *State Bar* (1984) 36 Cal.3d 785 (misappropriation due to failure to supervise employees); *Grossman* v. *State Bar* (1983) 34 Cal.3d 73 (misappropriation due to unauthorized retention of a fee in excess of the fee agreed upon in the retainer agreement); *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404 (misappropriation due to failure to supervise staff coupled with shortfalls in trust account balances); and *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113 (misappropriation due to misuse of trust account to pay personal expenses).

performed legal services for the various entities associated with Rutten and Kranser. Apparently, the established billing practices permitted respondent to use funds from one entity to pay legal fees incurred by another entity. There is no evidence that the amount of the fees charged by respondent was disputed by Rutten or Kranser or any of the various entities. A malpractice action was filed against respondent which alleged, among others, a cause of action for conversion of the money in count one, but that action was long after respondent took the money. Thus, it does appear that at the time respondent took the money he had an honest belief that he was entitled to it.

[10b] Nevertheless, as in *Sternlieb*, respondent's belief was not reasonable. Respondent's agreement with Rutten was that respondent could apply the money to past due fees if the opposing party did not sign a release settling the dispute. In his accounting to Miller Dial in December 1985, respondent indicated that he applied the funds to his fees because Miller Dial did not sign the release. There was no evidence to suggest that respondent ever discussed this latter condition with his client or was authorized to take the money if Miller Dial did not sign the release.

In count six, the examiner proved that respondent met with Slater on August 1, 1984, and discussed the use of the client's money he held in trust to satisfy his outstanding fees.[9] At respondent's request and direction, his associate confirmed those discussions in a letter to the client on August 6, 1984. That letter requested the client approve the application of her trust funds to fees by signing the letter. The client did not sign the letter and her father wrote respondent on August 21, 1984, objecting to the amount of the fee charged and the quality of the work performed. Respondent testified without contradiction that he took the money immediately after the August 1 meeting, without waiting for the client's signature on the August 6 letter and before he became aware that the client was disputing the fee, because he believed an agreement was reached at the August 1 meeting.[10] **[10c]** Thus, it appears that at the time respondent took most of Slater's money, he honestly believed he had the client's permission. However, that belief was not reasonable considering the specific request for client authorization contained in the August 6 letter and his failure to obtain that consent prior to taking the money.

Respondent's accounting to Slater in the August 6 letter indicated that the balance of Slater's money in his trust account after deducting his outstanding fees was $929; that the accounting was for services rendered through July 3, 1984; that there would be additional charges for the preparation for and appearance at a hearing on July 19, 1984, and the preparation of a post-hearing order; and that he would send her the $929 upon receipt of a copy of the letter signed by Slater. The August 6 letter also indicated that as of August 1984 there was approximately $1,800 owing for fees pursuant to a January 1984 agreement with Slater. The January 1984 agreement provided that Slater was to pay $300 per month beginning January 15, 1984, for unpaid fees in the amount of approximately $3,900. Of the amount respondent deducted from Slater's trust funds pursuant to his August 6 letter, $2,100 represented the seven monthly payments of $300 from January 1984 through July 15, 1984, that Slater had not paid.

In respondent's billing statement of December 1984, he indicated that he applied the $929 to the $1,800 for the months of September 1984 through December 1984. **[10d]** Thus, at the time respondent took the $929 in early August 1984 respondent had not earned the money.[11] Accordingly, we conclude that respondent did not have an honest belief he was authorized to apply this money.

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9. The hearing judge found that respondent's associate met with the client on August 1. However, the associate testified that he did not specifically recall attending this meeting. Respondent testified that he was at the August 1 meeting and he did not believe the associate attended.

10. Respondent's associate sent Slater's father a letter dated September 4, 1984, which referred to the August 1 agreement as a "proposal" for distribution of the trust funds. However, respondent disclaimed any prior knowledge of the specific language contained in this letter, and his testimony was confirmed by the associate. The hearing judge did not make findings of fact on this issue.

11. The record is silent as to the work performed regarding the July 19 hearing and order. The December 1984 billing statement belies any claim that the $929 was applied to this work.

[10e] In *Sternlieb*, the attorney began withdrawing her client's money prior to the time when she could have believed that her client authorized the withdrawals. (*Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at p. 325.) The hearing referee and Supreme Court concluded that no dishonesty was involved. Nevertheless, Sternlieb, unlike the present respondent, had applied trust funds to arguably earned fees. Respondent's action of applying the $929 to legal fees for which he did not have a claim of right distinguishes this case from *Sternlieb* and amounts to an act of moral turpitude in violation of section 6106. (*In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 662.) **[11]** In addition, respondent's withdrawal of the $929 after the client disputed respondent's right to receive that money was also a wilful violation of rule 8-101(A)(2).

The hearing judge's conclusions that respondent wilfully violated rule 8-101(B)(4) in counts one and six are supported by the record. In count one, Miller Dial's new attorney demanded respondent return the settlement money entrusted to him. Respondent did not have a lien on that money nor did he have client authorization to apply more than $1,200 to outstanding fees. In count six, Slater's father demanded payment of the money to which Slater was entitled in his letter to respondent in late August 1984 and respondent failed to do so. Respondent did not have authority from the client to apply the funds to outstanding fees. In short, the clients were entitled to that money and respondent failed to return it after demand.

In counts two through five, respondent does not dispute that he was grossly negligent "in the manner in which he deposited, transferred and distributed funds from trust," as indicated in his brief on review. Nevertheless, he asserts that this conduct does not support a finding of dishonesty or moral turpitude. The hearing judge found that respondent was grossly negligent in failing to ensure that sufficient funds were transferred from other accounts to cover the checks respondent wrote in these counts. **[12]** "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." (*Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 475 [gross negligence in handling client funds that resulted in shortfall in trust account]; see also *Simmons* v. *State Bar* (1970) 2 Cal.3d 719, 729 [gross negligence that resulted in abandonment of clients' interests].)

[13] There is no evidence to suggest that at the time he wrote the checks respondent knew he was not going to transfer sufficient funds into the appropriate account, or that he intentionally failed to transfer sufficient funds, or that he had any other dishonest motive for issuing insufficiently funded checks to these clients. On the other hand, ensuring sufficient funds were on deposit to cover the checks he wrote was a problem more pervasive than the several checks involved in this proceeding. Respondent testified that he had these shortfalls from the time he began using the multiple trust account system and that in the beginning, his banks would simply call him to tell him of the shortfall but as time went on, his banks began assessing charges against his accounts and that was when he "started getting some NSF-stamped checks." In addition, respondent testified that his problems with his trust account system stemmed from his busy schedule and that he "didn't give it the care that it should have received." Thus, while we agree with respondent that his conduct in these counts does not support a finding of dishonesty, his gross negligence in handling his clients' funds, which resulted in the issuance of trust account checks that were not honored due to insufficient funds, does support a moral turpitude conclusion.

[14a] The hearing judge found respondent wilfully violated rule 8-101(B)(4) in counts two and five because he did not provide the clients with a sufficiently funded check. Although not raised by the parties on appeal, we conclude respondent wilfully violated the rule in count two but not in count five.

In count two, respondent sent a letter to Miller Dial dated February 13, 1986, enclosing the mutual release for its signature and informing Miller Dial that he would send the settlement money to Miller Dial and file the dismissal of the action upon receipt of the executed release. Although the record is not clear as to when respondent received the executed release, on February 24, 1986, he sent the request for dismissal to the court for filing and sent copies of the executed releases to Miller Dial. On March 25, 1986, respondent sent a conformed copy of the dismissal to Atari, and issued a check to Miller Dial for its share of the Atari settlement proceeds. On April 22, 1986, Miller Dial's bank account was charged for the amount of that check because it was returned unpaid. On April 24, 1986, the check was redeposited and was honored. Respondent testified that his bank called him and told him his account was short and he brought over funds to cover the check. However, due to a miscommunication between his bank branches, the branch that processed the check was not informed of his deposit and the check was not honored initially.

[14b] Although a month passed after the presentation of the check to Miller Dial, it appears that respondent took relatively prompt steps to cover the check when notified. Nevertheless, respondent was to have sent the settlement money to Miller Dial upon his receipt of the executed release, which he received at least by February 24. Thus, the delay in payment was over two months. Under these circumstances, we find clear and convincing evidence of a failure to pay the client its money promptly.

[14c] In count five, respondent gave Perry a check for $3,500 in October 1985, pursuant to a court order in Perry's lawsuit against respondent for conversion of the settlement money. That same day Perry went to respondent's bank and was not able to cash the check because of insufficient funds in the account. Perry went to the police immediately and a day or two later, after police intervention, Perry was advised that the police had a cashier's check for the money. There is no evidence that respondent provided the insufficiently funded check intentionally to delay payment and payment was received within days of when the check was given. Under these facts, we do not find clear and convincing evidence of a wilful violation of rule 8-101(B)(4).

In summary, with respect to the trust fund violations, we conclude that respondent is culpable in counts one and six of wilfully violating: rule 8-101(A)[12] **[15 - see fn. 12]** for his misappropriation of client funds; rule 8-101(B)(4) for his failure to pay the clients their funds promptly after demand; and additionally in count six, rule 8-101(A)(2) for failing to retain the disputed portion of his fee in the trust account and section 6106 for his wilful misappropriation of $929. In counts two through five, we conclude that respondent is culpable of violating section 6106 based on his gross negligence in handling his clients' funds, which resulted in the issuance of trust account checks that were not honored due to insufficient funds; and additionally in count two, of wilfully violating rule 8-101(B)(4) for his failure to pay the client its settlement money promptly.

Discipline

As noted above, respondent asserts the hearing judge's recommended discipline is unreasonably harsh and the actual suspension should be reduced to not more than 90 days because the misconduct occurred under strong mitigating circumstances and was the result of gross negligence as opposed to intentional wrongdoing. The hearing judge recommended a four-year stayed suspension with four years probation and eighteen months actual suspension.

[16] Three character witnesses, one judge, one attorney and one client, testified for respondent, which the hearing judge found to be a factor in mitigation under standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct, Transitional Rules of Procedure of the State Bar, division V (standard[s]). We do not find this evidence

12. **[15]** Even though rule 8-101(A) was not expressly charged in the notice to show cause, misappropriation of client funds was clearly encompassed within the allegations in support of the section 6106 charge. (Cf. *Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at p. 321.)

to be "an extraordinary demonstration of good character . . . attested to by a wide range of references" (*id.*) and therefore do not give it significant weight in mitigation. The hearing judge also found that respondent now "can handle responsibly funds entrusted to him." Respondent testified that he still uses two trust accounts, one for short term transactions and one for keeping funds for longer periods of time. However, he has check writing ability on both accounts and does not have to transfer funds from one account to the other to cover checks. Finally, the hearing judge found that although respondent made restitution to all his clients except Slater, he did so only under the pressure of the pending State Bar proceeding, civil proceedings or the potential criminal liability and therefore the mitigating weight of the restitution was significantly reduced. While this is generally accurate, we note that respondent did make good on the various insufficiently funded checks shortly after they were dishonored.

[17] Respondent argues that his misconduct is mitigated because the State Bar delayed prosecuting this matter for an unusually long period of time which prejudiced his defense in that his trust account bank records were destroyed and he was therefore not able to introduce evidence at trial "in corroboration of his testimony." We note that the hearing judge essentially accepted respondent's testimony regarding his trust account practices, as her findings of fact make clear, and respondent admits that he was grossly negligent in handling his clients' funds. Thus, respondent's inability to corroborate his testimony, even if it resulted from unreasonable delay, was not prejudicial.

[18] The hearing judge did not find respondent's many years of practice as a mitigating factor, presumably because of his prior discipline. However, the prior misconduct occurred during the same time period as the present misconduct and both the prior and current misconduct occurred within a narrow time frame. Therefore, it is appropriate to consider respondent's approximately 28 years of blemish-free practice prior to the first act of misconduct as a mitigating circumstance. (*Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 259; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350-351.)

[19] Nevertheless, we consider the prior discipline as a factor in aggravation. (*Lewis* v. *State Bar* (1973) 9 Cal.3d 704, 715; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646.) "Whenever discipline is imposed, consideration is properly given to the presence or absence of a prior disciplinary record. [Citations.]" (*Lewis* v. *State Bar*, *supra*, 9 Cal.3d at p. 715 [prior discipline is appropriately considered even when the facts giving rise to that prior discipline occurred after the misconduct in the proceeding then under consideration].) Had the full facts of respondent's contemporaneous misconduct been presented in the earlier proceeding more severe discipline would have been warranted. (*Ibid.*) However, the aggravating force of the prior discipline is diminished because it occurred during the same time period as the present misconduct and thus did not provide respondent with an opportunity to "heed the import of that discipline." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

The hearing judge also found in aggravation that the present misconduct involved multiple acts; the misconduct in counts four and six was surrounded by bad faith because respondent failed to adequately document the Hwa transaction and failed to repay Hwa forcing the heirs to incur legal costs, and because of the manner in which he converted Slater's money and his failure to repay her; the clients in counts one, four, five and six suffered harm by having to incur legal costs to recoup their money and by the delay in disbursement to them of their money; and the misconduct in count six demonstrated indifference toward rectification or atonement.

We do not believe the bad faith findings in counts four and six are appropriate. There is no evidence that respondent acted in bad faith in the Hwa transaction. He did not adequately document the transaction, but that is part of the basis for finding him culpable of violating rule 5-101 and there is no indication that this failure was in bad faith. In addition, respondent testified he could not repay the $25,000 because of his own financial difficulties brought on by his divorce. There is no evidence that he intentionally did not repay the money or delayed payment because of an improper motive. Respondent's taking of the $929 was an act of moral turpitude. However, except for

the $929, respondent "converted" Slater's money because he thought he had an agreement. Although this was improper, there is no evidence that there was bad faith involved. Respondent had not paid Slater any money at the time of trial. While his failure to repay the money or put the money in trust was improper, we do not view this fact as an act of bad faith in light of the work he performed for the client which tends to support his claim that he honestly believed he was owed the money for legal services rendered.

In summary, respondent is culpable in counts one and six of wilfully violating: rule 8-101(A) for his misappropriation of clients' funds; rule 8-101(B)(4) for his failure to return client funds after demand; and in count six, rule 8-101(A)(2) for his withdrawal of the disputed portion of his fee from his trust account and section 6106 for his wilful misappropriation of $929. In counts three and four, respondent wilfully violated rule 5-101 for his failure to advise the clients to seek independent counsel, and in count four, also because the transaction was not fair and reasonable to Hwa. In counts two, three, four and five he violated section 6106 for his gross negligence in handling his clients' funds which resulted in the issuance of insufficiently funded trust account checks, and additionally in count two, respondent wilfully violated rule 8-101(B)(4) for his failure to promptly pay the client its settlement money. Respondent's misconduct is mitigated by his 28 years of practice prior to his earliest misconduct, his change in trust account practices, his repayment of the insufficiently funded checks, and to a lesser extent his restitution of the other monies he owed his clients; and is aggravated by the multiple acts of misconduct, and to a lesser extent, his prior discipline, and the harm suffered by the clients.

In arriving at the recommended 18 months actual suspension, the hearing judge applied, among others, standards 2.2(a) (wilful misappropriations shall result in disbarment unless compelling mitigating circumstances predominate in which case the discipline shall be not less than one year actual suspension), and 2.3 (moral turpitude misconduct shall result in actual suspension or disbarment depending on the surrounding circumstances). **[20a]** The hearing judge concluded that an actual suspension of eighteen months was appropriate by concluding that at least one year was warranted for the misappropriations in counts one and six, and an actual suspension of at least six months was warranted for knowingly writing insufficiently funded checks in counts two through five.[13] **[20b - see fn. 13]** As indicated above, the record supports a finding of wilful misappropriation for the $929 involved in count six, and respondent's issuance of the checks in counts two through five was the result of gross negligence that amounted to moral turpitude.

[21a] The appropriate discipline for wilful misappropriation is disbarment in the absence of extenuating circumstances. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37.) Extenuating circumstances sufficient to warrant less than disbarment have been found both in the attorney's background, which demonstrate that the misconduct was aberrational and hence unlikely to recur, and in the facts relating to the misappropriation, which recognizes that more severe discipline is warranted for intentional theft as opposed to negligent acts unaccompanied by evil intent. (*Id.* at pp. 37-38.)

[21b] Respondent has practiced law for 35 years without misconduct except for the approximately three-year period involved in the present and prior matters and had practiced 28 years without misconduct prior to the earliest incidents. In addition, the three-year period of misconduct is attributable, at least in part, to respondent's marital problems. We find these factors tend to prove that the misconduct was aberrational and the threat of future misconduct is therefore somewhat discounted. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.)

In *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, the misconduct consisted of misappropriation of client funds caused by grossly negligent office

13. **[20b]** We are not aware of any authority that supports this approach to determining an appropriate discipline recommendation. Indeed, the standards provide that where two or more acts of professional misconduct are found, the discipline should be the most severe of the several applicable sanctions, not the sum of the applicable standards. (Std. 1.6.)

procedures in one matter and an improper business transaction with another client which had caused financial loss to the client in another matter. Sugarman did not have a prior record of discipline but had only been in practice approximately three years prior to the misconduct. The Supreme Court imposed three years stayed suspension, three years probation, and a one-year actual suspension.

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 accounts in a single matter. 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 Supreme Court imposed one year actual suspension, with three years stayed suspension and probation.

In *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, the attorney, who had no prior record of discipline, was culpable of six counts of grossly negligent misappropriation of trust funds totaling over $20,000 in medical liens due to his failure to adequately supervise his staff and one count each of failing to perform legal services competently and failing to return a file to a client. We adopted the hearing judge's recommendation of two years stayed suspension with three years probation on conditions including one year actual suspension. The Supreme Court adopted our recommendation and imposed the above discipline. (Order filed April 15, 1992 (S025013).)

[21c] The misconduct in the present case is more extensive than the misconduct in *Sugarman* and *Edwards*. However, Sugarman did not have many years of blemish-free practice, Edwards misappropriated funds that he knew were not his to prevent the foreclosure of his residence, and respondent's improper business transactions are to some degree mitigated because they were not violations of a more well established rule. Respondent's misconduct is similar to *Robins* in that it involved multiple acts of grossly negligent handling of trust funds but, unlike Robins, respondent also wilfully misappropriated funds and entered into improper business transactions with clients. However, Robins engaged in misconduct over a seven-year period whereas respondent's misconduct occurred over a three-year period, and Robins had practiced for 12 years without discipline prior to his misdeeds whereas respondent had practiced for 28 years.

[21d] Thus, although the misconduct is extensive in the present case, the circumstances surrounding respondent's background and the misconduct indicate that discipline similar to that imposed in *Sugarman*, *Edwards*, and *Robins* will achieve the purposes of attorney discipline. Accordingly, we conclude that respondent should be suspended for three years, stayed, and placed on probation for three years on conditions, including one year of actual suspension.

The hearing judge recommended as a condition of probation that respondent be ordered to make restitution to Slater in the amount of $7,823 plus interest from September 1984 prior to being relieved of his actual suspension. **[22]** We believe it is appropriate for respondent to make restitution to Slater even though he performed substantial legal services for her (*Brockway* v. *State Bar*, *supra*, 53 Cal.3d at p. 67) because it will effectuate respondent's rehabilitation and protect the public from similar future misconduct (*Sorensen* v. *State Bar* (1991) 52 Cal.3d 1036, 1044). (See also *McKnight v State Bar* (1991) 53 Cal.3d 1025, 1039 [restitution ordered where attorney did not have the client's authority to apply client funds to fees despite attorney's claim that he was owed more for services rendered than he took].) However, the sum recommended is the entire amount respondent held in trust for Slater. Slater's father, in his August 21, 1984 letter to respondent, authorized respondent to apply $1,361 of the trust funds to his fees. Thus, even the client was not claiming a right to the entire amount of the trust funds. Therefore, we limit the amount of restitution to $6,462 plus interest, which represents the amount recommended by the hearing judge less $1,361.

RECOMMENDATION

For the foregoing reasons, we recommend that

respondent be suspended from the practice of law in California for a period of three (3) years, that said suspension be stayed, and that he be placed on probation for a period of three (3) years on the conditions recommended by the hearing judge except that respondent be actually suspended from the practice of law in California for the first one (1) year of said period of probation and until he makes restitution to Shirley Slater (or to the Client Security Fund, if appropriate) in the amount of $6,462 plus interest from September 21, 1984, until paid at ten (10) percent per annum, and furnish satisfactory evidence of restitution to the Probation Department of the State Bar Court in Los Angeles. Further, we recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and take and pass the California Professional Responsibility Examination within one (1) year of the effective date of the Supreme Court's order in this matter, as recommended by the hearing judge.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT G

A Member of the State Bar

No. 89-O-12350

Filed August 18, 1992

Reconsideration denied, September 22, 1992 (see separate opinion, *post*, p. 181)

SUMMARY

Respondent wilfully failed to perform legal services competently in a probate case by failing to ensure that his client knew the amount of state inheritance tax assessed against the client. Respondent's misconduct resulted in the client suffering three years accumulated interest and penalties on unpaid inheritance taxes. Finding several mitigating circumstances and no aggravating circumstances, the hearing judge ordered that respondent be privately reproved with conditions, including restitution to the client and passage of the California Professional Responsibility Examination. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent requested review, contending that his neglect, although regrettable, was not a wilful violation of the Rules of Professional Conduct. The review department concluded that respondent's repeated failure to inform his client regarding the inheritance tax obligation constituted a wilful violation of the rule of professional conduct regarding attorney competence. The review department agreed with the hearing judge that a private reproval, with a requirement of restitution, was the appropriate discipline in light of the misconduct and the surrounding circumstances. However, the review department declined to require respondent to pass the professional responsibility examination.

COUNSEL FOR PARTIES

For Office of Trials: Bruce H. Robinson

For Respondent: Donald Masuda

HEADNOTES

[1 a, b] 163 Proof of Wilfulness
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
410.00 Failure to Communicate

An attorney's failure to communicate with and reckless or repeated inattention to the needs of a client have long been grounds for discipline. Such misconduct need not involve deliberate

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wrongdoing or a purposeful failure to attend to the duties due to a client, and the attorney's acts need not be shown to be wilful where there is a repeated failure of the attorney to attend to the needs of the client. Where respondent received several notices regarding the inheritance taxes owed by his client in a probate matter, and did not notify his client of any of them, and the client was reasonably relying on respondent to provide her with such notice, respondent failed to perform legal services competently in wilful violation of the applicable Rule of Professional Conduct.

[2] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
844.31 Standards—Failure to Communicate/Perform—No Pattern—Reproval
844.33 Standards—Failure to Communicate/Perform—No Pattern—Reproval
Private reproval was appropriate discipline for isolated and relatively minor incident of failure to perform services competently which occurred early in respondent's career and was followed by respondent's candor and cooperation, improvement in office procedures, and voluntary participation in State Bar's ethics course.

[3] **171 Discipline—Restitution**
Most Supreme Court cases requiring restitution have involved misuse of client funds or unearned fees. Nevertheless, where client owed interest on inheritance taxes which were not timely paid due to attorney's failure to perform services competently, and attorney offered to make restitution in amount of such interest as condition of discipline, restitution requirement was appropriate in light of the rehabilitative purposes that it would serve.

[4 a, b] **173 Discipline—Ethics Exam/Ethics School**
Since 1976 the Supreme Court has required that all attorneys who are suspended from the practice of law in a disciplinary proceeding take and pass the Professional Responsibility Examination. In the case of reprovals, however, an order that the reproved attorney take and pass the examination should not be imposed automatically. Conditions attached to a reproval may only be imposed based on a finding that protection of the public and the interests of the attorney will be served thereby. Where a reproved respondent had already taken steps to insure that his misdeeds would not reoccur, and taking the examination would not further assist him in recognizing his failings and preventing future misconduct, the examination requirement was not an appropriate condition of the reproval.

ADDITIONAL ANALYSIS

Culpability
Found
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Mitigation
Found
735.10 Candor—Bar
745.10 Remorse/Restitution
750.10 Rehabilitation
791 Other
Discipline
1051 Private Reproval—With Conditions
Probation Conditions
1021 Restitution

OPINION

NORIAN, J.:

Respondent[1] in this matter has requested that we review a hearing judge's decision that found that he had neglected a client in a probate case, which resulted in the client suffering three years accumulated interest and penalties on unpaid inheritance taxes. Finding several mitigating circumstances and no aggravating circumstances, the hearing judge ordered that respondent be privately reproved with conditions.

Respondent contends his neglect was regrettable, but was not a wilful violation of the Rules of Professional Conduct. The hearing judge concluded that in failing to ensure that his client knew of a state inheritance tax assessed against the client, respondent recklessly failed to perform legal services competently and therefore wilfully violated former rule 6-101(A)(2) of the Rules of Professional Conduct.[2] We have independently reviewed the record and conclude, for the reasons which follow, that respondent repeatedly failed to perform legal services competently in wilful violation of rule 6-101(A)(2) and that a private reproval, with the added duty of restitution, is the appropriate discipline in light of the misconduct and the surrounding circumstances.

FACTS AND CONCLUSIONS

Findings of Fact

We adopt the facts as found by the hearing judge and briefly summarize them here. Alice B.'s mother died on May 28, 1982, and, as sole beneficiary and executor, Alice B. retained respondent in June 1982 to assist in the probate of the estate.[3] Alice B. was distraught over her mother's death and relied on respondent regarding all matters arising from the probate of the estate. Respondent prepared all the documents for processing the estate, including those filed over the signature of Alice B. as executor.

On or about March 18, 1983, respondent met with Alice B. regarding the distribution of the estate and she paid respondent his fees. Respondent had orally advised Alice B. that she would owe inheritance taxes to the state, but did not confirm this advice in writing. The inheritance tax referee filed his report on the estate with the superior court on October 12, 1983, and copies for Alice B. and respondent were sent to respondent's office. Respondent neither contacted Alice B. nor delivered a copy of the report to her. No objection was filed to the report within the required ten days and the superior court issued an order on October 27, 1983, fixing the inheritance tax owed by Alice B. at $818. This order was served on respondent, with Alice B.'s copy likewise sent to respondent's address. Respondent did not contact Alice B. concerning the order or send her a copy of it.

The Controller of the State of California (Controller) wrote to respondent on January 9, 1987, concerning the unpaid inheritance tax, indicating the tax and interest then due. Respondent did not contact Alice B. at this point. The Controller's office wrote to respondent again on October 7, 1987, indicating that the balance due was $1,273.57 and that the matter would be sent to collection. A copy of this letter was sent to Alice B. at her home address. This was the first indication to Alice B. that she owed a settled amount of inheritance tax to the state. By 1987, Alice B. was suffering financial difficulties due to her husband's catastrophic illness and was unable to pay the tax. The Controller's office recorded an abstract of judgment against Alice B.'s

1. In light of our disposition of this matter as a private reproval, we omit respondent's name from this published opinion, although the proceeding itself was, and remains, public. (Rule 615, Trans. Rules Proc. of State Bar.)

2. All further references to rule 6-101(A)(2) are to the former rule in effect from October 23, 1983, until May 26, 1989, which provided: "A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently."

3. Respondent was admitted to practice law in California in 1981. He testified that this was his first probate case as an attorney, although he had assisted other attorneys in probate matters as a legal assistant after graduating from law school.

property in October 1989. Alice B. paid the amount of the unpaid tax ($818) in January 1990, but has not paid any of the interest due and the judgment lien remains against her property.

After being contacted by Alice B., respondent agreed to pay the accrued interest attributable to his oversight. Alice B. retained another attorney and the matter remains in dispute. Respondent has not paid any of the interest to date.

The Hearing Judge's Conclusions and Disposition

The notice to show cause in this matter charged that respondent misrepresented to Alice B. that all taxes on the estate had been paid and that respondent thereafter failed to competently complete the legal services for which he was hired.[4] The hearing judge concluded that respondent had not misled his client, but had failed to perform competently.

The hearing judge found that Alice B.'s testimony and actions were consistent with the findings that she relied on respondent's advice as to her legal obligations, was unaware of the tax assessment and first learned of her delinquent tax bill in October 1987. The judge found that respondent was obligated to advise Alice B. of the tax assessment, particularly given respondent's knowledge that Alice B. remained emotionally distraught over her mother's death and relied on respondent's assistance regarding the estate. The hearing judge concluded that respondent's failure to ensure that his client received this essential information was a reckless failure to perform services competently and violated rule 6-101(A)(2). The judge did not find that there was a failure to communicate after October 1987, concluding that Alice B.'s testimony was not reliable on that point.[5]

The hearing judge found as mitigating factors respondent's lack of prior discipline since his admission to practice law in California in 1981, his candor and cooperation, the isolated nature of respondent's misconduct, his recent voluntary participation in the State Bar's course on ethics (Attorney Remedial Training School), and respondent's improvement in his office procedures to prevent recurrence of the misconduct. No aggravating factors were found. The hearing judge ordered that respondent be privately reproved with two conditions: passage of the California Professional Responsibility Examination (CPRE) and restitution of $455.57 plus interest from date of the hearing judge's decision, to repay the interest on inheritance tax owed by client attributable to respondent's misconduct.

DISCUSSION

Failure to Perform Legal Services Competently

Respondent argues that his conduct was not wilful misconduct. His contention is that he told Alice B. that she would owe inheritance tax, that she signed the inheritance tax declaration form, and that she received a copy of the judgment of final distribution on waiver of accounting, all of which gave her fair warning that she owed inheritance tax of an undetermined amount sometime in the future. Respondent's "omission" in giving his client notice of the tax assessment was admittedly faulty but not, in respondent's view, a wilful violation of his duty to provide Alice B. with competent representation.

The examiner responds that the standard for a wilful violation of the Rules of Professional Conduct is as follows: "the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it." (*King* v. *State Bar* (1990) 52 Cal.3d 307, 313-314, citing *Zitny* v.

4. The first count of the two-count notice to show cause, and the allegation in the Alice B. matter that respondent misrepresented to the superior court that all taxes had been paid, were dismissed prior to trial on the examiner's motion due to insufficient evidence to support those charges.

5. The hearing judge found that respondent ceased to communicate further with Alice B. after he was contacted by an attorney who was representing Alice B. However, the exhibits on which the judge relied for this finding (finding number 18) were not offered into evidence by the examiner and thus are not part of the record. Nevertheless, we adopt the finding because respondent's testimony on this point supports the finding.

State Bar (1966) 64 Cal.2d 787, 792.) He underlines the three instances (the tax referee's report, the superior court order and the January 1987 letter from the Controller's office concerning the delinquent account) on which respondent was given notice of the taxes owed while his client remained in the dark. The examiner contends that given these reminders, respondent's failure to inform Alice B. of the tax assessment was a wilful breach of rule 6-101(A)(2). The examiner does not assert that culpability exists for any of the charges that were dismissed by the hearing judge and after independently reviewing the record, we adopt those conclusions.

[1a] An attorney's failure to communicate with and reckless or repeated inattention to the needs of a client have long been grounds for discipline. (*McMorris* v. *State Bar* (1981) 29 Cal.3d 96, 99; *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 932.) Such misconduct need not involve deliberate wrongdoing (*ibid.*) or a purposeful failure to attend to the duties due to a client. (*King* v. *State Bar*, *supra*, 52 Cal.3d at p. 314.) Contrary to the contentions of respondent, an attorney's acts need not be shown to be wilful where there is a repeated failure of the attorney to attend to the needs of the client. (*Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 188; *Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at p. 932.)

An attorney's duty to the client can extend beyond the closing of the file. In *Kapelus* v. *State Bar*, *supra*, 44 Cal.3d 179, 187-188, the attorney failed to provide his client with a copy of an appeals board decision, which the attorney contended ended his participation in the case, did not respond to the client's subsequent calls and letter regarding the case and did not cooperate with the client's new counsel. The attorney contended that his acts were the result of mere negligence. That assertion was rejected by the Court, which held that the numerous opportunities for Kapelus to respond to his former client and his new attorney demonstrated Kapelus's wilful violation of his professional duties. (*Ibid.*) Further, the Court found that such repeated misconduct, even if not found to be wilful, still constituted grounds for discipline. (*Id.* at p. 188.)

[1b] In this case, there is sufficient evidence to show wilfulness similar to that present in the *Kapelus* case. Respondent received three notices and did not act.[6] As the hearing judge found, Alice B. reasonably relied on respondent to safeguard her interests and to advise her regarding the probate of her mother's estate. Respondent's obligation included providing her with notice of the determination of the taxes she owed. The fact that all notices addressed to Alice B. regarding the inheritance taxes were sent only to respondent itself proves the obligation he undertook. Respondent was reminded on repeated occasions of the inheritance taxes owed and he repeatedly failed to advise his client of them. As a result, respondent failed to perform legal services competently in wilful violation of rule 6-101(A)(2).

Discipline

[2] As noted above, the hearing judge concluded a private reproval was the appropriate discipline based on the misconduct and the mitigating circumstances. We agree. As the hearing judge found, the misconduct was an isolated and relatively minor incident early in respondent's career. Respondent's candor and cooperation, improvement in his office procedures, and voluntary participation in the State Bar's course on ethics indicate that he has recognized his misconduct and has taken steps to insure that it does not reoccur.

[3] The hearing judge also concluded that it was appropriate to require, as conditions attached to the reproval, that respondent make restitution to Alice B. of the unpaid interest that had accrued up to the time she became aware of the amount (October 1987), and take and pass the CPRE. Most Supreme Court cases requiring restitution have involved misuse of client funds or unearned fees. (*Sorensen* v. *State Bar* (1991)

6. Presumably respondent closed Alice B.'s file sometime after he was paid in March 1983. That activity could have served to remind respondent of the tax assessment as well. However, the record below is not clear concerning respondent's office practice in this regard.

52 Cal.3d 1036, 1044.) Nevertheless, respondent offered to pay the interest to Alice B. and indicated to us at oral argument that he "is and always has been willing to pay" restitution and, indeed, would stipulate to a restitution order. In light of respondent's position and in light of the rehabilitative purposes that will be served by requiring restitution, we conclude that restitution is appropriate in this case.

[4a] We do not, however, find the requirement that respondent pass the CPRE to be a necessary condition of his reproval. Since 1976 the Supreme Court has required that all attorneys whose conduct so far deviates from the ethical norms as to warrant the serious step of suspension from the practice of law, take and pass the Professional Responsibility Examination as a condition of resuming or continuing practice. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891 ["[T]he examination will cause the erring member of the bar to reevaluate and reflect upon the moral standards of the profession, and thereby more deeply appreciate his responsibilities to society as a whole. In short, although we cannot insure that any attorney will in fact behave ethically, we can at least be certain that he is fully aware of what his ethical duties are."].)

[4b] In the case of reprovals, which do not involve suspension from practice, an order that the reproved attorney take and pass the examination should not be imposed automatically. In fact, the requirement of taking the examination, as with any condition attached to a reproval, may only be imposed based on a finding "that protection of the public and the interests of the attorney will be served thereby." (Cal. Rules of Court, rule 956(a).) The protection of the public and the interests of the attorney are served when the examination will further the purpose of a disciplinary proceeding, which, as articulated in *Segretti*, is designed to rehabilitate rather than penalize. (*Segretti* v. *State Bar*, *supra*, 15 Cal.3d at pp. 890-891.) In the present case, respondent has taken steps to insure that his misdeeds will not reoccur. Given his efforts, taking the CPRE or PRE would not further assist respondent in recognizing his failings and preventing future misconduct.

DISPOSITION

For the foregoing reasons, it is hereby ORDERED that respondent be privately reproved. As a condition of his reproval, imposed pursuant to rule 956(a), California Rules of Court, respondent is ORDERED to make restitution within three (3) months of the effective date of this reproval to Alice B., or to the Client Security Fund to the extent it has paid Alice B., in the amount of $455.57, plus interest at the rate of ten (10) percent per year from the effective date of this reproval until paid, and to furnish satisfactory proof of restitution to the Probation Department of the State Bar Court in Los Angeles within thirty (30) days after making the restitution.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT G

A Member of the State Bar

No. 89-O-12350

Opinion and Order Denying Request for Reconsideration, filed September 22, 1992

SUMMARY

The State Bar Office of Trials requested that the review department reconsider its conclusion that the circumstances of this case, involving respondent's failure to provide notice of inheritance taxes owed by one of his clients, did not justify ordering respondent to take and pass the California Professional Responsibility Examination as a condition of his private reproval. The Office of Trials argued that any attorney found culpable of violating the Rules of Professional Conduct or State Bar Act should be required to take and pass the examination.

The review department denied the motion for reconsideration, noting that Supreme Court precedent does not require that the examination be routinely ordered in cases not involving misconduct serious enough to warrant suspension, and that conditions on reprovals can only be imposed based on a finding that they will serve the protection of the public and the interests of the respondent. In this matter, no authorities or previously overlooked evidence indicated the appropriateness of ordering respondent to take the examination. Respondent had already changed his office procedures to prevent a repeat of the misconduct which resulted in his private reproval, and the examination was not needed for public protection or rehabilitation.

COUNSEL FOR PARTIES

For Office of Trials: Bruce H. Robinson

For Respondent: No appearance

HEADNOTES

[1] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

A finding of a wilful violation of a Rule of Professional Conduct does not necessarily indicate intent to violate ethical guidelines, but merely an intent to perform an act which results in a violation. Even where there was no evidence of intentional misconduct, evidence of repeated acts of negligence

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justified finding respondent culpable of wilfully violating the rule regarding failure to perform services competently.

[2] **173 Discipline—Ethics Exam/Ethics School**
179 Discipline Conditions—Miscellaneous
194 Statutes Outside State Bar Act
1099 Substantive Issues re Discipline—Miscellaneous

The California Professional Responsibility Examination, when appropriately ordered, does assist in the rehabilitation of an errant attorney and, as a general proposition, the examination is an effective tool to measure an attorney's understanding and appreciation of the rules and statutes which are designed to protect the public and the best interests of the profession. However, when imposed as a condition of a reproval, the examination may only be required based on a finding that the protection of the public and the interests of the attorney will be served thereby. (Cal. Rules of Court, rule 956(a).)

[3 a, b] **173 Discipline—Ethics Exam/Ethics School**
1099 Substantive Issues re Discipline—Miscellaneous

No decisional law requires automatic imposition of a requirement to take and pass a professional responsibility examination as a condition of a reproval. Routinely requiring the examination should be limited to cases in which the attorney's behavior has so far deviated from ethical norms as to warrant the serious step of either actual or wholly stayed suspension from practice.

[4] **173 Discipline—Ethics Exam/Ethics School**

Where the primary problem which caused respondent's misconduct was inadequate law office management, and respondent had already taken appropriate steps to ensure that future office management practices would greatly reduce the risk of a similar violation, ordering respondent to pass the California Professional Responsibility Examination as a condition of respondent's private reproval would not be appropriate for public protection or have rehabilitative value.

ADDITIONAL ANALYSIS

[None.]

OPINION AND ORDER DENYING REQUEST FOR RECONSIDERATION

NORIAN, J.:

The State Bar Office of Trials has requested that we reconsider our conclusion in the opinion in this proceeding filed on August 18, 1992, holding that the circumstances of this case involving failure of an attorney to provide notice of inheritance taxes owed by one of his clients did not justify ordering him to take and pass the California Professional Responsibility Examination ("CPRE") as a condition of his private reproval. The Office of Trials argues that it is the position of that office that "the respondent in this particular case, who has been found culpable of wilfully violating former rule 6-101(A)(2), and any member found culpable of violating any Rule of Professional Conduct or section of the State Bar Act should be required to take and pass the CPRE."

[1] As discussed in our opinion, a finding of a wilful violation of a rule does not necessarily indicate intent to violate ethical guidelines, but merely an intent to perform an act which results in a violation. Here, there was no evidence of intentional misconduct, but sufficient evidence of repeated acts of negligence to justify culpability. (*In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179.)

[2] We noted in our opinion that the CPRE, when appropriately ordered, does assist in the rehabilitation of an errant attorney. We agree with the Office of Trials that, as a general proposition, the examination is an effective tool to measure a respondent's understanding and appreciation of the rules and statutes which are designed to protect the public and the best interests of the profession. However, as the Office of Trials itself points out, when imposed as a condition of reproval, it may only be based on a finding in the particular case "that protection of the public and the interests of the attorney will be served thereby." (Cal. Rules of Court, rule 956(a).)

The requirement of a finding linking the particular condition imposed to public protection and rehabilitation of the attorney mirrors the requirement of section 6093 of the State Bar Act which requires that "Whenever probation is imposed by the State Bar Court or by the Office of Trial Counsel with the agreement of the respondent, any conditions may be imposed which will reasonably serve the purposes of the probation." It also mirrors the requirement of a reasonable relationship between a criminal probation condition and criminal conduct. (See *People* v. *Lent* (1978) 15 Cal.3d 481, 486 [requiring that terms of criminal probation reasonably relate to the crime or future anticipated criminality of a criminal defendant].)

[3a] In urging us to reconsider our decision in this case, the Office of Trials acknowledged that no decisional law expressly requires automatic imposition of the examination as a condition for a reproval resulting from any violation of the Rules of Professional Conduct or State Bar Act. Indeed, it points to no opinion where the Supreme Court has suggested or implied that a professional responsibility examination should be ordered in every case. To the contrary, we read the Supreme Court's seminal opinion in *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 890 as strongly suggesting that routinely requiring the taking of a professional responsibility examination should be limited to more serious misconduct than that which occurred here. Thus, in *Segretti*, the Supreme Court stated that the same rationale that supported the 1975 change in bar admissions procedures to require all new admittees to take a professional responsibility examination applied to "members of the bar whose behavior has so far deviated from ethical norms as to warrant the serious step of suspension from practice." (*Id.*)

[3b] We have interpreted *Segretti* to require the examination to be ordered routinely for respondents with no prior record in all cases including either actual or wholly stayed suspension. However, the Supreme Court and State Bar Court have declined to order the examination to be taken as part of the discipline ordered in a suspension case when the examination was recently taken and passed by a respondent in compliance with a prior disciplinary order. (See, e.g., *In the Matter of Trousil* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 229, 244, recommended discipline adopted by order of the Supreme Court, April 24, 1991 (S019598).)

We have also previously considered in an unpublished opinion a similar argument to that urged here.[1] In that case, the respondent had pled guilty to the misdemeanor offense of possession of a controlled substance. At the hearing, respondent had objected to the examiner's position that he should be ordered to take the professional responsibility examination, contending that no nexus existed between requiring the examination and his misconduct. The referee agreed with the respondent and ordered a public reproval with unsupervised probation, but no educational condition. On review, the examiner saw no necessity for probation, but argued that respondent should have been required to take the examination as a condition of his reproval. We concluded that in light of mitigation evidence and precedent, that a private reproval was more appropriate than a public reproval. On the issue of conditions, we noted the recent adoption of an "Ethics School" program by the Office of Trials which included segments on substance abuse and stress management. We concluded that Ethics School was more appropriate as a condition than the taking of the professional responsibility examination which had no component that related to the offense which caused the respondent to be disciplined. We therefore ordered a private reproval with the condition that the respondent attend Ethics School.

[4] Here, the primary problem which caused the misconduct was inadequate law office management. In our original opinion, we concluded that the respondent had already taken appropriate steps to ensure that his office management practices in the future would greatly reduce the risk of a similar violation. Respondent was a recent admittee at the time he handled the case which resulted in the imposition of discipline. Unlike Segretti, respondent had to take and pass the national Professional Responsibility Examination in order to be certified for admission to practice law in the first place. The Office of Trials has not directed our attention to any authorities or any overlooked evidence that would indicate the appropriateness of ordering the respondent to take the CPRE for public protection or that would indicate its rehabilitative value for this respondent who has already changed his office procedures to prevent a repeat of the misconduct which resulted in his private reproval.

Since there appears to be no basis for reconsideration of our opinion, the State Bar Office of Trials' motion for reconsideration is DENIED.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

1. In that case, the examiner requested review of the referee decision and waived oral argument. Only two judges participated in the ensuing review department opinion. In accordance with court policy, the opinion was not published. However, the proceeding remained public and the resulting private reproval was anonymously summarized in *California Lawyer*.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID GREENE LILLY

A Member of the State Bar

No. 86-O-13282

Filed August 21, 1992; as modified, November 5, 1992

SUMMARY

Respondent was found to have commingled client trust funds with his own money, misappropriated the trust funds, and misrepresented to a third party that the funds were in a trust account. In aggravation, respondent had made restitution to the client using money from a probate estate which respondent had no right to use without prior court approval. Finding the only mitigating circumstance to be respondent's lack of a prior record of discipline, the hearing judge weighed that against the serious nature of the misconduct and recommended that respondent be disbarred. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent sought review, disputing his culpability of moral turpitude and contesting the disbarment recommendation. The review department affirmed the hearing judge's findings of fact and conclusions of law. It rejected respondent's contention that he did not have an attorney-client relationship with the owner of the funds, and noted that even if there was no such relationship, respondent still had a fiduciary duty to safeguard the money. Nonetheless, the review department rejected the disbarment recommendation in light of respondent's long record of practice without prior discipline and the relatively short duration of his misconduct. Instead, the review department recommended a five-year stayed suspension, a five-year probation term, and actual suspension for three years and until respondent showed his rehabilitation, fitness to practice and legal learning in a standard 1.4(c)(ii) hearing.

COUNSEL FOR PARTIES

For Office of Trials: Nancy J. Watson

For Respondent: Jeremiah Casselman

HEADNOTES

[1] **108 Procedure—Failure to Appear at Trial**
112 Procedure—Assistance of Counsel
615 Aggravation—Lack of Candor—Bar—Declined to Find

It was not an aggravating circumstance that respondent did not personally attend the hearing on the degree of discipline, since respondent was represented by counsel who appeared on respondent's behalf.

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[2] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
204.90 Culpability—General Substantive Issues
Where complaining witness testified credibly that an attorney-client relationship existed between himself and respondent, respondent himself had filed pleadings in civil litigation acknowledging such relationship, and respondent's counsel conceded that respondent had held himself out as complaining witness's attorney, respondent's argument in disciplinary proceeding that complaining witness was not his client was without merit.

[3] **162.20 Proof—Respondent's Burden**
169 Standard of Proof or Review—Miscellaneous
A respondent seeking review by the review department of a hearing department decision does not have the burden of showing that the hearing judge's findings are not supported by substantial evidence. That is a statutory burden applicable only to a respondent appearing before the Supreme Court.

[4] **204.90 Culpability—General Substantive Issues**
280.00 Rule 4-100(A) [former 8-101(A)]
430.00 Breach of Fiduciary Duty
An attorney holding funds for a person who is not a client is held to the same fiduciary duties in dealing with those funds as if there were an attorney-client relationship.

[5] **280.00 Rule 4-100(A) [former 8-101(A)]**
An attorney is prohibited from deviating from the rule requiring client funds to be deposited in a trust account even when the attorney has the client's consent to place trust funds in an account other than a trust account.

[6] **221.00 State Bar Act—Section 6106**
The statute regarding acts of moral turpitude or dishonesty prohibits any dishonest act by an attorney, whether or not committed while acting as an attorney. Where respondent falsely stated to client's prospective lessor that respondent was holding client's lease deposit in trust, respondent committed an act in violation of such statute.

[7] **745.39 Mitigation—Remorse/Restitution—Found but Discounted**
Respondent could not claim mitigating credit for restitution of misappropriated client funds, where the funds used for restitution were funds which the attorney had no right to use, and the client had to hire counsel and undergo litigation prior to receiving restitution.

[8 a-c] **710.10 Mitigation—No Prior Record—Found**
822.39 Standards—Misappropriation—One Year Minimum
1092 Substantive Issues re Discipline—Excessiveness
Not all serious trust fund misappropriation cases warrant disbarment. Where respondent had a 21-year record of practice without prior discipline and respondent's misconduct took place within a relatively narrow time frame, standard 1.4(c)(ii) hearing, with three-year actual suspension and five-year stayed suspension and probation, would be adequate to protect public, despite gravity of respondent's misconduct and lack of evidence regarding its cause.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
420.11 Misappropriation—Deliberate Theft/Dishonesty

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Aggravation

Found

561 Uncharged Violations
691 Other

Mitigation

Found

791 Other

Standards

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

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

Other

1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ, J.:

Respondent, David Greene Lilly, was admitted to practice law in California in 1965. He has no prior record of discipline. After a three-day trial in which most facts were not disputed, a hearing judge of the State Bar Court found respondent culpable of serious misconduct in one matter over a period of a few months in 1986 while acting as a fiduciary of trust funds to be used for a partnership venture of his clients: commingling with his own funds $20,000 of trust funds, misappropriating those funds and misrepresenting to a third party that the funds were in a trust account when respondent knew they were not. During the entire time period respondent maintained a personal savings account at the same bank which contained more than enough funds to cover the entire amount misappropriated. After the judge determined culpability, respondent presented no evidence in mitigation beyond his long practice without prior discipline, but the judge determined that there were several factors in aggravation, including that respondent made restitution with fees he had taken from a probate estate without court approval. The hearing judge recommended disbarment, concluding that the aggravating circumstances in the record far outweighed the one mitigating factor of respondent's lack of a prior record.

After reviewing the record at respondent's request, we adopt the findings and conclusions of the hearing judge. However, as we shall explain, after reviewing guiding Supreme Court decisions, we have concluded that a five-year suspension stayed on conditions of an actual suspension for three years and until respondent shows proof of rehabilitation and legal learning is more in keeping with precedent and will protect the public adequately in this case of an attorney with a long unblemished record of practice whose misconduct, albeit serious, was concentrated over a relatively short period of time and involved one client matter.

I. KEY FACTS

Most of the essential facts were established either by documentary evidence or testimony not in dispute. In about March 1985, one Thornburgh, an Oklahoma investor who had been in the oil and gas business, was dealing with one Wagner, a California businessperson. The two of them wanted to form Rodeo Coach ("Rodeo") to operate an exotic or classic car business at 9501 Wilshire Blvd., Beverly Hills, one-half block from Rodeo Drive and across the street from the Beverly-Wilshire Hotel. This property, owned by American Savings and Loan Association ("American"), was available for lease and had been used since 1972 for selling exotic or classic cars. Wagner and Thornburgh planned to lease this site for Rodeo.

Respondent first met Wagner in 1985 before Wagner brought up the subject of Rodeo to respondent. Respondent was then practicing law about 10 percent of the time and was involved in a publishing business the rest of the time. Starting in 1985, Wagner assisted respondent in this publishing business.[1] Respondent used a business (non-trust) bank account at Bank of America, West Hollywood Office ("B of A W.H. account") as the operating account for the publishing business and also as an account to hold any legal fees he received. Respondent was the only signatory on this account.

In February 1986, after conversations with Wagner, respondent agreed to represent Wagner. Respondent considered that he was hired primarily to form Rodeo and prepare articles of incorporation and an offering memorandum. As Wagner handled the lease negotiations with American mostly by himself, respondent had little to do with them. By April 1986, negotiations with American had progressed to where it wanted a $27,000 deposit to an escrow account in return for exclusive lease negotiation rights. Wagner indicated to respondent that the deposit would come from a partner in Oklahoma who was a wealthy "gas and oil person." This person was

1. The record is unclear as to the relationship of Wagner and respondent in the publishing business.

Thornburgh. Thornburgh testified that Wagner told him that respondent was a partner with Wagner in another business and could save them money by representing both Wagner and Thornburgh in forming Rodeo and helping with the American lease. Thornburgh agreed to that and sent Wagner a $1,000 retainer fee to give respondent. Respondent agreed to hold the $27,000 wanted by American in trust for Rodeo and disburse it according to instructions of Wagner and Thornburgh.

On April 8, 1986, respondent received a $27,000 check from Wagner for the deposit requested by American. Wagner wanted the check deposited immediately. Respondent told Wagner the most convenient thing to do was to put it into respondent's B of A W.H. account "right across the street." Wagner told respondent to do that. That same day, respondent wrote to an American employee that he was holding "$27,000 in my trust account on behalf of Rodeo . . . ." Respondent ultimately testified that when he wrote this letter, he did not hold that sum in an attorney-client trust account. As it would turn out, respondent was not holding any money in *any* account for Rodeo or American until April 18, 1986, because Wagner's $27,000 check bounced even after respondent's later redeposit of it.

Since American insisted on receiving the $27,000 lease deposit, on April 11, 1986, Thornburgh wired $27,000 to Wagner's bank. Wagner then gave respondent a cashier's check for $20,000 and Wagner's separate $7,000 check. As to the $7,000 check, Wagner asked respondent not to deposit it without further instruction. Respondent again used his B of A W.H. account to hold the $20,000. The $7,000 check was never deposited. It is undisputed that respondent sent no funds to American. Respondent admitted that although in his mind he earmarked this $20,000 for Rodeo, he used no part of it for Rodeo. While he did not state what amount he used for the publishing business he and Wagner were involved in, he admitted that "some" of that money went there. As the hearing judge correctly found, based on respondent's bank statements, by May 14, 1986, the balance of respondent's account was down to $5,694.02. By July 16 of that year, the balance was only $137.64. However, the hearing judge also found that respondent maintained over $40,000 in a personal savings account at the same bank throughout this period.

Sometime in April 1986, Thornburgh made a trip to California to work with Wagner on Rodeo. At that time, he met with respondent. Respondent told Thornburgh everything was moving along. In late April, Thornburgh understood that respondent had the $27,000 in trust. A few months later, Thornburgh checked with Bank of America, learned that there were no trust accounts at the B of A W.H. site and confronted respondent with that information. Respondent represented that Thornburgh would be reimbursed out of his personal savings account which Thornburgh verified contained sufficient funds. Thornburgh demanded that the funds be segregated into an account under his name instead of respondent's. Respondent did not transfer the money to a trust account, but wrote to American that he was not yet authorized by Thornburgh to send the money to American. On July 9, 1986, Thornburgh demanded in writing that respondent place the funds for Rodeo in a trust account and respondent represented to Thornburgh that he had done so. The record reveals that on June 27, 1986, respondent had placed $20,000 in a new trust account at the Bank of America, Sunset-Wetherly branch. However, instead of taking the money from his savings account this money was taken from the estate of Hiatt, a decedent's estate for which respondent served as executor. According to respondent, this estate money was an "advance on fees." Respondent testified that he had neither the approval of the court nor that of the attorney for the executor to use the estate funds.[2]

2. At oral argument before us, respondent's counsel claimed that the hearing judge had sustained his objections to questions concerning the source of respondent's $20,000 deposit in the new Bank of America trust account. Counsel is incorrect. Respondent interposed a belated objection, *after* the source of funds from estate of Hiatt had been established. (R.T. pp. 135-137.) Further, although the hearing judge questioned the relevancy of this subject at that point in the hearing (before culpability was determined), respondent did not request that she strike the testimony already elicited nor did she do so on her own. (*Id.* at pp. 137-140.) On the contrary, she made an express finding that respondent used the estate funds to open the trust account and also found it to be an aggravating circumstance. (Hearing judge's decision, pp. 12-13, 31.)

In July 1986 Thornburgh discharged respondent and hired another attorney to get his money back from respondent. Wagner and respondent had a falling out. Rodeo never got off the ground. In September 1986, American sued respondent and Thornburgh for damages for breach of contract and fraud. The next month, respondent cross-complained against Wagner and Thornburgh for indemnification and Thornburgh was able to settle with American. In early 1987, Thornburgh recovered his money from respondent.

Respondent never explained why he failed to pay over the Rodeo funds to American or use them for any other Rodeo purpose. He said he had Wagner's permission to use the funds for the publishing business he and Wagner were involved in, but he never provided details or documents supporting his claim.

Respondent testified that he did represent Wagner in a legal capacity with regard to Rodeo and he believed the monies given him for the American lease deposit were Wagner's own funds. One of the few disputes in the record was whether respondent also represented Thornburgh. Thornburgh testified that in March 1986, Wagner had arranged for respondent to represent them both on Rodeo, Thornburgh met with respondent about Rodeo more than once starting in late April 1986, and Thornburgh considered respondent to be Thornburgh's attorney until he discharged him in the summer of 1986. At the trial respondent denied that he represented Thornburgh. However, respondent's testimony on this point was contradicted by his own litigation position in 1986.[3] Ultimately, respondent's counsel conceded that the evidence showed that respondent had held himself out as representing Thornburgh.[4]

II. EVIDENCE RE MITIGATION

[1] Respondent did not appear at the hearing on degree of discipline. His counsel told the hearing judge that respondent was out of state on an undefined "absolute, desperate emergency." Respondent's counsel did not seek a continuance, instead stating that respondent had told his counsel that he would have to go ahead without him. The hearing judge properly did not make a finding in aggravation based on respondent's failure to be personally present at the hearing on degree of discipline, since he was represented by counsel. (See *Calvert* v. *State Bar* (1991) 54 Cal.3d 765, 784.) The judge judicially noticed respondent's lack of a prior record of discipline. No other evidence of mitigation was offered.

III. THE HEARING JUDGE'S CONCLUSIONS

Rejecting a motion by the State Bar examiner to amend the notice to show cause to add a charge of violating (former) rule 8-101(B)(4), Rules of Professional Conduct (failure to promptly pay client's share of funds),[5] the hearing judge concluded that respondent wilfully violated rule 8-101(A) (failure to keep client funds in a proper trust account) and section 6106 (commission of an act of dishonesty or moral turpitude)[6]—the latter both by misappropriating the $20,000 in funds and by misrepresenting to American that they were held in a trust account. She declined to

3. As noted earlier, in early April 1986, respondent wrote to American stating that he was holding in a trust account funds on behalf of Rodeo. (Exh. 1.) In October 1986, in the superior court action brought by American, respondent acknowledged in part in his cross-complaint, "During 1986, [I] acted as the attorney for Michael Wagner and J. Lynn Thornburgh . . . [and] faithfully and correctly carried out all instructions of said clients." (Exh. 15.) Finally, in June 1987, in a reply to a State Bar investigator's inquiry, respondent stated in part that Wagner's partner in Rodeo was Thornburgh, that Wagner instructed respondent to hold the $27,000 in trust to be disbursed per "their" instructions and that $20,000 in funds was later placed in a trust account for "the benefit of Mr. Thornburg[h]." (Exh. 14.)

4. The record on this point reads as follows: "[Hearing judge]: [Respondent] held himself out—the evidence clearly shows he held himself out as representing Mr. Thornberg [sic]. ¶ [Respondent's counsel]: Yes, he did." (R.T. p. 253.)

5. Unless noted otherwise, all references to rules are to the former Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

6. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

find culpability as charged under rule 6-101(A)(2) or under sections 6068 and 6103.

IV. DISCUSSION

A. Culpability.

On review, respondent disputes both his culpability and the hearing judge's disbarment recommendation. He disputes any attorney-client relationship between himself and Thornburgh and denies that any of his conduct violated section 6106. We deal with his arguments in turn, noting first that near the end of his review brief, respondent concedes that he commingled and misappropriated client funds and deceived American, although he claims to have acted in good faith and with client Wagner's consent.

[2] Respondent's argument to us to defeat the hearing judge's findings that he had an attorney-client relationship with Thornburgh is without merit. The judge discussed this issue extensively in her decision, citing relevant evidence and court decisions, and respondent has given us no authorities justifying any different conclusion in light of this record. Thornburgh testified credibly that an attorney-client relationship existed; but more significantly, respondent acknowledged such a relationship in his cross-complaint to American's suit and respondent's counsel conceded that the evidence showed that respondent had held himself out as Thornburgh's attorney.[7] **[3 - see fn. 7] [4]** Even if no such relationship had ever been created, respondent, having acknowledged more than once that he was holding funds for Rodeo or Thornburgh and Wagner, is still held to the same fiduciary duties to Thornburgh in dealing with those funds as if there were an attorney-client relationship. (See *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156; *Hamilton* v. *State Bar* (1979) 23 Cal.3d 868, 879; *Worth* v. *State Bar* (1976) 17 Cal.3d 337, 340-341.[8])

[5] It is also beyond dispute that respondent's placement of any funds for Rodeo in his general, business, B of A W.H. account, violated rule 8-101(A), even if, as he says, he had Wagner's consent to do that. Prior to 1975, a client's *written direction* to an attorney to deviate from the trust account deposit provisions of rule 8-101's predecessor, former rule 9, would have immunized an attorney from such a rule violation. However, rule 8-101 dropped rule 9's written client direction exception. In any case, respondent never produced any corroborating evidence from Wagner. Moreover, his other client, Thornburgh, insisted commencing in late April, that the funds be placed in a trust account, just as respondent had falsely represented to American he had already done.

Respondent's wilful misappropriation of nearly all of the $20,000 from Rodeo was also clear. This is not a case of misappropriation based on carelessness or inadequate office management. (Cf. *Palomo* v. *State Bar* (1985) 36 Cal.3d 785, 795-796.) The evidence shows that respondent depleted most of the funds to be used for Rodeo within a month of their deposit. Admittedly, he used no portion of them for Rodeo and he offered no convincing evidence to justify using them for his own business.

[6] Equally clear is respondent's written misrepresentation to American that he was holding funds in a trust account. He did not make a mistaken deposit. He knew when he falsely wrote to American that the account into which he deposited Rodeo's funds was not a trust account. Contrary to respondent's position

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7. [3] In the State Bar's brief on review, while discussing the evidence showing an attorney-client relationship, the examiner stated that respondent had the burden before us to show that the hearing judge's findings are not supported by substantial evidence. She cited as her authority *Dixon* v. *State Bar* (1982) 32 Cal.3d 728. That authority speaks only to the burden of a member of the State Bar appearing before the Supreme Court—a burden which is specifically defined by statute. (Bus. & Prof. Code, § 6083 (c).) Neither *Dixon* v. *State Bar*, *supra*, nor any authority of which we are aware supports the proposition that that same burden is imposed on a member of the State Bar appearing before the State Bar Court Review Department. (See *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 135-136.)

8. Worth had no attorney-client relationship with the mother of his law partner who had given him $25,000 for investment in a limited realty partnership in which Worth was the general partner. The Supreme Court disciplined Worth for commingling the investment funds with his personal funds, engaging in grossly negligent misrepresentations and failing to account to the investor.

on review, section 6106 prohibits *any* act of attorney dishonesty, whether or not committed while acting as an attorney. (See *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.) The Supreme Court's words in *McKinney* v. *State Bar* (1964) 62 Cal.2d 194, 196, are apt: "It thus is evident that [McKinney] by his own admission intended to deceive the bank. Therefore, it is immaterial whether any harm was done, since a member of the State Bar should not under any circumstances attempt to deceive another person. [Citations.]"

We therefore adopt the hearing judge's findings of fact and conclusions of law.

B. Degree of Discipline.

In recommending disbarment, the hearing judge emphasized the very serious nature of respondent's offenses, found aggravating circumstances preponderating and relied on the Standards for Attorney Sanctions for Professional Misconduct ("standards") (Trans. Rules Proc. of State Bar, div. V) as well relying on as two decisions of the Supreme Court: *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 29 and *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 656. However, *Grim* involved an attorney with a prior record of discipline and *Kelly* involved an attorney with a much shorter prior blemish-free record than respondent. Under the standards, our past decisions and guiding decisions of our Supreme Court, we properly look at the balance of mitigating and aggravating circumstances and the discipline imposed in similar cases in the past in order to best assure that the goals of imposing attorney discipline are served. Those primary goals are the protection of the public, the preservation of the integrity of the legal profession and the maintenance of public confidence in that profession. (Std. 1.3; e.g., *Lebbos* v. *State Bar* (1991) 53 Cal.3d 37, 45; *In the Matter of Taylor*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 582.)

Respondent's offenses were unquestionably serious. **[7]** While he did set aside funds for restitution to Thornburgh shortly after his acts of misappropriation, he can claim little or no mitigating credit for restitution for two reasons: first, he had no right to use the estate funds which were the source of restitution[9] and second, Thornburgh had to endure respondent's suit against him and hire counsel to aid him prior to receiving his restitution.

[8a] Yet, without diminishing the gravity of respondent's misconduct, we believe that the combination of his 21-year record of practice without prior discipline, coupled with the relatively narrow time frame over which his misconduct occurred, are factors which have been weighed more heavily in similar cases by our Supreme Court than by the hearing judge. In *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245, the Supreme Court was faced with very serious misconduct by a practitioner in two client matters with more than 20 years of blemish-free practice. While Friedman presented some additional mitigating evidence which respondent did not, Friedman's misconduct lasted longer than respondent's and included perjured testimony and an attempt to manufacture evidence at the hearing. In rejecting the disbarment recommendation of the former, volunteer review department and instead ordering a five-year stayed, three-year actual suspension, the Supreme Court described Friedman's unblemished record as "highly significant for purposes here" and considering evidence of family problems causing stress, the Court concluded that Friedman's behavior could be termed "aberrational."

More recently, in *Lipson* v. *State Bar* (1991) 53 Cal.3d 1010, 1021-1022, the Supreme Court followed the suspension recommendation of the former review department rather than the disbarment recommendation of the hearing panel. In that case, an attorney with over 42 years of practice and no prior record of discipline had committed serious misconduct in two matters, including misappropriation of funds and deceit. Although Lipson presented more mitigating evidence than respondent, the Court saw Lipson's very serious offenses remediable by a five-

9. While a personal representative of a decedent's estate is entitled to a fee for performing administrative services, it is well settled that no right to payment accrues until the probate court enters an order for payment. (See *Hatch* v. *Bush* (1963) 215 Cal.App.2d 692, 705; *Estate of Johnson* (1956) 47 Cal.2d 265, 272.)

year suspension stayed on conditions of actual suspension for two years and until respondent made a showing under standard 1.4(c)(ii).

Since we must balance all factors, we recognize that an unblemished record of lengthy practice even with other favorable circumstances may not be mitigating enough in all cases to demonstrate that disbarment is inappropriate. To that end, last year a majority of this department recommended disbarment of an attorney with over 20 years of discipline-free practice who had misappropriated a large client settlement and who had deceived the client's agent repeatedly over the next 18 months—misconduct spanning a far greater time period than involved here. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, recommended discipline imposed by Supreme Court, October 29, 1991 (S022164).) **[8b]** On the other hand, we recognize, as does the Supreme Court, that not all serious cases of trust fund misappropriation warrant disbarment. (See *In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, recommended discipline imposed by Supreme Court, April 16, 1992 (S024352) .) There a respondent culpable of misappropriating nearly $25,000 in 19 unauthorized withdrawals over an eight-month period coupled with other violations received three years actual suspension and until restitution.

In recommending disbarment, the hearing judge did not discuss the *Friedman* and *Lipson* cases or the *Tindall* case, but she did discuss at length the disbarment cases of *Grim* v. *State Bar*, *supra*, 53 Cal.3d 21 and *Kelly* v. *State Bar*, *supra*, 45 Cal.3d 649. As discussed above, we believe that the result in *Grim* was significantly influenced by that attorney's prior discipline for a related offense. Kelly had far fewer years of discipline-free practice than does this respondent and that factor has made a significant difference in the outcome of cases as we view them.

[8c] We share the concern stated by the hearing judge in her decision that the record does not reveal the cause of respondent's misconduct and the public therefore could be at risk without severe discipline. We believe that the mechanics of the standard 1.4(c)(ii) rehabilitation hearing, imposed in *Lipson* v. *State Bar*, *supra*, and *In the Matter of Tindall*, *supra*, would be sufficient, as part of a three-year actual suspension and a five-year stayed suspension and probationary period, to protect the public adequately in this case.

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that the respondent, David Greene Lilly, 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 upon probation for a period of five (5) years upon the following conditions:

1. That during the first three (3) 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 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, 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;

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

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 (5) years shall be satisfied and the suspension shall be terminated.

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.

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 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.

Finally, we recommend that the costs incurred by the State Bar in the investigation, hearing and review of this matter be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GEORGE NUNEZ

A Member of the State Bar

No. 89-O-10972

Filed August 24, 1992

SUMMARY

Respondent entered into a written contingent fee agreement to represent a client in an action against the client's former employer, a school district. Although the fee agreement provided that respondent would advance costs, respondent received $2,000 from the client to cover part of the cost of a transcript of her administrative hearing, a sum which respondent later contended was for advanced fees, not costs. After rendering some services, respondent took no further action, insisting that his client first had to advance him the balance of the cost of securing transcripts.

The hearing judge found that respondent failed to communicate effectively with his client, did not provide competent legal services to her, failed to keep the advanced costs in a trust account, did not return the client's file promptly upon demand, and withdrew from representation without safeguarding his client's interests. The judge dismissed a separate count of the notice charging respondent with failing to pay a medical lien, on the grounds that the lien had been discharged by the client's bankruptcy, and respondent did not have a duty to communicate with the medical lienholder. The judge recommended that respondent be suspended for six months, stayed, on conditions including a one-year probation, actual suspension for 60 days and restitution to the client. (Arthur H. Bernstein, Judge Pro Tempore.)

On respondent's request for review, the review department on its own motion modified the hearing judge's decision with respect to the dismissal of the medical lien count. The review department held that respondent did have a duty to communicate with the medical provider, arising from the fiduciary obligation of the medical lien. However, it upheld the dismissal because the notice to show cause did not charge a failure to communicate.

As to the wrongful termination count, the review department sustained the hearing judge's essential findings and conclusions, and rejected respondent's contention that as a matter of law, he could not be found culpable of failing to communicate with a client after he had effectively abandoned the client. After considering respondent's serious misconduct and harm to the client, tempered by respondent's impressive evidence of mitigation, and in light of comparable case law, the review department adopted the hearing judge's recommended discipline as to stayed suspension and probation, but reduced the recommended actual suspension to 30 days.

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 a, b] **166 Independent Review of Record**

Where review is sought, the review department must independently review the entire record. Accordingly, the review department reviewed propriety of hearing judge's dismissal of one count even though examiner did not request such review.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
410.00 Failure to Communicate
430.00 Breach of Fiduciary Duty

An attorney has a fiduciary obligation toward a medical provider which holds a medical lien arising from advancement of funds to the attorney's client, and the attorney therefore has a duty to communicate with the provider as to the subject of the fiduciary obligation. However, where respondent was not charged in the notice to show cause with failing to communicate with the medical provider, respondent could not be found culpable on that basis.

[3] **163 Proof of Wilfulness**
165 Adequacy of Hearing Decision
204.10 Culpability—Wilfulness Requirement

In order to find an attorney culpable of a rule violation, the attorney's misconduct must be found to have been wilful. Where no such finding was expressly set forth in hearing judge's decision, review department deemed it to have been made based on hearing judge's conclusions.

[4 a, b] **165 Adequacy of Hearing Decision**
166 Independent Review of Record

Where, in weighing conflicting evidence, hearing judge gave greater credence to complaining witness than to respondent based on witness's better record keeping and trustworthiness and on lack of documents to support respondent's decisions, review department was required to accord great weight to hearing judge's credibility assessments, and would not disregard hearing judge's findings without sufficient reason.

[5] **213.10 State Bar Act—Section 6068(a)**
214.30 State Bar Act—Section 6068(m)
410.00 Failure to Communicate

Where respondent did not respond to client's reasonable inquiries and missed appointments with client both before and after effective date of statute regarding duty to communicate with clients, respondent was culpable of violating attorney's oath and duties, as to conduct before such effective date, and of violating statutory duty to communicate, after such effective date.

[6 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Where hearing judge properly accepted client's testimony that advanced funds were for transcript costs and not for respondent's fees, and where applicable written fee agreement provided for respondent to advance costs, respondent's failure to pursue litigation because of client's failure to advance cost of transcripts constituted both a wrongful withdrawal from employment and a wilful violation of duty to perform legal services competently. Respondent was also culpable for failing to deposit the advanced funds in a trust account and for failing to return the client's file promptly upon demand.

[7] **213.10 State Bar Act—Section 6068(a)**
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)]
410.00 Failure to Communicate

It is not inherently inconsistent to conclude that an attorney who withdrew from employment and failed to perform legal services competently is also culpable of failing to communicate with the client thereafter.

[8 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
120 Procedure—Conduct of Trial
159 Evidence—Miscellaneous
192 Due Process/Procedural Rights

Where notice to show cause could have been more clearly phrased with respect to duration of respondent's alleged misconduct, but hearing judge correctly concluded after colloquy at trial that it encompassed misconduct prior to as well as after a certain date, and where hearing judge prohibited introduction of evidence as to respondent's conduct prior to such date only after respondent had had ample time to present such evidence, and where respondent gave no offer of proof or explanation regarding any additional evidence on such issue, respondent's claims of denial of adequate notice of charges and fair opportunity to present evidence were without merit.

[9a-c] **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)]
710.10 Mitigation—No Prior Record—Found
745.10 Mitigation—Remorse/Restitution—Found
765.10 Mitigation—Pro Bono Work—Found
844.12 Standards—Failure to Communicate/Perform—No Pattern—Suspension
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension

In matters involving abandonment of a single client by an attorney with no prior record of discipline, discipline imposed by Supreme Court has ranged from no actual suspension to 90 days of actual suspension. Where respondent's misconduct was serious, harmed client, and included trust account violation as well as abandonment and failure to communicate, but respondent presented impressive mitigating evidence, including services to disadvantaged clients and to minority community, and respondent expressed sincere aspiration not to be involved in disciplinary proceedings again, review department recommended actual suspension of 30 days, with stayed suspension of six months and one year of probation.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
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)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
410.01 Failure to Communicate

Not Found

280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]

Aggravation

Found

582.10 Harm to Client
691 Other

Mitigation

Found

740.10 Good Character

Discipline

1013.04 Stayed Suspension—6 Months
1015.01 Actual Suspension—1 Month
1017.06 Probation—1 Year

Probation Conditions

1021 Restitution
1024 Ethics Exam/School

Other

1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness

OPINION

STOVITZ, J.:

This case illustrates the need for attorneys to insure that all aspects of an attorney-client fee agreement are integrated into a single writing, that the attorney handles client payments consistently with the agreement, that the attorney responds in a timely manner to the client's reasonable status inquiries and that the attorney does not improperly cease work for the client. Respondent, George Nunez, admitted to practice law in California in 1976 and with no prior record of discipline, has requested our review of a decision of a hearing judge pro tempore of the State Bar Court finding him culpable of several acts of professional misconduct toward a client involving failure to deposit in a trust account funds advanced for purchase of a hearing transcript, failure to communicate with his client and ultimate abandonment of her case and failure to return promptly his client's file. The judge recommended that respondent be suspended for six months, stayed on conditions including a one-year probation, actual suspension for sixty days and restitution to his client.

Respondent contends that two findings of the hearing judge are not supported by the evidence, that the judge committed procedural error and that the discipline is excessive. Respondent urges that, at most, we impose a public reproval. The State Bar examiner urges us to adopt the hearing judge's decision and suspension recommendation, noting her agreement with respondent's position as to the lack of support for two of the hearing judge's findings. On our independent review of the record, we agree with respondent that the record does not support the two disputed findings below but we conclude that those findings are not significant to the issues of culpability. We do find clear and convincing evidence of culpability of ethical violations found by the hearing judge and we find those violations to be serious, but tempered by impressive evidence of mitigation. Guided by comparable decisions of the Supreme Court and this department, we adopt the hearing judge's recommendation of stayed suspension and probation, but we believe that a 30-day actual suspension rather than one of 60 days is sufficient discipline.

I. THE DISMISSED HENDERSON COUNT.

We deal first with a charge of the notice to show cause dismissed by the hearing judge, involving a client named Henderson. Another lawyer represented Henderson and filed a personal injury suit on her behalf. Henderson changed attorneys and hired respondent in 1984. Respondent was notified no later than 1984 that the California Department of Health Services Medi-Cal program ("Medi-Cal") held a lien for about $3,020. Respondent answered Medi-Cal's periodic pre-settlement status inquiries. When the case settled, a dispute arose as to the first lawyer's fee. At about this time, Henderson and her husband suffered financial difficulties and filed a bankruptcy petition. Respondent understood that the bankruptcy would "wipe out" the Medi-Cal lien. He placed all settlement funds in a trust account and after the dispute with the first attorney was resolved, he distributed all funds to Henderson and she was ultimately satisfied with the distribution. Believing that all had been taken care of and since he was holding no funds, respondent failed to answer two certified mail letters in 1989 from Medi-Cal concerning the personal injury case proceeds. Medi-Cal did not pursue the matter and the hearing judge found no clear and convincing evidence of culpability of the charges of failure to pay promptly the funds Henderson was entitled to receive or of failure to pay the Medi-Cal lien.

Labeling respondent's failure to answer the Medi-Cal letters "inconsiderate," the judge correctly found no attorney-client relationship between respondent and Medi-Cal. However, the judge therefore concluded that respondent had no duty to have communicated with Medi-Cal. **[1a]** We must independently review the entire record of State Bar proceedings in which our review is sought. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 638, fn. 1.) **[2]** While we believe that respondent occupied a fiduciary obligation toward Medi-Cal as to its advancement of funds to Henderson and its lien (see *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156) and therefore had a reasonable duty to communicate with Medi-Cal as to the subject of the fiduciary obligation, we uphold the hearing judge's finding solely on the ground that the notice to show cause did not charge respondent with

a failure to communicate with Medi-Cal. No culpability could be assigned therefore to this aspect of respondent's conduct. (See, e.g., *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 925-926.) **[1b]** We note also that the examiner has not sought review of the hearing judge's decision of dismissal in the Henderson matter. Accordingly, we adopt such dismissal.

II. THE MYERS COUNT.

A. Essential Charges and Facts.

We now address the one disputed count in this proceeding. Respondent was charged with having failed to: complete legal services for his client, communicate with her, deliver her papers and property and comply with the trust account rules as to $2,000 in funds he received from his client for transcripts. The notice to show cause also charged respondent with misappropriation of those funds.

Although the hearing judge's findings are lengthy and detailed, the essential facts are not complex. Ms. Lydia Myers was a bus driver for the Kings Canyon Unified School District (District) in rural Fresno County and a permanent, classified, District employee. In November 1983, the District suspended Myers interimly (with pay) from her position and charged her with careless bus operation and other inappropriate conduct.

Myers had been referred to respondent by a mutual friend. Myers and respondent discussed his representing her at the upcoming District disciplinary hearing, but they decided that Myers could be represented at that hearing by her employee organization, California School Employees Association (CSEA).

In February 1984, after conducting its hearing, the District found Myers culpable of grounds for discipline, suspended her without pay for a month, reprimanded her and demoted her to a part-time employee. She later resigned from the District deeming the few hours per day of low-level work offered her as uneconomic given the commuting time and expense.

Myers felt that she did not have a fair District hearing and she wanted respondent to represent her "in court to go against the school board decision." In about March 1984, after several meetings, respondent agreed to take Myers's case. Respondent was aware of Myers's limited education and strained finances. On March 21, 1984, he presented her with a retainer agreement which she signed. It described the subject matter of respondent's representation of Myers simply as "dismissal of employment." It called for a 50 percent contingent attorney fee, i.e., only if Myers recovered would respondent get a fee which would be 50 percent of the recovery amount.[1] Moreover, the agreement required respondent to advance all costs of litigation deemed "reasonably necessary." Only if there was a "recovery or judgment" did Myers have to reimburse respondent advanced costs.

Myers told respondent that her District hearing had been reported. She testified that respondent agreed that it would be a good idea to get the transcript which would cost about $2,000. Respondent asked Myers for that sum which she borrowed from friends and paid him. Tina Long, Myers's half-sister, testified that she overheard a conversation between Myers and respondent at a restaurant when respondent was discussing the fee and costs arrangement for Myers's representation. Long heard respondent state that he needed Myers to advance money. Long asked respondent why, since she understood respondent was taking the case on a contingent fee basis. Long testified that respondent told Long that the advanced sums were for the transcript of the District hearing.

On March 20, 1984, respondent gave Myers a receipt for the $2,000, stating it was for "fees received."[2] Respondent placed these funds in his

1. Myers testified that respondent earlier proposed a 40 percent contingent fee. She signed the agreement for the higher fee considering that it was still "worth it." At the time of this agreement, state law required attorney-client contingent fee contracts to be in writing. (Bus. & Prof. Code, § 6147.)

2. Respondent used a form of receipt with pre-printed categories. The only choices were "trust funds received," "costs recovered" or "fees received." A space for a memorandum was blank. (Exh. D.)

general, non-trust bank account. At the State Bar Court trial, he testified that Myers's $2,000 was for fees, as he had agreed with Myers to a fee of $5,000 *before* the written contingent fee agreement was signed and he testified that the written agreement did not change that.[3] Admittedly respondent had nothing in writing supporting his claim to a fixed fee and he never billed Myers for the $3,000 difference after she advanced $2,000 which she had testified was for the reporter's transcript, not fees. Respondent testified that he was not asked by Myers in 1984 to get the reporter's transcript, but his testimony was equivocal on whether or not the transcript would have been useful to him at that time. It is undisputed that respondent did not ever order the transcript. Respondent denied that he had spoken to Long about requesting money for the District hearing transcript.

There is no dispute that early in his handling of the case, respondent performed considerable services for Myers. He estimated that he had invested about $1,500 in investigator fees and filing and service costs. He filed a tort claim with the District and after it was denied, on October 30, 1984, he filed an action for wrongful termination against the District in Fresno County Superior Court. This suit prayed for Myers's reinstatement and damages exceeding $45,000. In 1985, the District answered the suit and respondent prepared responses to discovery which the District had propounded to Myers.

In December 1985, the District moved for summary judgment on the ground that Myers failed to seek judicial review of the District's personnel action under section 1094.5 of the Code of Civil Procedure (administrative mandamus) and mandamus review was a jurisdictional prerequisite to pursuing the wrongful termination action. The District was correct insofar as Myers's failure to pursue administrative mandamus prevented a cause of action from surviving as to issues bound up in the District's administrative proceeding.[4] Rather than have a summary judgment hearing, respondent stipulated with the District's lawyer that respondent would dismiss Myers's suit without prejudice and Myers would seek administrative mandamus before proceeding with any other action.

The respective testimony of Myers and respondent was in conflict as to what respondent told Myers about her case. Although Myers testified that she received a few contacts from respondent during the years 1985 to 1988, some of which she could not understand, her regular phone calls during those years seeking progress and status information went unreturned and a number of appointments Myers set up with respondent's office staff were canceled or respondent did not show up for them. According to Myers, in 1988, she learned from the State Bar, not respondent, of the 1986 dismissal of her wrongful termination action. In August 1988, she was able to meet with respondent. He told her that the judge ruled that she did not have a case, but she should not worry as respondent could go against the CSEA; however, it would take several more years.

Respondent testified: he was aware that Myers's education was limited and he tried to keep his explanations simple. He kept Myers adequately and clearly informed of all major steps in her case. Early on he advised her that her damages claim was weak and told her so in advance of the summary judgment motion, explaining that the judge was going to determine if "she had a case." He first did research in January 1986 on the jurisdictional issue of failure to pursue administrative mandamus. Soon thereafter, he realized that the District's counsel had a good legal position. Respondent told Myers later in 1986 that her case would be dismissed because, in essence, the type of suit he brought was wrong. He offered to pursue the administrative mandamus petition promptly, but told Myers that he would need $2,800

3. Respondent believed that he could get some or all of these fees from CSEA since he understood there was an attorney fee benefit in Myers's CSEA benefits package. The record is unclear whether respondent or Myers ever applied to CSEA for any attorney's fees for this matter but there is no evidence that respondent or Myers ever received any such benefit from CSEA.

4. E.g., *Boren* v. *State Personnel Board* (1951) 37 Cal.2d 634, 637. More recently see *Knickerbocker* v. *City of Stockton* (1988) 199 Cal.App.3d 235, 243-245 ("Unless the administrative decision is challenged, it binds the parties on the issues litigated and if those issues are fatal to a civil suit, the plaintiff cannot state a viable cause of action.").

to order the transcript of the District hearing. Since Myers did not give him the money, he considered the case closed. He did not know how many appointments with Myers were broken, but he knew that he missed a couple of appointments with her.

Respondent admitted that he did not return Myers's file promptly but that was due to his inability to locate it until February 1989, a year after Myers had requested. He admitted that he did not let Myers know of his inability to locate the file. Respondent had no documentation as to Myers's file being closed and was not sure exactly when it went to a closed case status. He did not offer to return Myers's $2,000 but he did offer to give the $2,000 to the State Bar to hold. He felt that since he had quoted that sum as part of his fees, he had earned it for fees.

B. Findings Regarding Culpability.

On the significant aspects of this count, the hearing judge found in substance that in 1984, Myers retained respondent on a contingent fee agreement. She advanced him $2,000 for transcripts but he considered the advance to be for legal fees. Between about January 1985 and June 1986, a year passed without direct contact between Myers and respondent. During this time she received one letter from respondent in April 1986 regarding an upcoming court determination of whether she had a case against the District. She received no other written communication from respondent after this time and learned only from the State Bar that her suit had been dismissed. In February 1989, Myers requested her file and refund of the $2,000. Respondent did not return her file or her $2,000.

From the above findings, the hearing judge concluded that respondent's failure to communicate with Myers prior to January 1, 1987, violated Business and Professions Code section 6068 (a)[5]. Respondent's failure to respond to most of Myers's attempts to communicate with him after January 1, 1987, violated section 6068 (m). After June 1986, when Myers's suit was dismissed, respondent violated former rule 2-111(A)(2), Rules of Professional Conduct.[6] **[3 - see fn. 6]** Respondent's intentional failure to perform services after Myers's suit was dismissed violated rule 6-101(A)(2). Finally, by failing to keep Myers's costs advance in a proper trust account, respondent violated rule 8-101(A) and also violated rule 8-101(B)(4) by failing to return promptly Myers's file. The hearing judge concluded that there was no clear and convincing evidence that respondent violated rule 8-101(B)(3) in not giving Myers an accounting.

[4a] In weighing conflicting evidence, the hearing judge gave reasons for preferring Myers's testimony over respondent's. These included Myers's better record keeping, her better trustworthiness and the lack of any documentation on respondent's part to reflect the critical decisions he made about the handling of Myers's case.

C. Discussion of Findings Regarding Culpability.

On the significant findings and conclusions, we adopt those contained in the hearing judge's decision. While we agree with respondent and the examiner that individual portions of two findings do not appear supported by clear and convincing evidence—the second and third sentences of finding one and the use of the term "Thereafter" in the first sentence of finding seven—those portions of the findings are not critical to the principal charges of culpability facing respondent.

[4b] Respondent would have us disregard the hearing judge's weighing of evidence and assessment of credibility and adopt contrary findings. While our power of independent record review has caused us to examine the evidence anew, we must give great weight to the hearing judge's findings

5. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

6. **[3]** Unless noted otherwise, all references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989. To be disciplinable, a rule violation must have been found to have been "wilful." (E.g., section 6077; rule 1-100.) The hearing judge's decision is silent on this question of wilfulness; however from a reading of his conclusions, we deem that the judge intended to draw the conclusion that respondent's violation of the respective rules was wilful.

resolving issues pertaining to testimony. On the significant findings, we are not given any sufficient reason to upset the hearing judge's assessment of credibility and we therefore decline to do so. (See *In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 638, 640.)

[5] Although respondent and Myers were able to communicate a few times over the years, the record contains clear and convincing evidence that respondent did not respond to several of Myers's reasonable inquiries before and after January 1, 1987, when section 6068 (m) became part of an attorney's duties.[7] Accordingly, respondent was culpable of violating section 6068 (a) for failure to communicate adequately with Myers before 1987 and of violating section 6068 (m) for such failure after the start of 1987. (See *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 486-487.)

[6a] The record yields clear and convincing evidence that respondent both failed to perform legal services in wilful violation of rule 6-101(A)(2) and withdrew from employment without avoiding prejudice in wilful violation of rule 2-111(A)(2), after he agreed to dismiss his client's wrongful termination suit in order to permit him to pursue administrative mandamus. Indeed, there is no dispute that respondent failed to proceed for Myers. He sought to justify his inaction only by Myers's failure to provide funds to order the administrative hearing transcript. However, the hearing judge found that Myers had given respondent $2,000 for this transcript and her testimony was corroborated by her half-sister, Long. In any event, respondent's written fee agreement required him to advance all reasonably necessary costs and did not require the payment of any attorney fees in advance. Although respondent was free to alter the agreement in 1986 when he agreed to dismiss Myers's suit, he did not do so and claimed instead, without documentary proof, that he had made a fee agreement with Myers prior to their written agreement which survived that writing. As to the $2,000 sum, the record shows that neither respondent nor Myers acted strictly by the terms of the written contingent fee agreement. Neither has asserted that that agreement was the sole repository of all terms regarding fees and costs.

[6b] Given the state of the evidence, the hearing judge properly chose to weigh Myers's testimony about the fee agreement greater than respondent's and appropriately determined that Myers's $2,000 advanced to respondent in 1984 was for costs, not fees; and that therefore respondent wilfully violated rule 8-101(A) by not depositing that sum in a trust account. Equally well supported is the conclusion that respondent wilfully violated rule 8-101(B)(4) by not returning Myers's file promptly.

D. Procedural Issues.

Before turning to the issue of degree of discipline, we address two points asserted by respondent relating to the findings of culpability.

[7] Respondent contends first that "having found an abandonment of the case" prior to 1987, the hearing judge could not have found that respondent violated section 6068 (m). Respondent cites no authority for his claim. Contrary to respondent's view, on this record there is nothing inherently inconsistent in concluding that respondent failed to communicate reasonably with Myers and that he also effectively withdrew from employment (rule 2-111(A)(2)) and failed to perform services (rule 6-101(A)(2)). In *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816-817, the Supreme Court opined in footnote five that the record might suggest more of a rule 6-101 competency violation than a rule 2-111(A) withdrawal one. The Court nevertheless concluded that once Baker stopped coming to the office and could not be contacted by his clients, he effectively withdrew his services. Nowhere in *Baker* does the Court suggest that discipline for failure to communicate is inconsistent with violation of the withdrawal rule and several of the counts in *Baker* involved a finding of both types of violations. Additionally, we recently found an attorney culpable of failing to communicate in response to client concerns during a time period

7. Respondent's own testimony conceded that he did not keep all of his appointments with Myers.

after the completion of all substantive legal services. (See *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 146-147.)

[8a] Respondent's second point is that he was denied adequate notice of the scope of the charges of failure to communicate with Myers and was not given a fair opportunity to present evidence when the judge determined that the time frame predated June 1986. Whether respondent did or did not communicate appropriately with his client before June of 1986 is not the most critical of the charges. Respondent's claims are without merit.

Paragraph four of the notice to show cause in this count alleged: "4. On or about June 2, 1986, you signed a Stipulation on behalf of Ms. Myers that the above-referenced matter be dismissed without prejudice. Said Stipulation was ordered by the Court on June 5, 1986, and filed on June 6, 1986."

The next paragraph of the notice alleged: "5. Thereafter, you failed to complete the performance of services for which you were employed. You failed to communicate with your client despite her attempts to communicate with you and you have failed to deliver to Ms. Myers her papers and property despite her requests that you do so. You failed to notify Ms. Myers of the stipulated dismissal of her matter."

Had paragraph five of the notice made it clear that the word "Thereafter" was a predicate to all charges ("Thereafter you failed: to complete . . .; to communicate; etc.") respondent's argument about the time factor of the charges would be more persuasive. **[8b]** However, there was extensive colloquy at the trial about the scope of the notice. While the hearing judge acknowledged that the notice could have been more clearly phrased, he correctly concluded that it allowed for evidence of pre-1986 failure to communicate.

[8c] Respondent's complaint that he was foreclosed from presenting evidence regarding alleged pre-1986 failures to communicate is simply unmeritorious. On May 23, 1991, the judge did prohibit further evidence, but only because the taking of evidence from both parties had been closed. Respondent has failed to cite the early portion of the transcript of the *previous* full-day evidentiary hearing (R.T. 5/9/91, pp. 38-39) in which the judge stated that he would rule that testimony "about failure to communicate at any time during the [attorney-client] relationship . . . is appropriate and admissible and is relevant . . . ."At this May 9 hearing, respondent had ample time during his lengthy examination which followed to present whatever evidence he wanted to about this subject. He has given us no offer of proof of any additional evidence nor explained why he was unable to present it at the appropriate time.

E. Degree of Discipline.

Respondent has no record of prior discipline. He testified to an impressive success story: he was the son of field workers and he had also been one. He was always active in Chicano causes and 85 percent of his earlier practice involved the representation of persons of Mexican origin, especially persons such as immigrant farm workers, in a wide variety of matters, such as unlawful detainer, immigration and vehicle purchase. More recently, his law practice changed so that it is now much more concentrated in criminal defense. Respondent has always performed reduced fee or pro bono legal services. He presented no live character witnesses, but introduced 11 character reference letters. The character references consisted of a bank vice president, persons owning small businesses, one of respondent's former legal secretaries, a political consultant and a musician. The 11 letters were "form" in nature—they appeared to be prepared on the same word processor and most contained some text identical to other letters. Although the references professed awareness of the complaint against respondent, they gave no details of how it related to character assessment. Nevertheless, each witness gave a strong endorsement of respondent's character and integrity. Several references emphasized respondent's unselfish community and pro bono services.

In hindsight, respondent testified that he would have taken more time to make sure that Myers understood the steps he was taking on her behalf.

In reaching his recommendation of suspension, the hearing judge cited both mitigating and aggravating circumstances. He discussed the mitigating

evidence of respondent's free and reduced-fee legal services and community service. While concluding that respondent did not show "remorse as a reaction to a sense of guilt," the judge opined that respondent did express regret for involvement in the State Bar proceedings and sincerely expressed his desire to avoid any recurrence. As aggravating circumstances, the judge cited the loss of Myers's legal rights occasioned by respondent's misconduct; lack of communication with Myers, especially after the 1986 dismissal of her suit; and respondent's understanding about his fee arrangements with Myers, which were "guaranteed to cause confusion and lead to disputes." The judge concluded that respondent treated Myers in a "condescending, paternalistic and inconsiderate manner" which cost her time, money, her legal rights and emotional distress. In making his suspension recommendation, the judge did not discuss comparable cases and gave only a simple citation to the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.)

[9a] Concerning the balance of aggravating and mitigating circumstances, we agree that respondent did present impressive mitigating evidence as to his generous service to disadvantaged clients in his community as well as his community service. Nevertheless, his abandonment of Myers was serious and harmful to her. Despite getting an opportunity from opposing counsel to correct the legal mistake respondent made by failing to pursue administrative mandamus for Myers, he took no further action for her, thereby causing her to lose her cause of action. Even if respondent somehow believed that Myers's $2,000 advance two years earlier was for fees, not costs, he was obligated to preserve Myers's legal rights. His lack of diligent representation was also echoed in his failure to document his file adequately as to steps he had taken for Myers in the critical year of 1986. Respondent admitted that he was unsure when he considered Myers's file to be in a closed status and he was unable to produce it for a year after Myers had requested its return. His failure to communicate with Myers after 1986 was also serious.

The parties' briefs on review do not call our attention to decisions of the Supreme Court or of this department on the issue of appropriate degree of discipline for a case which is primarily one of client abandonment. Respondent cites the public reproval imposed in *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092. While that case is helpful in viewing a situation of an attorney's wrongful but not dishonest claim of entitlement to trust funds, nothing in that case bears on respondent's abandonment of Myers.

[9b] In an opinion we filed earlier this year, *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 45-46, we discussed several past decisions of the Supreme Court revolving around an attorney's abandonment of a single client in situations where the attorney had no prior record of discipline. (*Harris* v. *State Bar* (1990) 51 Cal.3d 1082; *Layton* v. *State Bar* (1990) 50 Cal.3d 889; *Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d 921; *Wren* v. *State Bar* (1983) 34 Cal.3d 81.) The discipline imposed in these cases ranged from no actual suspension to 90 days of actual suspension. In our *Aguiluz* decision, we recommended no actual suspension on a record involving no violation of rule 8-101, in which slightly more mitigating circumstances were present and in which the clients did not suffer loss of their cause of action. In *Van Sloten* v. *State Bar*, *supra*, the Supreme Court imposed no actual suspension on an attorney with five years of practice who had failed to perform services for a client without causing substantial harm, where the misconduct was aggravated by the attorney's lack of appreciation of the disciplinary process as well as the charges against him.

At the other end of the range, *Harris* v. *State Bar*, *supra*, imposed a 90-day actual suspension as a condition of probation for protracted inattention to a client's case resulting in a large financial loss to the client's estate. The Court considered Harris's debilitating illness to be of some weight in mitigation but also noted that she showed little, if any, recognition of wrongdoing and no remorse.

[9c] We see this case as warranting slightly more discipline than the *Van Sloten* or *Aguiluz* decisions but less discipline than the *Harris* decision. Considering all relevant circumstances, we believe that a stayed suspension on the conditions recommended by the hearing judge is appropriate in this case, except that we believe an actual suspension of

30 days rather than 60 days is sufficient. It will serve to remedy the seriousness of respondent's misconduct which involved not only abandonment of and failure to communicate with his client but also his trust account violation; and, at the same time it recognizes the mitigation present including respondent's sincerely-expressed aspiration not to be the subject of disciplinary proceedings again.

III. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend to the Supreme Court that the respondent, George Nunez, be suspended from the practice of law in California for a period of six (6) months, that his suspension be stayed and that he be placed on probation for a period of one (1) year on conditions including that he be actually suspended from the practice of law for the first thirty (30) days of the period of probation and that he comply with the remaining conditions of probation numbered two through nine recommended by the hearing judge in his decision filed August 1, 1991.

We also recommend that respondent be required to take and pass the California Professional Responsibility Examination administered by the State Bar's Committee of Bar Examiners within one (1) year of the effective date of the Supreme Court's order in this case. Finally, we adopt the hearing judge's recommendation that costs be awarded the State Bar, pursuant to section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ERNEST LINFORD ANDERSON

A Member of the State Bar

Nos. 88-C-14303, 88-C-14545

Filed September 21, 1992; as modified, March 10, 1993

SUMMARY

After a consolidated hearing on respondent's two conviction referrals for drunk driving in 1985 and 1988, one of which had been remanded by the review department, the hearing judge concluded that the facts and circumstances of the convictions, including respondent's three prior drunk driving convictions, did not involve moral turpitude but did involve other misconduct warranting discipline. The hearing judge recommended that respondent be suspended for one year, stayed, with probation for three years and a thirty-day actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

The examiner sought review, contending that respondent's most recent criminal actions, viewed in light of his past record, involved moral turpitude, and that respondent should be actually suspended for a minimum of one year. The review department affirmed the findings and legal analysis in the hearing judge's decision, holding that while respondent's conduct was very serious, posed a danger to society, and warranted discipline, it did not fall within the definition of moral turpitude. Although not applying standard 1.7(b) strictly to require disbarment of respondent for his third disciplinary matter, the review department considered as an aggravating circumstance respondent's prior disciplinary record, consisting of two reprovals for inattention to clients' needs. The department concluded that the seriousness of respondent's misconduct merited a greater actual suspension than 30 days. It recommended a 60-day actual suspension and adopted the remainder of the hearing judge's discipline recommendation.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Tom Low, James L. Crew

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] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1528 Conviction Matters—Moral Turpitude—Definition
Although drunk drivers pose a extreme danger to society, the Supreme Court has held that an attorney's conviction for drunk driving does not per se establish moral turpitude, even when the attorney has prior convictions for that offense. The Court has also determined that the more serious crime of gross vehicular manslaughter while intoxicated does not per se involve moral turpitude.

[2] **1528 Conviction Matters—Moral Turpitude—Definition**
The determination whether the facts and circumstances of an attorney's criminal conviction involved moral turpitude is a matter of law. The concept of moral turpitude does not fit a precise definition; it is a commonsense concept, designed to protect the public. It is measured by the morals of the day and may vary according to the community or the times.

[3 a, b] **1528 Conviction Matters—Moral Turpitude—Definition**
1691 Conviction Cases—Record in Criminal Proceeding
The determination of whether an attorney's conviction of certain crimes not involving moral turpitude per se should give rise to discipline, and on what basis, is not always an easy task. When the State Bar Court is asked to decide after hearing whether moral turpitude is involved in an attorney's conviction, the determination must be based on the facts and circumstances surrounding the conviction.

[4] **691 Aggravation—Other—Found**
1699 Conviction Cases—Miscellaneous Issues
An attorney's criminal misconduct is aggravated when the attorney's previous experiences demonstrate that the attorney was aware of the issues involved in the criminal behavior.

[5] **720.30 Mitigation—Lack of Harm—Found but Discounted**
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1528 Conviction Matters—Moral Turpitude—Definition
In order to determine that a crime involved moral turpitude, specific resulting harm need not be shown. Conduct which poses a danger to the public, such as drunk driving, is no less serious because it did not result in death or injury.

[6 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1527 Conviction Matters—Moral Turpitude—Not Found
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found
In analyzing whether a conviction for drunk driving involves moral turpitude, such factors as a prior conviction for drunk driving, a violation of criminal probation, and a high blood alcohol level have been held insufficient to warrant a moral turpitude finding. Where respondent had several drunk driving convictions and was aware of the problems of drunk driving due to past prosecutorial experience, and where the circumstances of respondent's crimes involved threats to peace and safety and confrontations with law enforcement officers, respondent's misconduct approached but did not cross the moral turpitude line, but did constitute misconduct warranting discipline.

[7 a-c] **511 Aggravation—Prior Record—Found**
691 Aggravation—Other—Found
740.10 Mitigation—Good Character—Found
750.10 Mitigation—Rehabilitation—Found
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence

Where respondent's drunk driving convictions involved more serious misconduct than in prior reported disciplinary cases involving drunk driving, including repeated abusive conduct with law enforcement officers, and respondent had two prior disciplinary reprovals, but respondent presented favorable evidence of professional ability and character references as well as efforts toward overcoming his addiction to alcohol, a 60-day actual suspension was appropriate to serve the aims of attorney discipline and, coupled with three years of probation, to assist in convincing respondent to deal with his alcohol abuse problems seriously.

[8 a, b] **511 Aggravation—Prior Record—Found**
801.41 Standards—Deviation From—Justified
806.59 Standards—Disbarment After Two Priors
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence

A literal application of standard 1.7(b) would call for disbarment of any attorney who is found culpable in a third disciplinary proceeding, unless compelling mitigating circumstances predominate. However, this standard must be applied in light of the nature and extent of the prior record. Where respondent's prior record of two reprovals involved inattention to the needs of clients, misconduct of a different nature than the drunk driving convictions involved in respondent's third proceeding, respondent's prior disciplinary record did not warrant disbarment, but did constitute a proper aggravating factor.

ADDITIONAL ANALYSIS

Aggravation
Found
561 Uncharged Violations
Mitigation
Found
725.11 Disability/Illness
Discipline
1613.06 Stayed Suspension—1 Year
1615.02 Actual Suspension—2 Months
1617.09 Probation—3 Years
Probation Conditions
1024 Ethics Exam/School

OPINION

STOVITZ, J.:

These matters return to us on the State Bar examiner's request for review after our remand for consolidation of two conviction referrals involving respondent, Ernest L. Anderson. (See *In the Matter of Anderson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 39.) As a result of the record made on remand in the consolidated proceeding, we have detailed findings of fact by the hearing judge on four specific instances of respondent's drunk driving: two in 1983, and one each in 1985 and 1988. In addition, on remand, the judge considered carefully the issue of moral turpitude and all issues bearing on the aggregate degree of discipline. She concluded that the facts and circumstances surrounding respondent's conduct did not involve moral turpitude, but showed conduct warranting discipline under *In re Kelley* (1990) 52 Cal.3d 487. She recommended a one-year suspension, stayed on conditions of a three-year probation and a thirty-day actual suspension.

The State Bar's request for review contends that respondent's most recent actions, viewed in light of his past record, involved moral turpitude and that, at a minimum, respondent should be actually suspended for one year. Before us, respondent urges that we affirm the hearing department findings, conclusion and recommended discipline. While we affirm the hearing judge's findings and legal analysis, we have determined on balance that respondent's conduct merits a longer actual suspension than that recommended by the hearing judge, given respondent's record of prior discipline and the serious nature of the misconduct at issue in the consolidated cases before us. We will, therefore, recommend to the Supreme Court a one-year stayed suspension, a three-year probation term on the conditions outlined in the hearing judge's decision and a sixty-day actual suspension.

I. FACTS

In this conviction referral proceeding, neither party has disputed the hearing judge's thorough findings. They are fully supported by the record. We adopt them and summarize them briefly.

A. 1979 Incident

The parties stipulated that on January 15, 1979, respondent was arrested and charged in the Municipal Court, San Leandro-Hayward Judicial District, with drunk driving.[1] In April 1979, he pled guilty to speeding (Veh. Code, § 22350) and was fined approximately $750.

B. 1983 Incidents

In July 1983, an Alameda County deputy sheriff responded to a disturbance call placed by a business in the Hayward area. He noticed respondent inside the business. He was exuding a heavy odor of alcohol and his speech was slurred. Respondent gave the deputy his attorney-at-law business card. He possessed an expired driver's license. The deputy told respondent he appeared to be intoxicated and that he should not drive. The deputy directed respondent to a telephone and told him to call a friend or taxi. Respondent and the deputy left the business separately. A short time later, the deputy observed respondent enter his car and drive away. Unable to follow respondent's car in heavy traffic, the deputy radioed for police assistance. About five minutes later, the deputy learned that a California Highway Patrol unit had stopped respondent's car. The deputy drove to the scene of the stop and observed that respondent was verbally abusive to and uncooperative with the highway patrol officer.

After negotiations, in October 1984, respondent was convicted in the Municipal Court, San Leandro-Hayward Judicial District on plea of nolo contendere to two counts of drunk driving, one arising out of the July 1983 incident, discussed herein, and another arrest arising out of a December 1983 incident, the circumstances of which are not part of our record because the parties did not submit any additional evidence. Also, in October 1984, respondent was convicted of one count of driving without a valid

1. We follow the Supreme Court's use of the term "drunk driving" in a colloquial sense to refer to any of the several offenses of prohibited driving after the excess consumption of alcohol. (*In re Kelley*, *supra*, 52 Cal.3d at p. 494, fn. 3.)

license in July 1983. Based on his pleas, he was sentenced to two days in county jail, with credit for time served, three years of court probation and fined $674.

C. 1985 Incident

On January 31, 1985, respondent had 10 to 12 alcoholic drinks after work. He then drove and was stopped by a Hayward police officer who saw respondent's car drift into the next traffic lane, causing a car in that lane to swerve across a double yellow line to avoid a collision. When exiting his car, respondent stumbled and fell against it. The officer smelled alcohol on respondent's breath and noticed that respondent's eyes were glassy and bloodshot and his speech slurred. As the officer was preparing to administer a sobriety test to respondent, respondent pushed the officer backwards, causing him to fall. Respondent got back into his car and, when the officer tried to turn off the car's ignition, respondent pushed the officer's hand away, put the car in gear and drove off into the night at high speed without headlights. The officer suffered a minor cut to his hand during this incident.

Unable to pursue respondent, the officer obtained his home address and arrested him there without incident. A later chemical test showed respondent's blood alcohol level was 0.20 and respondent knew when he was driving that he was drunk. When stopped, he was still on probation from his 1983 drunk driving incidents. From the 1985 incident, respondent pled guilty to drunk driving, was sentenced to three years probation and fined $900. Specific probation conditions included that respondent not drive with any measurable blood alcohol level and that he not refuse to submit to a chemical test of blood alcohol if arrested for drunk driving. In 1986, respondent's formal probation was converted to an unsupervised community release.

D. 1988 Incident

In April 1988, after a felony trial was unexpectedly continued in which respondent was representing the defendant in San Jose, respondent returned to the area of his law office near Hayward. It was lunch time. Respondent had been up since very early in the morning and had no further appointments that day. He went to two nearby restaurants to have lunch but instead drank several glasses of wine in each. He does not recall getting into his car in the shopping center parking lot in which the restaurants were located, but several citizens saw him do that and telephoned the Hayward police. There is no evidence that respondent's vehicle left the shopping center. The responding officer saw that respondent's eyes were watery and bloodshot, smelled alcohol about him and noticed he swayed while standing and his speech was slurred. The officer concluded that respondent was unable to safely care for himself and was subject to arrest for public intoxication. (Pen. Code, § 647, subd. (f).) While the two were talking, respondent reached out and touched the officer's holstered service revolver. The officer told respondent not to do that again. After further discussion, respondent appeared to start leaving the scene and the officer arrested respondent. During the arrest, respondent struggled with the officer who had to place respondent on the ground to handcuff him. An assisting officer observed respondent kicking the arresting officer.

Respondent was transported to jail and on the way threatened to have the officer's job and home, then started to cry and said he was suicidal. Respondent was uncooperative and aggressive during part of the booking process. When asked to take a chemical test, respondent changed his mind three or four times as to the type of test he would take or whether he would take a test at all. During this process, he again had to be brought to the ground to be handcuffed so that he could be transported for testing. He later ceased his uncooperative behavior, but displayed conduct which resulted in his admission to a psychiatric facility for observation.

From this incident, in 1989 respondent pled nolo contendere to drunk driving. He was sentenced to 120 days in county jail with credit for 5 days and the balance stayed. He was also given three years conditional release and the 1988 revocation of his 1985 probation was rescinded and his probation restored.

II. MITIGATING AND AGGRAVATING EVIDENCE IN THE RECORD

In about 1970 or 1971, just after his admission to practice law, respondent was employed by the Alameda County District Attorney's office. At that time, he prosecuted 30 to 40 drunk driving cases to jury trial. He was aware of what a person driving under influence of alcohol could do to himself or to others. At times, during mid-day, respondent would call his office after having three to five alcoholic drinks and cancel one or two client appointments. Although not the subject of findings, the record also shows that respondent drove while intoxicated on more occasions than the incidents set forth above, but was not arrested.

As part of his sentencing in 1985, respondent participated in a drunk driving program. He took the drug Antabuse for about six months. After completing that program, he fell back into a pattern of drinking alcoholic beverages after work, but switched to drinking only wine. Since June 1988, respondent has stopped consuming alcohol.[2] Respondent has had regular psychiatric counseling for major depression as well as alcoholism. As found by the hearing judge, respondent's treating psychiatrist, Dr. Whitten, concluded that respondent's alcoholism and depression were so joined that it was not possible to treat one without treating the other. Respondent has maintained weekly sessions with Dr. Whitten.

Respondent testified at length about the events surrounding his 1988 arrest. He recalled his drinking wine at the restaurant, being arrested, a few details about his booking and jail stay, but few other details.

At the time of the evidentiary hearings, respondent was not participating in an alcohol treatment program. He had attended Alcoholics Anonymous meetings only three to four times in the six months prior to those hearings. One of respondent's witnesses, Lee Estep, a recovering attorney with 20 years of experience in assisting in the recovery from substance abuse of other attorneys, emphasized the need for ongoing involvement in an alcohol recovery program to insure a successful recovery. Although one is never "cured" of alcohol addiction, Estep testified that respondent's maintenance of sobriety past the one and one-half year point was very significant in his favor.

In aggravation, this is respondent's third disciplinary proceeding. He was privately reproved in 1983 and publicly reproved in 1984. Both prior reprovals were by stipulated disposition. Respondent's private reproval was based on his admissions in substance that in representing a client in a construction dispute in 1977, respondent performed initial services and conducted legal research, but wilfully failed to perform services despite his client's written and telephonic requests to proceed. In aggravation, respondent wilfully failed to respond to a local bar association client relations committee inquiry and initially failed to respond to the State Bar inquiries of respondent on his client's behalf. In mitigation, respondent had agreed to restore all attorney fees he had received from this client. He offered to prove that some of his failures to communicate were inadvertent and that he had since improved his office practices.

Respondent's public reproval was based on his admissions that he failed to: communicate with his clients, use reasonable diligence on their behalf and promptly deliver their papers after conduct tantamount to withdrawal. As factors bearing on discipline, the parties agreed that respondent had attempted to assist his clients in several other ways and had improved his office practices.

The hearing judge found the circumstances surrounding respondent's arrests in 1985 and 1988 also aggravating, particularly the altercation with the officer in 1985 and his erratic behavior and refusal to cooperate with the officers in the 1988 incident. Further aggravation was respondent's continued drunk driving, given his experience in having prosecuted drunk driving cases, his prior drunk driving arrests and knowledge of the dangers of drunk driving.

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2. Finding of fact 67 (decision p. 18) implies that respondent ceased his regular consumption of alcohol in April 1988. Respondent's own testimony was that he occasionally tasted wine at dinner parties until June 1988. (R.T., Sept. 30, 1990, p. 48.)

In mitigation, respondent offered impressive character evidence. Live witnesses had testified in his favor at the earlier hearing and he introduced several character letters in evidence on remand. None of these witnesses alleged that any problem respondent might have had with alcohol ever interfered with his representation of clients. Three of respondent's character letters were from superior court and municipal court judges in Alameda County who attested to his legal skills and competence. None of the judges expressed the view that respondent had shown any impairment on behalf of clients and two of the judges were surprised to learn that he had a problem with alcohol abuse. The hearing judge considered this character evidence mitigating.

III. CULPABILITY DETERMINATION

[1] There is no question as to the extreme risk of danger to our society posed by the drunk driver. In our earlier opinion in this proceeding, we cited the Supreme Court's own expression of concern in this regard. (*In the Matter of Anderson*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 44, fn.10.) Yet despite this risk to society, in recent times, our Supreme Court has held that an attorney's conviction of drunk driving even with prior convictions of that offense does "not per se establish moral turpitude." (*In re Kelley*, *supra*, 52 Cal.3d at pp. 492, 494.) The Supreme Court has also determined that the more serious crime of gross vehicular manslaughter while intoxicated is not one per se involving moral turpitude. (See *In re Conviction of Van Dusen* (S009736) min. order filed October 10, 1990 [conviction of Pen. Code, §191.5].)

Since respondent's offenses do not involve moral turpitude per se, our first step of analysis of the culpability issue is whether the facts and circumstances surrounding respondent's convictions involved moral turpitude or other misconduct warranting discipline. The principles and definitions of moral turpitude for attorney convictions of crime have been discussed and applied often by our Supreme Court over many years.

[2] 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), but has been consistently described as 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." (*In re Craig* (1938) 12 Cal.2d 93, 97.) The 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.) It 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.)

[3a] Although the Supreme Court's definitions of moral turpitude have been consistent over time, the determination of whether an attorney's conviction of certain crimes not involving moral turpitude per se should give rise to discipline, and on what basis, has not always been an easy task. Indeed, it has been one of the few issues of attorney regulation to sharply divide our Supreme Court over the years. (*In re Kelley*, *supra*, 52 Cal.3d 487 [drunk driving]; *In re Rohan* (1978) 21 Cal.3d 195 [wilful failure to file income tax returns].) The parties to this proceeding and this department recognize that the hearing judge appreciated the difficulty of this question, devoting over eight pages of her decision to its analysis.

[3b] When we are asked by the Supreme Court to decide after hearing whether an attorney's conviction is one involving moral turpitude, we must base our determination on the facts and circumstances surrounding the conviction. (*In re Carr* (1988) 46 Cal.3d 1089, 1091.) As noted by the hearing judge, there are few Supreme Court disciplinary opinions to guide us on this question in the area of vehicle-related criminal convictions. We recognize that the specific facts in a case may influence the legal analysis and make drawing general principles for future cases much more difficult. The hearing judge's careful delineation of the similarities and contrasts of this case to *In re Alkow* (1966) 64 Cal.2d 838; *In re Kelley*, *supra*, 52 Cal.3d 487, and *In re Carr*, *supra*,

46 Cal.3d 1089, demonstrates the struggle entailed in arriving at a reasoned determination of the issue of moral turpitude.

When we remanded this case for consolidation and rehearing, we noted in passing some apparent similarities between the stipulated facts and the facts in the *Alkow* case and suggested there might be some differences as well which the hearing judge might take into account. (*In the Matter of Anderson, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 44-45, fns. 10, 12.) After our remand, the Supreme Court decided *In re Kelley, supra*, 52 Cal.3d 487, holding that the facts and circumstances of that attorney's conviction of drunk driving, with a prior such conviction, did not involve moral turpitude, but did involve misconduct warranting discipline. The hearing judge concluded that the facts of the present case were closer to *Kelley* than to *Alkow*. As we shall discuss, we agree with the hearing judge.

In *Alkow*, the attorney was convicted of vehicular manslaughter after running down a pedestrian, an accident which was caused in part by Alkow's defective vision. Prior to the accident, Alkow had been denied renewal of his driver's license because of his impaired vision, and in the little more than three years from his license expiration to the fatal accident, Alkow was convicted of more than 20 traffic violations. At the time of the accident, Alkow was on probation for three separate incidents, all three finding that Alkow drove without a license and in two cases, he failed to observe a right of way or a stop sign. Alkow was subject to probation conditions requiring him to obey the law and not to drive without a license. The Supreme Court determined that Alkow showed "a complete disregard for the conditions of his probation, the law and the safety of the public" and concluded that under its applicable definitions, respondent's criminal conduct involved moral turpitude. (*In re Alkow, supra*, 64 Cal.2d at p. 841.)

Respondent also had a prior conviction record of three driving offenses, one in 1979 and two in 1983, all involving alcohol. In contrast, they are not as numerous as the more than twenty citations in the *Alkow* case, they are not as proximate to each other (over five years from January 1979 to December 1983) and there is more time between them and the incidents here.

[4] Both Alkow and respondent were aware of the circumstances which should have prevented either from driving and thus endangering the public. Alkow's impaired vision was well known to him and resulted in the denial of his driving privileges. He was cited repeatedly for driving without a license, the last time two months before he killed the pedestrian. Respondent had prosecuted drunk drivers early in his legal career, demonstrating his general awareness of the issue and exacerbating the impact of his own misconduct. (See *Seide* v. *State Bar* (1989) 49 Cal.3d 933, 938 [applicant's conduct surrounding conviction for drug trafficking more egregious due to prior law enforcement background]; *In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 251 [prior employment of attorney as deputy district attorney and FBI agent aggravated tax fraud conviction].) Further, respondent was conscious of his own drinking and driving problem because of his arrests; but, as noted by the hearing judge, alcohol use impairs judgment. Respondent's decision on occasion to drive when intoxicated is neither condoned nor excused, but it differs to a significant degree from Alkow's conscious, unimpaired decision to continue to drive with inadequate eyesight and without a license after *numerous* motor vehicle citations.

[5] The fact that respondent's drunk driving did not result in serious injury or death to another was merely fortuitous. It does not render respondent's conduct any less serious. While the death of the pedestrian appears to have been a factor in the moral turpitude determination in the *Alkow* case, we would not state that specific harm must always be shown to support a moral turpitude conclusion. As we found in *In the Matter of Frascinella* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 543, 550, physical harm was not required to show moral turpitude where an attor-

3. In contrast, in *In the Matter of Carr* (1992) 2 Cal. State Bar Ct. Rptr. 108, there were insufficient facts in the record regarding the circumstances of the offenses to conclude that moral turpitude was involved. (*Id.* at p. 116.)

ney brandished a replica firearm in a life-threatening manner, through deliberate conduct demonstrating his flagrant disregard for human life.[3]

The Court's limited discussion in *In re Carr*, *supra*, 46 Cal.3d 1089, a 1988 consolidated case of two convictions for drunk driving, provides little guidance. In that case, there is little factual recitation or discussion, and, on the issue of moral turpitude, a succinct adoption of the State Bar Court's recommended conclusion that moral turpitude was not involved. Carr was on criminal probation at the time of his second drunk driving offense. Respondent was on unsupervised probation at the time of his 1988 arrest. Carr had prior discipline from two consolidated cases of recent vintage, which was considered by the Court on the issue of degree of discipline. The Court adopted the review department's recommended discipline of six months actual suspension consecutive to Carr's then-current suspension. Respondent's prior attorney misconduct was proximate to his drunk driving arrests in 1983 and was not as serious, resulting only in reprovals.

As we stated, *ante*, since our remand of this matter, the Supreme Court has issued its opinion in *In re Kelley*, *supra*, 52 Cal.3d 487. We believe the present case to be closer to *Kelley* than to *Alkow*. In *Kelley*, an attorney was referred for State Bar hearing after she had been convicted twice of drunk driving within a 31-month period and had violated her probation in the first case by virtue of her second arrest. On her first arrest, Kelley had driven her car into an embankment and was arrested at the scene. Her probation conditions included obeying all laws and participating in an alcohol abuse program. While on probation, she was stopped by a police officer while driving home, initially refused a field sobriety test, and attempted to try to talk the officer out of that arrest. A second officer was called to the scene, assisted in the field sobriety test of Kelley, and arrested Kelley when she failed it. Her blood alcohol on the second arrest was noticeably above legal limits (in the range of 0.16 to 0.17). No one was injured in either of her drunk driving offenses.

At the discipline hearing, Kelley presented evidence that she lacked any prior discipline or criminal record, had participated in extensive community service and complied with all her probationary terms since her second conviction. The Court found that Kelley's conduct did not involve moral turpitude, but rather constituted other misconduct warranting disciplinary action. In response to Kelley's challenge to discipline for conduct not constituting moral turpitude, the Court found the circumstances of her misconduct were linked in two ways to her fitness to practice law. Kelley acted in violation of a court order setting forth the conditions of her probation in the first case by her second arrest and conviction, actions which the Court found were contrary to her duties as an officer of the court and as a practitioner. The circumstances of her two arrests and convictions within 31 months demonstrated to the Court's satisfaction an alcohol abuse problem which had entered into Kelley's personal life and which the Court found to have a potentially damaging effect on Kelley's practice and clients. These two grounds were sufficient support for the Court's exercise of disciplinary authority to protect the public. Noting that there had been no specific harm caused to the public or the courts, as well as Kelley's significant mitigating evidence, the Court ordered Kelley publicly reproved and directed her to participate in the State Bar's program on alcohol abuse.

[6a] The criminal violations in *Kelley*, *Carr* and the instant matter are the same, and such factors as a prior conviction for drunk driving, the violation of court-ordered probation and a high blood alcohol level at arrest, were insufficient in the Court's view to warrant a finding of moral turpitude. But the nature of the incidents and their greater number in this case indicate a more serious threat to the public and to respondent's fitness to practice and pose a closer question than in *Kelley* as to whether moral turpitude might be involved. Kelley's history of alcohol abuse is much shorter than respondent's and was not coupled with a prior awareness of the prob-

lem through professional, prosecutorial experience, as is the case with respondent. Kelley's crash into the embankment on her first arrest and her refusal to cooperate with arresting officers in her second arrest were not as threatening to the peace and safety nor as confrontational as in three of respondent's arrests.[4]

[6b] On balance, we agree with the hearing judge that this case, while more serious than the *Kelley* and *Carr* matters, approaches, but does not yet cross, the moral turpitude line. For the reasons we have discussed, *ante*, we have concluded on balance that this case is more akin to the Supreme Court's more recent *Kelley* decision than to its *Alkow* case. We therefore adopt the hearing judge's conclusion that the facts and circumstances surrounding respondent's drunk driving convictions involved other misconduct warranting discipline.

IV. DEGREE OF DISCIPLINE

[7a] The examiner has requested an increase in discipline from the recommended thirty days actual suspension, as a condition of probation, to a one-year actual suspension. We agree with the examiner that respondent's criminal conduct is more serious than in the *Kelley* and *Carr* cases. Six months of prospective actual suspension as part of a probationary suspension was imposed in *Carr*. No details appear in the Supreme Court's *Carr* opinion as to the surrounding facts of the convictions of drunk driving, but *Carr* did have a recently-imposed suspension in another matter. No moral turpitude was found to surround Carr's offenses. In *In re Kelley*, *supra*, 52 Cal.3d 487, the attorney's drunk driving convictions were notably less aggravated and fewer in number than the current case and Kelley had no previous discipline. Kelley also presented extensive evidence concerning her community service. Public reproval on conditions was ordered. Respondent's evidence of professional ability and character references presented in mitigation is favorable, although it does not appear as impressive as in *Kelley*. As to his rehabilitation, it is evident that respondent has made important efforts toward overcoming his addiction to alcohol, but has had no participation in any ongoing program of alcohol rehabilitation.

[8a] In the analysis of the aggravating evidence, the hearing judge did not discuss the weight to be given respondent's prior record of discipline. Since this is respondent's third disciplinary proceeding, literal application of the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("standards") would call for disbarment unless the most compelling mitigating circumstances predominate. (Std. 1.7(b).) However, under guiding case law, we look to the standards not reflexively, but, with regard to standard 1.7, with an eye to the nature and extent of the prior record. (See *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 778-780; *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 539.) In that light, respondent's priors were not remote in time, but they were of a different character—inattention to the needs of clients. **[7b]** Respondent's current convictions show no direct harm to clients' needs, but do show that he repeatedly failed to adhere to the law, jeopardized public safety, engaged in repeated abusive conduct with law enforcement officers and disregarded court probation orders. **[8b]** As a result, respondent's prior discipline is a proper factor for some aggravation.

[7c] In *In re Alkow*, *supra*, 64 Cal.2d 838, the attorney had one prior suspension for serious misconduct resulting in a three-year suspension. For his manslaughter conviction which involved moral turpitude, the Court imposed a six-month actual suspension. The prior misconduct in *In re Carr*, *supra*, 46 Cal.3d 1089, resulted in a suspension as well. For his criminal conduct, Carr was given an actual suspension of six months subsequent to his

4. As we have recited, in July 1983, respondent disregarded a police officer's warning not to enter his car and drive. In 1985, his driving almost caused a collision with a car in the opposite lane of traffic. When he was stopped, he engaged in an altercation with the arresting officer, causing a minor injury to the officer, and fled the scene at high-speed flight without headlights at night. As to respondent's 1988 arrest, his conduct appeared so seriously threatening to safety that citizens who saw respondent get in his car called the police and were ready to make a citizens' arrest. Respondent tried to place his hand on the arresting officer's revolver, then tried to elude him; and, when finally arrested, resisted, requiring another officer to intervene. On his way to jail, respondent threatened one of the officers and was uncooperative.

prior suspension. Respondent's prior reprovals do not carry aggravating weight equal to those matters. However, we conclude that a lengthier actual suspension of 60 days will serve the aims of attorney discipline: protection of the public, the courts and the bar; and, coupled with the conditions of probation we adopt in full from the hearing judge's decision, will assist in convincing respondent to deal at this juncture with his alcohol abuse problems seriously.

V. RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent Ernest Linford Anderson be suspended from the practice of law in this state for a period of one year; that execution of said suspension be stayed; and respondent be placed on probation for three years on the following conditions: that during the first 60 days of said period of probation, respondent shall be actually suspended from the practice of law in the state of California; and that he comply with the remaining conditions of probation numbered 2 through 14 recommended by the hearing judge in her decision filed September 30, 1991.[5]

Since we are recommending suspension, we also recommend that respondent be required to take and pass the California Professional Responsibility Examination administered by the State Bar's Committee of Bar Examiners within one year of the effective date of the Supreme Court's order in this case. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 890-891.) Finally, we adopt the hearing judge's recommendation that costs be awarded the State Bar, pursuant to Business and Professions Code section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

5. We correct what appears to be a typographical error in numbered paragraph 12, at page 41, line 2, of the hearing judge's decision. The number "10" is deleted, and the number "11" is substituted in its stead.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SUZANNE L. HARRIS

A Member of the State Bar

No. 89-O-10503

Filed October 22, 1992

SUMMARY

Respondent accepted fees to represent a corporate client in an unfair competition matter, failed to perform the required services, failed to return unearned fees, converted personal property of the client's president loaned to her in order to perform services, and failed to participate in the State Bar's investigation of the resulting complaint against her. Based on this misconduct, and on aggravating factors including respondent's prior discipline record and tardy and intermittent participation in the disciplinary proceedings, the hearing judge recommended that respondent be disbarred. (Richard D. Burstein, Judge Pro Tempore.)

Respondent sought review, contending that the hearing judge committed procedural errors and was biased against her. The review department upheld the hearing judge's findings and conclusions as to culpability. It rejected respondent's claim that she did not receive adequate notice of certain hearings, noting, inter alia, that respondent had been advised that it was her duty to keep the State Bar informed of her address and had been given an opportunity to correct her official address if the State Bar's records were incorrect. The review department also held that respondent had failed to show that she was prejudiced by a brief allusion in the examiner's pre-trial statement to respondent's prior discipline record, and that respondent had failed to establish bias or unfair treatment by the hearing judge.

On the question of discipline, the review department held that past Supreme Court cases involving similar offenses indicated that disbarment was not appropriate. Although her retention of her client's property was serious, respondent had committed misconduct in only two matters in 23 years of practice. Accordingly, the review department recommended a five-year stayed suspension, actual suspension for two years and until respondent established rehabilitation and fitness to practice under standard 1.4(c)(ii), and five years probation on conditions including restitution of the unearned fees and return of the client's property.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Suzanne L. Harris, in pro. per., Arthur L. Margolis

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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] **105 Procedure—Service of Process**
108 Procedure—Failure to Appear at Trial
119 Procedure—Other Pretrial Matters
211.00 State Bar Act—Section 6002.1
Respondent's highly generalized argument regarding inadequate notice of certain hearings warranted no relief, where respondent had been made aware of duty to keep State Bar informed of current address and given opportunity to correct the official State Bar record thereof, and notices had been served on respondent at another address in addition to the address of record.

[2] **108 Procedure—Failure to Appear at Trial**
119 Procedure—Other Pretrial Matters
162.20 Proof—Respondent's Burden
Medical emergency might have excused respondent's failure to attend pre-trial conference, but did not excuse respondent's failure to file pre-trial statement which would have better preserved respondent's posture at trial.

[3] **108 Procedure—Failure to Appear at Trial**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
Where respondent sought no relief from hearing judge on account of respondent's inability to attend pre-trial conference, which respondent contended was excusable due to medical emergency, respondent could not be heard to complain for the first time on review.

[4] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
119 Procedure—Other Pretrial Matters
135 Procedure—Rules of Procedure
159 Evidence—Miscellaneous
Where examiner's pre-trial statement listed respondent's prior record of discipline among exhibits to be offered at trial, but did not detail or characterize such prior record in any way, and copy of prior record was not considered by hearing judge until after determination of culpability, and respondent demonstrated no prejudice from reference in pre-trial statement and had failed to raise issue before hearing judge, respondent was not entitled to any relief based on asserted violation of rule 571, Trans. Rules Proc. of State Bar.

[5 a, b] **103 Procedure—Disqualification/Bias of Judge**
Claim of unfairness on part of hearing judge was not meritorious, and did not entitle respondent to new hearing, where such claim was very generalized, concerned some matters peripheral to charges, showed no example of specific prejudice, and was rooted in unproven charge of conspiracy, and where record showed that hearing judges acted fairly and took many steps to accommodate respondent, who had ample opportunity to present evidence.

[6] **108 Procedure—Failure to Appear at Trial**
161 Duty to Present Evidence
162.20 Proof—Respondent's Burden
While disciplinary hearings can be stressful for accused attorneys to attend, Supreme Court has made clear that accused attorneys must avail themselves of opportunity to participate and present all favorable evidence. Failing that opportunity, the accused may not demand a new hearing to present evidence belatedly.

[7] **130 Procedure—Procedure on Review**
166 Independent Review of Record
Review by review department is not the same as civil or criminal appeal. Even where neither party addressed issue of culpability on review, review department was not limited by issues raised by parties, and was required to analyze record independently, to determine whether clear and convincing evidence supported hearing judge's findings and conclusions regarding culpability, and to determine appropriate degree of discipline to recommend.

[8] **221.00 State Bar Act—Section 6106**
Where respondent had retained personal property given to respondent by client, claiming it was for legal fees owed, but respondent had no writing to support such claim and hearing judge rejected it based on client's testimony, respondent's retention of property was not reasonable or honest, and was in the nature of conversion, in violation of statute prohibiting acts of moral turpitude or dishonesty.

[9] **108 Procedure—Failure to Appear at Trial**
611 Aggravation—Lack of Candor—Bar—Found
Respondent's tardy and intermittent participation in disciplinary proceedings was an aggravating circumstance, where respondent gave no excuse for failure to appear on last day of hearing, was not represented by counsel, and displayed several failures to participate or tardiness in participating.

[10 a, b] **822.39 Standards—Misappropriation—One Year Minimum**
833.90 Standards—Moral Turpitude—Suspension
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness
Where respondent had been inattentive to a client's legal needs and had wrongfully retained the client's personal property, but respondent had only committed misconduct in two matters in 23 years of practice, disbarment was not appropriate under guiding Supreme Court opinions. Instead, review department recommended five years stayed suspension, five years probation, restitution, and actual suspension for two years and until respondent proved her rehabilitation, fitness to practice, and legal ability.

[11] **171 Discipline—Restitution**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
Where respondent had wrongfully retained client's personal property, review department recommended condition of probation requiring respondent to provide proof of return of such property to client.

[12] **171 Discipline—Restitution**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
It is common in State Bar matters involving failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client. It is also common to recommend the payment of interest incident to such restitution.

[13] **171 Discipline—Restitution**
If identity of party entitled to restitution of unearned attorney fees proved not to be ascertainable with reasonable diligence, review department recommended that, upon approval of probation

monitor, such restitution be paid to Client Security Fund.

ADDITIONAL ANALYSIS

Culpability

Found

213.91 Section 6068(i)
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)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Aggravation

Found

511 Prior Record
582.10 Harm to Client

Standards

801.41 Deviation From—Justified
805.10 Effect of Prior Discipline

Discipline

1013.11 Stayed Suspension—5 Years
1015.08 Actual Suspension—2 Years
1017.11 Probation—5 Years

Probation Conditions

1021 Restitution
1022.10 Probation Monitor Appointed
1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, Acting P.J.*:

Respondent, Suzanne L. Harris, was admitted to practice law in California in 1965. In 1990 the Supreme Court suspended her for three years, stayed execution of the suspension and placed her on probation on conditions including ninety days actual suspension. (*Harris* v. *State Bar* (1990) 51 Cal.3d 1082.) The Supreme Court imposed this suspension for respondent's misconduct between 1980 and 1984 in failing to communicate with her client, failing to perform services for him and ultimately abandoning his interests.

The record we now review at respondent's request includes findings that in 1988 respondent accepted fees to represent a corporate client in an unfair competition matter, failed to perform the required services, failed to return unearned fees, converted property of the client's president loaned to her in order to perform services and failed to participate in a later State Bar investigation.

Respondent's request for review is limited to an attack on the procedures followed in this disciplinary matter. She claims that the hearing judge was biased against her and that other errors were committed. As we shall discuss, respondent's claims do not warrant any relief.

We have independently reviewed the record and found the hearing judge's findings supported by clear and convincing evidence. After considering the circumstances of respondent's misconduct and consulting guiding decisions of the Supreme Court regarding the degree of discipline, we shall recommend that respondent be suspended for five years, that that suspension be stayed and that respondent be placed on probation for five years on conditions including restitution to her client and actual suspension for two years and until she establishes 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. (Trans. Rules Proc. of State Bar, div. V.)

I. SUMMARY OF PROCEEDINGS

Since respondent's contentions are all procedural in nature, we summarize the proceedings in this case. This summary will show that the State Bar Court Hearing Department afforded respondent ample opportunities to be heard on the charges before and during trial.

A. Pre-trial Proceedings.

In January 1990, the Office of Trial Counsel filed a three-count notice to show cause ("notice"). The first count charged respondent with accepting employment in 1988 from a corporation in a civil matter, but thereafter failing to communicate with the client, failing to perform services and failing to return unearned fees or give an accounting. The next count charged respondent with converting property of her client's principal, which she had borrowed while acting as the client's attorney. The last count of the notice charged her with failing to participate in the 1989 State Bar investigation of her client's complaint. (See Bus. & Prof. Code, §§ 6002.1 and 6068 (i).)[1] As required by section 6002.1, the notice was served on respondent's State Bar member records address in Glendale, California. In February 1990, respondent answered the notice, denying its charges. Respondent used her Glendale address in the answer's caption.

Judge Jennifer Gee, the hearing judge then assigned to the case, set a status conference for March 23, 1990. Due to respondent's illness, Judge Gee continued the conference to March 30, 1990, with an alternate date of April 6, 1990. When granting the continuance, Judge Gee directed respondent to inform the court and opposing counsel if she could not proceed on March 30.

* Pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

Respondent was unable to participate in the March 30 conference because of a criminal trial jury selection and she was also unavailable for status conference on April 6. On April 9, Judge Gee directed respondent to file a list of dates on which she would be available for a status conference. The judge's April 9 order also notified respondent that failure to designate available conference dates would result in a conference being scheduled without respondent's input. Respondent failed to reply to the judge's request and the judge filed a written order setting the status conference for May 23, 1990. In her order, the judge warned respondent that if she did not participate in the status conference, the trial date would be set without her input and any motion for continuance of trial would be closely scrutinized.

At both parties' request, the May 23, 1990, status conference was advanced to May 22. Respondent participated and Judge Gee set a schedule for an additional status conference, the completion of discovery, the filing of pre-trial briefs, a pre-trial conference and the start of trial on September 17, 1990. Respondent participated in the next two status conferences in June and July 1990 and obtained additional time for discovery. The pre-trial conference and trial dates were each extended about one month.

On August 14, 1990, after experiencing difficulty effecting service by mail of a discovery request on respondent at her Glendale address, the examiner filed a motion to require that respondent provide an official address of record to the State Bar.

The examiner served this motion by mail on respondent at the Glendale address (which had been her State Bar address of record to that time) as well as on a Pasadena address to which respondent referred during her June 7, 1990 deposition, as a home address at which she said she was doing most of her work.

On August 29, 1990, Judge Gee granted the examiner's request and directed respondent to designate a current address for State Bar purposes. In so ruling, the judge noted that State Bar Court correspondence mailed to respondent had also been returned and respondent had failed to reply to the examiner's August 14 motion. The judge also granted a separate request of the examiner to require respondent to produce certain documents for inspection. Also, on August 29, the judge vacated a voluntary settlement conference requested by respondent for that date, as respondent had contacted the court earlier that day to inform of her unavailability. In vacating the conference, Judge Gee noted that there had been earlier problems with respondent's availability for conferences due to a variety of reasons.

On September 11, 1990, the case was re-assigned for trial to Judge Pro Tem. Richard Burstein due to Judge Gee's unavailability to conduct the trial without unreasonable delay. The court notified the parties that the pre-trial conference earlier scheduled for October 4, 1990, was advanced from 11:00 a.m. to 9:30 a.m. and confirmed the earlier order for filing of the parties' pre-trial statement by September 25, 1990.

A few days later, on September 20, 1990, the examiner moved for issue and evidence sanctions for respondent's failure to produce documents. The examiner served this motion on respondent in care of the address of a different Suzanne Harris, at a downtown Los Angeles location. The next day, the examiner re-served the motion and accompanying papers on respondent at her Glendale and Pasadena addresses.

The examiner filed her pre-trial statement on September 26, 1990. She outlined her case, set forth a number of undisputed facts based on respondent's earlier deposition testimony, set forth the issues remaining in dispute, discussed briefly the legal points involved, including that the examiner believed that disbarment was warranted under case law which the examiner cited; and also listed the witnesses whom she planned to call to testify and the exhibits planned to be introduced. With regard to exhibits, the examiner stated that they would include, "Prior record of discipline in Case Number 84-O-14558." The examiner made no other reference in this statement to a prior record of discipline and respondent did not file a pre-trial statement.

On October 1, 1990, the State Bar Court clerk's office filed and served on respondent at her Glendale

address a notice that the pre-trial conference and the examiner's motion for sanctions would each be heard on October 4. This notice was served on respondent's Glendale address of State Bar record. Also, on October 1, respondent filed an opposition to the sanctions motion.

Respondent did not attend the motion or pre-trial hearing on October 4. After hearing the examiner's argument for sanctions and reviewing the examiner's pre-trial statement, Judge Burstein ordered the undisputed facts and disputed facts, respectively, to be those identified as such in the examiner's pre-trial statement, directed that trial was to start October 22, 1990, at 9:30 a.m. and directed that the State Bar Court clerk serve respondent at her Pasadena address as well as her current address of State Bar record. The judge also granted the State Bar's discovery motion and ordered respondent precluded from offering any documentary proof not previously disclosed to the examiner.

B. Trial Proceedings.

Trial commenced on October 22, 1990. Respondent did not appear at the scheduled time of 9:30 a.m. An unidentified caller on her behalf telephoned the State Bar Court clerk's office to report that respondent would be late but would arrive by 10:00. At 10:08 a.m., the trial started but respondent had still not arrived. One or two more messages were received later that morning by the State Bar Court that respondent had car trouble. She did not arrive until about 12:25 p.m. Upon her arrival, she levied an oral challenge to the hearing judge on grounds of bias. She also claimed that due to an eye malady, she was unable to see. The judge continued the hearing until November 26, 1990, at 9:30 a.m. in order to have respondent examined by an ophthalmologist at State Bar expense.[2] The only witness to testify against respondent in her absence on the first day of trial was a State Bar investigator who was later recalled at the November 26, 1990, continued trial date.

Trial resumed on November 26, 1990, at 9:35 a.m. Respondent was not present but the resumption of trial was delayed due to the tardiness of a State Bar witness. Respondent was present when the trial resumed at 10:20 a.m. At that time, the hearing judge stated that at the end of the trial session that day, "we will address scheduling additional days of hearing." (R.T. p. 60.) The State Bar investigator who was recalled was examined anew on the subjects of testimony she had earlier given when respondent was absent on October 20, 1990, and respondent cross-examined her extensively. The State Bar next called Keith M. Berman, president of the company that had hired respondent in 1988 to perform legal services for it. During cross-examination, respondent raised a documentary evidence issue which was the subject of some colloquy between counsel and the court.

As the ending time for this trial session was approaching, the judge held a conference with the parties off the record to pick another trial date. The judge stated on the record that trial would resume on December 18, 1990, at 9:30 a.m. Respondent waived notice of the continued trial date. The judge concluded his remarks as follows: "All right. We will see you at 9:30 at that time. And, at that time, I would expect that counsel would be able to address the evidence issue that we just touched upon a few minutes ago, *and that we will proceed on the 18th.* At that point, if additional time is needed after the 18th, I will expect to set dates for further hearings, probably right after the first of the year. . . ." (R.T. pp. 183-184, emphasis added.)

On December 18, 1990, trial resumed at 9:46 a.m. Respondent was not present. The hearing judge stated that a call had been received by State Bar Court staff earlier that respondent was "five minutes away." The judge waited to allow her to arrive; but as she was not present, he proceeded. At 9:53 a.m., 23 minutes after the scheduled start of the trial day, the judge asked the examiner if he had any other wit-

2. The examining ophthalmologist opined that although respondent may have suffered "an acute toxic keratitis and conjunctivitis from some particulate matter in the air," she did not have any significant organic eye condition precluding her from using her eyes or functioning in a "relatively normal manner."

nesses to call. When the examiner stated that he did not and rested the State Bar's case, the judge invited closing argument on culpability. Upon the examiner's submission of the matter to the court's discretion, the judge announced his tentative inclination to find culpability. He invited the examiner to address the issue of degree of discipline. Brief proceedings followed at which the examiner offered respondent's prior disciplinary record and argued that the judge should recommend disbarment, and, at a minimum, that the State Bar Court should "increase significantly" the suspension previously ordered by the Supreme Court in 1990. Subject to the examiner furnishing a certified copy of the Supreme Court's recently-filed suspension order, the hearing judge took the matter under submission.

II. THE EVIDENCE ON THE CHARGES

A. Representation of SDI, Inc. and Retention of its President's Property.

The principal charges alleged respondent's misconduct while representing a corporate client, Sys Dev, Inc. ("SDI"). In 1988, SDI was a small business developing health care computer software. As noted *ante*, the examiner called its then president, Keith Berman, who testified extensively to the relevant events and who was cross-examined by respondent. One Bigelow, an officer of SDI, attempted a hostile takeover of SDI. Moreover, he took control over most of SDI's computers, its spare parts bank, its customer lists and the "source code" for its software program. He also sought to have SDI customers make payments directly to him. In Berman's words, Bigelow's actions "shut down" SDI operations.

By referral from an SDI director, SDI hired respondent in June 1988. In a strategy session, respondent outlined an injunction as the best way to get back SDI assets, given its limited resources. On June 17, 1988, respondent and Berman signed respondent's fee agreement calling for respondent to prepare an "injunctive relief package" for a retainer fee of $2,000 and a set hourly fee. SDI wired $2,700 in cash to respondent's bank account.

Berman had one meeting with respondent in June. At that time, they planned for respondent to obtain declarations of witnesses friendly to SDI in order to support the injunction. However, by about mid-July, 1988 SDI was still being harmed by Bigelow and the SDI directors and creditors were clamoring for action. After being unable to contact respondent for five days, and fearing an imminent suit by irate SDI customers, Berman sent respondent a letter by telefacsimile, pleading for some word as to what was happening and what could be done to stop Bigelow.

Within a week of this letter, respondent met with Berman to get the injunction work moving. Respondent started preparing supporting declarations and Berman placed SDI secretarial resources at respondent's disposal so that she could prepare these quickly. At respondent's request, Berman loaned her his own personal computer, printer and some software so that she could prepare the legal papers for SDI. At the end of July 1988, respondent left for a trip to Kansas and Kentucky. She wanted to keep in touch with SDI to oversee document preparation. At her request, Berman loaned her his personal cellular car telephone. There is no evidence in the record of the value of these loaned items.

By late July or early August 1988, contact had been made with all six or seven witnesses who would be preparing declarations supporting SDI. Drafts of or requests for declarations had been sent to each witness and two or three completed ones had been returned. After this time, Berman was unable to speak with respondent again although he was able to get through to respondent's legal assistant. Respondent never prepared any injunction application or underlying lawsuit and never filed any court papers seeking relief for SDI. She never returned any of SDI's advance fees. Despite a letter from Berman in December 1988 and numerous prior phone calls, respondent never returned his computer or cellular phone nor did she return original SDI documents, including corporate minutes.

The only evidence of respondent's position on the charges came from portions of her deposition, parts of which were offered by the examiner and read into the record at trial. Respondent agreed that she accepted employment from SDI to prepare an injunctive relief package, expressed concern to SDI that maybe it should seek bankruptcy court protec-

tion as she was concerned about its ability to raise funds for a bond, if needed, and cautioned SDI that a lot of effort would be required to assemble a successful effort to gain injunctive relief. Respondent contended that SDI owed her about $15,000 in fees for all the work she did and that Berman's computer and cellular phone were given her in payment of legal fees.

B. Failure to Participate in State Bar Investigation.

In March and April 1989, a State Bar investigator sent letters to respondent outlining Berman's complaint, calling respondent's attention to section 6068 (i) and inviting respondent's reply. The investigator testified that respondent's assistant telephoned in reply to one letter and promised that respondent would reply by early May. The investigator testified that she waited until the promised date but never received a reply. In the portion of respondent's deposition offered in evidence at trial by the examiner, respondent stated that she did not reply in writing to the State Bar investigator but believed that she or her paralegal must have spoken to an investigator, or after the notice issued, to a State Bar examiner.

III. RESPONDENT'S PRIOR SUSPENSION

The record of respondent's prior suspension was the only evidence introduced by the examiner specifically on the issue of degree of discipline. Respondent was not present at the last day of hearing and submitted no evidence in mitigation. Effective January 5, 1991, the Supreme Court suspended respondent for three years, stayed that suspension and placed respondent on conditions of probation including 90 days actual suspension, compliance with rule 955, and passage of the professional responsibility examination within a year. (*Harris* v. *State Bar*, *supra*, 51 Cal.3d 1082.)

Respondent's previous suspension was based on her failure to communicate with, failure to perform services for and ultimate abandonment of a client between 1980 and 1984. The client's wife had fallen in a restaurant parking lot and later died while hospitalized. Respondent represented the client in seeking damages on account of his wife's injury and ultimate death. In imposing the greater discipline recommended by the former volunteer review department, the Supreme Court noted the lack of services performed by respondent over a four-year period, coupled with her repeated failure to communicate with her client or his personal attorney, respondent's lack of remorse and the prejudice to her client whose case was sharply devalued by respondent's inaction. Although the Supreme Court did consider as mitigating, evidence of an illness respondent suffered during the early stages of her client's dissatisfaction, the Court concluded that it did not "excuse four years of neglect and failure to communicate." (*Harris* v. *State Bar*, *supra*, 51 Cal.3d at p. 1088.)

IV. DISCUSSION

A. Procedural Points.

We address first the several procedural points which have been the sole focus of the parties' briefs.

1. Adequacy of notice.

[1] Respondent offers a highly generalized argument that she did not receive adequate notice of certain hearings. Her claim warrants no relief. The Supreme Court has held that service on the respondent's State Bar address of record (Bus. & Prof. Code, § 6002.1) is sufficient and that the member of the State Bar has a duty to keep the State Bar informed of a current address. (*Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1186.) The record shows that this requirement was made abundantly clear to respondent; that she was given special opportunity to correct her official address if it was not correct as it existed on State Bar records; and that many of the notices of hearings and conferences were served on respondent at another address she had used from time to time in addition to being served on her address of record. Although it does appear that the examiner's September 20, 1990, motion for issue and evidence sanctions was served on another member of the State Bar with the same name as respondent, that error was corrected one day later. Moreover, many of the notices of pre-trial or trial hearing dates were given repeatedly and notice of the last day of trial was given respondent verbally in her physical presence, upon her waiver of written notice.

2. Failure to attend pre-trial conference.

[2, 3] Respondent urges before us, for the first time, that her failure to attend the pre-trial conference was excusable due to a medical emergency. While a medical emergency might explain her inability to attend the conference, it did not explain her failure to have filed a required pre-trial statement, which might have better preserved her posture at trial. Moreover, respondent sought no relief from the hearing judge on account of her inability to attend the pre-trial conference and she cannot now be heard to complain. (Cf. *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774.)

3. Pre-trial reference to respondent's prior record.

[4] Respondent complains that rule 571, Transitional Rules of Procedure of the State Bar, was violated by the examiner's citing to respondent's prior record of discipline in the pre-trial statement. Respondent's claim does not warrant relief. The only such reference to respondent's prior record of discipline was the briefest statement on page 8 of the examiner's pre-trial statement that, among the exhibits the examiner would offer at trial was, "f) Prior record of discipline in Case Number 84-O-14558."[3] The examiner's pre-trial statement did not detail or characterize the prior record in any way and there is no evidence that the hearing judge considered any papers concerning it until, as prescribed by rule 571, a certified copy of the prior record was introduced after the judge had announced that he had determined culpability. (R.T. pp. 189-191.) Respondent has cited no authority that she was deprived of a fair hearing by this briefest pre-trial allusion to a "prior record of discipline" and the authority on the subject, *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 844-845, requires specific prejudice before relief will be granted. In that case, the Court rejected Stuart's position that the premature disclosure to the hearing panel of the prior record warranted dismissal of the proceedings, finding no specific prejudice. As in *Stuart*, where the disclosure occurred after a "clear case for culpability had been made," here the brief reference occurred in a pre-trial statement carrying undisputed facts themselves warranting a finding of culpability. Further, we note, identical to respondent's last claim arising out of the pre-trial phase, she failed to present it to the hearing judge at any time during the trial. Finally, to the extent that any reference to a prior record of discipline—albeit brief—somehow affected, arguendo, the hearing judge's recommendation, we exercise our independent power of intermediate review to determine culpability and to recommend the appropriate level of discipline based on the evidence and guiding factors.

4. Overall fairness of the hearing judge.

[5a] Respondent paints broadly diffuse strokes of unfairness charges on the part of the hearing judge. Her claims are not meritorious. Not only are her claims very generalized, they concern some matters peripheral to the charges, they are rooted in an unproven charge of conspiracy and they show no example of specific prejudice. **[6]** At oral argument before us, respondent's counsel suggested that respondent was not able, because of stress or other related difficulty, to be able to attend all hearing sessions. While we understand that any State Bar disciplinary hearing can be uncomfortable, even stressful for an attorney accused of charges of professional misconduct to attend, the Supreme Court has made it clear over the years that an accused attorney must avail herself or himself of the opportunity presented to participate and present all favorable evidence. Failing that opportunity, the accused may not demand a new hearing to present evidence belatedly. (See *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 792; *Warner* v. *State Bar* (1983) 34 Cal.3d 36, 42; *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 447; *Wilson* v. *State Bar* (1958) 50 Cal.2d 509, 510-511.) **[5b]** Our review of the record shows that despite respondent's many excuses for not participating or for her tardiness, the hearing judges at pre-trial and trial, respectively, acted fairly throughout and took many steps to accommodate her. She had ample

3. Rule 1222(h), Provisional Rules of Practice of the State Bar Court, prescribing the contents of a pre-trial statement, requires that it contain a list of all exhibits to be offered at trial.

opportunities to present whatever evidence she desired and she is not now entitled to a new hearing as she requested at oral argument before us.

B. Culpability.

[7] Neither party has addressed the issue of culpability. Yet this review of the hearing judge's decision is not the same as a civil or criminal appeal. (See *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) We are required to analyze the record independently and we are not limited by the issues raised by the parties. (See *In the Matter of Heiser* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 47, 53; rule 453(a), Trans. Rules Proc. of State Bar.) Accordingly, we must determine whether clear and convincing evidence supports the hearing judge's findings and conclusions of respondent's culpability. If so, we must determine the appropriate degree of discipline to recommend.

In brief, the judge found that after September 1988, respondent failed to communicate with her client; and that, although she drafted some declarations, she did not prepare the needed documents for injunctive relief, she did not return any of the $2,700 in fees she received which she did not earn nor did she return requested client documents. The hearing judge concluded that respondent's misconduct violated section 6068 (m) and rules 2-111(A)(2) and (A)(3), 6-101(A)(2) and 8-101 (B)(4), former Rules of Professional Conduct. The judge also found that respondent failed to return both a computer and cellular telephone her client's president had given her to work on its injunctive relief matter. The judge concluded that this misconduct violated section 6106. Finally, the judge found that respondent had failed to participate in the State Bar investigation by failing to respond to two letters of a State Bar investigator. As a result, the judge concluded that respondent violated section 6068 (i).

The State Bar introduced abundant evidence to support each of the charges. SDI's president, Berman, testified in detail about the hiring of respondent, the advance payment of her legal fees, the critical need for legal services to be rendered SDI over a short time to ease the harm caused by another who had taken over SDI's assets, the loan to respondent of the cellular phone and computer and respondent's performance of initial services followed by her failure to communicate, to complete the services required to apply for injunctive relief or to return the unearned fees or corporate property. The State Bar investigator testified as to her unsuccessful efforts to secure an answer from respondent as to Berman's complaint. Documentary evidence was also introduced on the charges. Respondent presented no defense and the only evidence of her point of view came from the State Bar's offer in evidence of a brief excerpt from her pre-trial deposition. Given the state of the record, the hearing judge was in a well-suited position to weigh this evidence and decide that it supported the charges. (See *Harris* v. *State Bar*, *supra*, 51 Cal.3d at p. 1087.) Our independent review of the record leads us to adopt the hearing judge's findings and conclusions.

It is settled beyond doubt that the type of offenses found to have been committed by respondent are a clear basis for attorney discipline. As the Supreme Court said in *Harris*, "'Failure to communicate with, and inattention to the needs of, a client may, standing alone, constitute grounds for discipline.' [Citation.]" (*Id.* at p. 1088.) The Supreme Court's opinion in *Harris* also dealt with abandonment of a client, which we have here. Respondent also failed to return SDI records and unearned fees.

[8] As to respondent's retention of Berman's computer and telephone equipment, the hearing judge concluded that this conduct was in the nature of conversion, in violation of section 6106. Respondent was charged in the notice with such conduct; and, on this record, we find support for the hearing judge's conclusion. In *Martin* v. *State Bar* (1991) 52 Cal.3d 1055, a client gave Martin his slightly damaged Rolex watch to use as evidence in the client's case and Martin never acceded to the client's request to return it. While the specific violation found by the Court as to this conduct of Martin is unclear, the Court did find Martin culpable of professional misconduct. In *Martin*, the attorney urged the same claim that respondent urges to us: that the property was retained as part of the lawyer's fees. Yet one member of the Supreme Court, who wrote on this aspect in some detail, noted that Martin had no writing to support his view, the matter was resolved

against him by the State Bar Court and he did not contest the support for those findings. (*Martin* v. *State Bar*, *supra*, 52 Cal.3d at pp. 1065-1066 (dis. opn. of Arabian, J.).) We have the identical factors present here and we cannot conclude that respondent's retention of Berman's property was either reasonable or honest. (Compare *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1099-1100; *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 332-333.)

Finally, we agree with the hearing judge that respondent's ignoring letters sent by the State Bar investigator violated her duty under section 6068 (i). (See *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, 1126.)

C. Degree of Discipline.

The hearing judge found no mitigating circumstances but found several aggravating circumstances as a result of: respondent's suspension for misconduct arising prior to her hiring by SDI, significant harm caused to SDI by respondent's inaction, her failure to file a pre-trial statement as ordered, her tardy appearances and her "unexcused and unexplained" failure to appear on the last day of hearing.

The judge looked solely to the Standards for Attorney Sanctions for Professional Misconduct and, on that basis and considering the prior discipline, recommended disbarment. He noted that although respondent's dishonesty toward Berman (property retention) would not by itself justify disbarment, that sanction appeared to be the only one which would fulfill the goals of attorney discipline, given the similarity of the current matter with the prior one, the application of the other standards and the other bases of culpability found. The judge cited no Supreme Court decisions he had considered for guidance and neither party cites us to any, focusing instead on procedural points.

There can be little question as to the seriousness of respondent's misconduct toward SDI and Berman. **[9]** We also believe that her tardy and intermittent participation in these disciplinary proceedings is also aggravating. In contrast to *Calvert* v. *State Bar* (1991) 54 Cal.3d 765, 784, where the attorney's failure to appear on the last day of trial was held not to be aggravating, here respondent gave no excuse for her similar failure to appear; and, unlike Calvert, respondent was in propria persona so that there was no one else to present evidence or speak for her. Also, unlike Calvert, the hearing judge noted that respondent displayed several failures to participate or tardiness in participating.

[10a] Despite the aggravating circumstances in the record, we believe that past Supreme Court decisions involving similar offenses lead us to conclude that a recommendation of a lengthy suspension and until respondent presents proof under standard 1.4(c)(ii) is more appropriate than disbarment. Despite the severity of respondent's inattention to clients, we note that in her 23 years of practice up through the SDI matter, her failure to perform services extended to only two matters. We interpret guiding Supreme Court opinions as not calling for disbarment in such circumstances.

Calvert v. *State Bar*, *supra*, 54 Cal.3d 765 involved a single case of failure to communicate and to perform services. However, the significant harm which occurred to that client was not attributable to Calvert and she had given impressive evidence in mitigation as to substantial pro bono activities and community service. Her one prior discipline occurred at the same time as the later matter; thus it was not deemed aggravating. The Supreme Court imposed a 90-day actual suspension in the prior case and a 60-day actual suspension in the later one. However, unlike the present matter, there was no evidence of dishonesty or misappropriation in Calvert's case.

In *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074, the attorney had no prior discipline in 17 years of practice but had been found culpable of four matters of failing to perform services and a fifth matter of failing to participate in the State Bar investigation. There appeared to be no dishonest conduct by Bledsoe but he had failed to refund unearned fees or costs in several of the matters. He also defaulted in the State Bar proceedings. Finding no pattern of misconduct justifying disbarment, the Court imposed a five-year stayed suspension, with two years actual suspension and until standard 1.4(c)(ii) was met. Two justices would have disbarred.

Finally, we also believe *Martin* v. *State Bar*, *supra*, 52 Cal.3d 1055, is instructive. There the attorney had no prior record of discipline but had mishandled five matters over a four-year period only several years after admission to practice law. In one matter, he made false statements during civil settlement negotiations. As we discussed, *ante*, in another, he had kept his client's slightly damaged Rolex watch to use as evidence despite his client's request to return the watch. He had also falsely stated to two of his clients the status of their cases. Martin defaulted in the State Bar proceedings and there was almost no evidence in mitigation. The Supreme Court majority adopted the volunteer review department's recommendation for a five-year suspension, stayed on conditions including two years of actual suspension.[4]

[10b] Unquestionably, respondent's retention of her client's property, found to be wrongful under abundant evidence, was very serious. One troubling factor is that the record discloses no evidence of its value. We also note that while the examiner advocated disbarment to the hearing judge, he stated, at the minimum, that respondent should be suspended for a much greater period than her prior suspension. Considering all relevant factors, we believe that the discipline we recommend, a five-year suspension stayed on conditions of a five-year probation, restitution as specified, and a two-year actual suspension and until respondent proves her rehabilitation, fitness to practice and learning and ability in the general law pursuant to the provisions of standard 1.4(c)(ii) is appropriate to protect the public and to maintain the integrity of the courts and legal profession.

[11] With regard to restitution, our recommended conditions of probation will require respondent to provide proof of return to Berman of the computer and telephone equipment he loaned respondent and will also require that respondent return $2,700 as unearned fees, together with interest at 10 percent per year until paid. We read the hearing judge's decision as concluding that the entire sum ($2,700) respondent received as advance fees was unearned. **[12]** It is common in State Bar matters involving the failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client. (See *Gadda* v. *State Bar* (1990) 50 Cal.3d 344, 348, 350, 357; *Bernstein* v. *State Bar* (1990) 50 Cal.3d 221, 232-234.) It is also common to recommend the payment of interest incident to such restitution. (*Martin* v. *State Bar*, *supra*, 52 Cal.3d at p. 1064.) **[13]** We shall recommend that the restitution of unearned fees be paid to SDI, or its successors or those determined, with approval of the probation monitor referee, to be entitled to receive this sum. In the event that the recipient(s) entitled to the $2,700 in restitution cannot be ascertained with reasonable diligence, in view of the rehabilitative nature of restitution, we shall recommend, upon approval of respondent's probation monitor referee, that this sum be paid to the State Bar's Client Security Fund.

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Suzanne L. Harris, be suspended from the practice of law in this state for a period of five years, that execution of the suspension be stayed and that respondent be placed on probation for a period of five years on the following conditions:

1. That during the first two years of said period of probation and until 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, she shall be suspended from the practice of law in the state of California;

2. Within sixty (60) days of the effective date of the Supreme Court's order herein respondent shall present proof satisfactory to her probation monitor

4. Chief Justice Lucas would have disbarred based on the magnitude of the unexplained misconduct. Justice Arabian, who agreed with the Chief Justice, wrote separately to point out the egregiousness of Martin keeping his former client's watch.

referee:

(a) that she has returned to Keith Berman all computer and cellular telephone equipment loaned to her by Berman in 1988, including any loaned software, peripherals and hardware; and

(b) that she has returned to Berman all SDI corporate minutes and any other SDI records in her possession;

3. Within one (1) year of the effective date of the Supreme Court's order herein, respondent shall make restitution of $2,700 plus interest at ten (10) percent per year from September 1, 1988, until the principal sum is paid in full. Restitution shall be made to SDI, its successors in interest; or, with the approval of the probation monitor referee, to those others entitled to receive such payment. In the event that authorized recipients of this restitution cannot be ascertained with reasonable diligence; then with approval of the probation monitor referee, restitution shall be paid to the State Bar's Client Security Fund.

4. 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;

5. 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;

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 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 or her to discharge the duties of rule 611, Transitional Rules of Procedure of the State Bar.

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 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 five years shall be satisfied and the suspension shall be terminated.

We 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 her compli-

ance with said order.

Since respondent was required to pass the professional responsibility examination by order of the Supreme Court in *Harris* v. *State Bar*, *supra*, 51 Cal.3d 1082, we do not recommend that she be required to pass that examination again.

We 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 section 6086.10.

We concur:

NORIAN, J.
VELARDE, J.*

* By appointment of the Acting Presiding Judge pursuant to rule 435(c), Trans. Rules Proc. of State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT H

A Member of the State Bar

No. 89-O-11979

Filed November 13, 1992

SUMMARY

Respondent settled contingent fee cases for two clients who had previously been represented by another attorney ("X"). Respondent informed X of the settlements, stating that unless X objected by a certain date, respondent would endorse X's name to the drafts and pay X's share of the fees out of respondent's trust account. Respondent also disputed the amount of X's claimed fees. When X did not timely reply to respondent's communications, respondent had his staff endorse the drafts, deposited them in his trust account, and disbursed the settlement proceeds to the clients, to their medical providers, and to himself for his fee. X was holding in trust funds of one of the clients which respondent believed were sufficient to cover X's fees, and respondent and X subsequently resolved the fee dispute. X complained to the State Bar, and respondent was charged with committing acts of moral turpitude and dishonesty, and with violating trust account rules. The hearing judge dismissed the charges. (Hon. Christopher W. Smith, Hearing Judge.)

The examiner requested review, contending that respondent should have been found culpable on both charges. The review department affirmed the dismissal. It held that respondent's direction to his staff to endorse the drafts, based on his reasonable belief that X's silence constituted consent, was not an act of moral turpitude or dishonesty. Noting that the evidence did not establish that X had a lien on the clients' recovery, the review department concluded that funds held for a client on which another attorney has a claim for fees for services rendered are not held in trust for the other attorney. Respondent therefore did not violate the charged provisions of the trust account rules by failing to hold the disputed amount in trust pending resolution of X's fee claim.

COUNSEL FOR PARTIES

For Office of Trials: Teresa J. Schmid

For Respondent: Respondent H, 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] **101 Procedure—Jurisdiction**
204.90 Culpability—General Substantive Issues
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)]

A disciplinary proceeding is seldom the proper forum for attorney fee disputes. In a matter arising from a dispute between attorneys, where respondent did not mishandle any sum that could be considered trust funds and respondent's instruction to staff to endorse the other attorney's name to settlement drafts was not dishonest, corrupt, or reflective of bad moral character, the review department affirmed the dismissal of the proceeding.

[2] **162.11 Proof—State Bar's Burden—Clear and Convincing**

Disciplinary charges must be proved by the State Bar examiner by clear and convincing evidence. All reasonable doubts must be resolved in favor of the accused attorney. If equally reasonable inferences may be drawn from a proven fact, the inference leading to innocence must be chosen.

[3 a-d] **163 Proof of Wilfulness**
164 Proof of Intent
204.10 Culpability—Wilfulness Requirement
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106

Although the term "moral turpitude" has been defined very broadly, the Supreme Court has always required a certain level of intent, guilty knowledge, wilfulness, or, at the very least, gross negligence before labelling an attorney's conduct moral turpitude. Where respondent reasonably and in good faith believed that he had the authority to endorse his clients' former attorney's name to settlement drafts, and there was no evidence that respondent misused funds intended for clients or medical providers and no evidence of fraud, hearing judge correctly concluded that there was no clear and convincing evidence of moral turpitude.

[4] **162.90 Quantum of Proof—Miscellaneous**
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues

In matter where record lacked any evidence of impropriety of respondent or respondent's staff in dealing with clients, case law requiring all reasonable inferences to be resolved in respondent's favor supported attribution of no base motives to respondent. Thus, in deciding to dismiss charges, hearing judge properly saw case as one involving a dispute between two attorneys over clients, files, and the first attorney's fee, and did not improperly fail to consider totality of respondent's conduct.

[5 a, b] **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)]

Supreme Court and review department look to elements of trust account rule, and their purposes, in determining whether a particular transaction violates the rule. Under this analysis, funds received by a member of the State Bar which are the subject of a medical lien held by the client's medical provider for services rendered in the matter for which the client hired the attorney are trust funds within the meaning of the trust account rule, for they are, in effect, funds held for the benefit

of clients. Similarly, funds of certain third parties which come into a lawyer's hands are required to be treated as trust funds.

[6 a-c] **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)]
State Bar Court can and should look to label and treatment of funds by attorney and client when considering whether they are trust or non-trust funds. However, it is the character and nature of the funds, not their label by either attorney or client, which must ultimately determine their status. Despite respondent's labelling of clients' prior attorney's claim for quantum meruit fees as a "lien," in the absence of adequate proof of creation of a lien, the funds claimed by the prior attorney for fees for services rendered were not trust funds within the meaning of the trust account rule.

[7 a, b] **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)]
Attorney fees for legal services already performed are personal obligations of a client, and funds held to pay them are not trust funds within the meaning of the trust account rule. A claim for attorney fees for past services has been raised to trust status within the meaning of the trust account rule only where such fees were legally recognized as a lien on the client's recovery.

[8] **199 General Issues—Miscellaneous**
In a contingent fee matter, the client has the power to discharge the attorney at any time, with or without cause, subject to the obligation to pay the discharged attorney the reasonable quantum meruit value of services rendered up to the time of discharge. If the discharged attorney has a lien it may be enforced in the quantum meruit amount. However, unless there is adequate proof that a lien for the discharged attorney's fees was created, the attorney does not enjoy the status of a lienholder with an interest in the client's recovery.

[9] **125 Procedure—Post-Trial Motions**
178.90 Costs—Miscellaneous
139 Procedure—Miscellaneous
Where disciplinary proceeding was dismissed due to State Bar's failure to bring forth clear and convincing evidence to support any of the charges, respondent was entitled by statute to reimbursement for the reasonable expenses of preparation for hearing, but State Bar Court was not authorized to award respondent any amount for attorney fees.

ADDITIONAL ANALYSIS

Culpability

Not Found

221.50 Section 6106
280.05 Rule 4-100(A) [former 8-101(A)]
280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

Other

166 Independent Review of Record

OPINION

STOVITZ, J.:

After two days of trial, the State Bar Court hearing judge filed a lengthy, thoroughly-considered decision finding respondent H[1] innocent of charges that he engaged in any charged misconduct by authorizing an employee to simulate the signature of the clients' previous attorney when depositing to his trust account settlement drafts for two clients and by failing to reserve in trust, sums for the previous attorney's claim of fees. Finding no culpability whatever, the judge dismissed the proceeding and noted respondent's eligibility to recover the allowable statutory expenses of preparing for the hearing. (Bus. & Prof. Code, § 6086.10 (d).)

The State Bar examiner seeks our review, urging that the hearing judge made incorrect factual findings and that the evidence showed respondent's culpability on both charges. The examiner contends that respondent should be suspended for two years, stayed, on conditions including an actual suspension for nine months. Respondent urges us to adopt all findings below and the decision for dismissal.

[1] Our independent review of the record leads us to underscore the hearing judge's apt observations on page 28 of his 30-page decision: "This Court's interpretation of . . . *Shalant* v. *State Bar* (1983) 33 Cal.3d 485, is that a disciplinary proceeding is seldom the proper forum for attorney fee disputes. The reason for this is brought to bear in this case. The case before us arises from a dispute between attorneys which caused considerable bad blood. . . ." Indeed, there is no evidence that any sum which could be considered trust funds was mishandled by respondent or that his instruction to his employee to endorse the clients' former attorney's name to two settlement drafts was dishonest, corrupt or reflective of bad moral character. Since the dispositive facts rest largely on documentary evidence supplemented by respondent's uncontradicted testimony—all properly evaluated by the hearing judge—we have no valid reason to disturb the judge's essential findings and conclusions. Instead, with minor modifications, we adopt them and order the proceeding dismissed.

I. PROCEDURAL HISTORY

An amended notice to show cause ("notice") was filed November 19, 1990, charging respondent with two counts of violating Business and Professions Code section 6106[2] and with wilfully violating portions of the former trust account rule, rules 8-101(A)(2), 8-101(B)(3) and 8-101(B)(4), Rules of Professional Conduct.[3] Both counts of the notice charged the identical misconduct arising in about March 1989. Only the clients involved were different. We shall refer to one client as A and one as B. Essentially, respondent was charged with causing an employee to place the endorsement of the clients' previous lawyer ("X") on settlement drafts without X's "express authorization" and with failing to keep in trust the amount of fees due X, while knowing of X's "lien" claim.

The parties engaged in discovery and filed detailed pre-trial statements. On March 1, 1991, just a few days before the start of trial, respondent moved to dismiss the charges, contending that he had the authority to cause X's name to be endorsed to the settlement drafts, and, even if he were mistaken, that the examiner had fallen short of establishing moral turpitude as charged. Respondent also urged that X's claimed amount of fees was not the type of money which, by rule 8-101's terms, had to be placed or maintained in trust. In opposing respondent's dismissal motion, the examiner cited authorities for the proposition that funds held for a third person not the client are subject to rule 8-101, but the only authorities the examiner cited regarding liens concerned liens of medical providers for services rendered in

1. In view of our dismissal of this matter, we follow our practice of not identifying respondent by name. (See *In the Matter of Respondent D* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 517, 520, fn. 1.)

2. Unless noted otherwise, all references to sections are to the provisions of 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, to May 26, 1989.

treating the clients for injuries and not of attorneys for their fees. Regarding the endorsement of X which respondent caused to be placed on the A and B settlement drafts, the examiner cited authorities that, absent express authority, a lawyer may not endorse a client's name to a draft.

After hearing argument on respondent's motion to dismiss, the hearing judge denied it and the case was tried. Although many documents were received in evidence and themselves established many of the events, the only witnesses called were respondent and D, X's office manager in early 1989. D's testimony went largely to the subject of the transfer of client files by X's office. On the factual issues central to the charges, respondent's testimony was uncontradicted.

II. THE FACTS

Respondent was admitted to practice law in California in 1981. In January 1989, respondent had a general civil practice with a plaintiff personal injury concentration and was the editor of a national magazine. He planned to cease practicing law several months later to devote more time to the magazine. About the same time, two non-attorney staff members left X's employ. One of these X employees, F, fluent in a foreign language, had been X's liaison with his clients who spoke that language. Respondent hired F and the other employee. About 10 of X's clients whose contact with X was through F traced F to respondent's office and asked respondent to take over their personal injury cases. On January 17, 1989, respondent agreed to do so. Shortly thereafter, he forwarded substitution of attorney forms to X signed by the clients and asked X for the clients' files. That was the start of trouble for both X and respondent, as X thought that respondent was stealing both his employees and his clients.[4] This in turn led to the "bad blood" which the hearing judge found to have developed between the two lawyers.

Respondent's January 1989 letters to X notifying him of A's and B's decisions to retain respondent included this text: "We will honor your lien for the reasonable value of legal services rendered by you up to the delivery of this letter. However, no work performed thereafter will be included in the computation of your lien." Nothing in these letters stated that X's claimed fees would be considered trust funds or held in a trust account.

Between January and March 1989, respondent expended much effort to secure the needed client files from X, including filing a superior court motion and a complaint with the State Bar.

In the meantime, respondent pursued settlements with the defendants' insurers in both the A and B cases. By March 15, 1989, he was able to settle both cases, even though he had not yet received X's file in the A case when he negotiated with the insurer a few weeks earlier.[5] Respondent was able to get the files for A's and B's cases by mid-March 1989. X took the position, through contemporaneous documents corroborated by D's testimony at trial, that he cooperated as fully with respondent as was reasonable, given the move of X's office. X also claimed that respondent acted unreasonably in not affording X sufficient time for the file transfer and in not cooperating better with X on this subject.

Respondent settled A's case on March 14, 1989, for $8,000. The insurer's draft in that case was made payable jointly to A, respondent and X. The same day, respondent placed a call to X's office. He was unable to speak to X but he left a message with one of X's employees that he had settled the A case for $8,000 and asked that X advise when X would be available to endorse the settlement drafts. The next day, respondent telephoned X's office again to convey a similar message with regard to the settlement of the B case for $13,000.

4. X's reaction to the 10 client substitutions was established by D's testimony. The hearing judge did not find nor did any evidence show that there was any ethical impropriety in respondent hiring X's former employees or in accepting X's former clients. The record reveals that F left X's employ in part because of concern over X's pending personal bankruptcy.

5. Respondent testified that as the insurer in the A case was eager to settle, that insurer sent respondent copies of medical records he needed.

In respondent's experience, most attorneys who had formerly represented his clients were eager to talk to him when a case settled for they would then receive the fee for their earlier services. However, when X did not return respondent's calls in either matter, respondent sent X a three-page letter concerning the A and B cases and one additional case. This letter was dated March 16, 1989, and received by X on March 20, 1989. Respondent acknowledged in the letter that X claimed a lien of $1,861.50 for his fees in the A case and $2,092.25 in the B case. Respondent disputed in detail the merits of X's claim for such large fees, by asserting specifics of how he believed X's claim for services was excessive in each case. Respondent proposed to pay X $600 in the A case and $1,200 in the B case. Respondent concluded his letter by stating that unless he received word directly from X, regarding the three cases discussed, within three days of March 16, he would assume that X agreed with the proposed amounts. Respondent also stated, "I will further assume that you [X] are authorizing us to deposit the drafts received upon notice to you of their receipt and in exchange for post-dated drafts from our clients [sic] trust accounts in the [$600 and $1,200 respective amounts]."

Respondent did not hear from X by the deadline in his letter. He waited until March 22 and instructed one of his employees to endorse X's name to each draft and deposit them in his trust account. The parties stipulated that the $8,000 draft in the A case was deposited on March 24, 1989, and the $13,000 draft in the B case was deposited on March 29, 1989. On March 23, respondent received a letter from X dated March 21 concerned only with defending X's earlier claim for fees. X's letter did not object to respondent's earlier-stated intent to deposit the drafts.

Respondent had also learned by March 1989 that, in the A matter, X held $3,015 in his trust account representing medical payment insurance proceeds he had received for A. In his March 16, 1989, letter, respondent requested that X forward this sum to him for A. Eleven days later, respondent wrote to X telling him that he had deposited the draft in the A case and had paid A his share of the settlement funds, and that, since X had not forwarded the $3,015 medical payment amount, respondent was applying $600 (the sum he had determined was proper for X's fees) in partial satisfaction of the medical payment amount X owed A.

On April 3, 1989, X wrote respondent stating that he (X) had never authorized respondent to sign X's name to any draft or check. He repeated that statement in a certified mail letter to respondent dated April 21, 1989, adding that his lien claims for fees were not addressable except by arranging for neutral arbitration, and, pending that, by placing the amount of X's claims in trust. On April 14, 1989, X forwarded respondent a trust account check for $1,153.50, representing the $3,015 medical payment amount minus the amount X claimed for his lien. In a cover letter, X wrote that he would hold the $1,861.50 balance in trust pending agreement.

About three months later, respondent and X settled their disputes over the attorney fees X claimed in the A and B cases and the medical payment proceeds X held in the A case. Respondent testified that X never expressly authorized him to endorse his name to a draft. Respondent never assumed that he could endorse X's name to the settlement drafts without authority, but he claimed he had the authority by virtue of X's silence in response to respondent's communications. Respondent further testified that had X objected timely to respondent endorsing X's name on the drafts, respondent would not have done so. He was concerned that X's pending personal bankruptcy could tie up for some time any files or funds which X had in his possession and since the insurers were eager to settle the clients' cases, respondent did what he thought was needed to serve his clients. The State Bar introduced no evidence of client A or B disputing any portion of their respective recoveries nor of either client objecting to respondent's handling of any portion of them.

III. DISCUSSION

A. Burden of Proof and Scope of Review.

[2] The Supreme Court has held that disciplinary charges must be proved by the State Bar examiner by clear and convincing evidence and we have followed its directive. (See *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725, and cases cited; *In the Matter of*

Temkin (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 329.) Our review of the record is independent of the hearing judge; but as to findings of fact resolving issues of testimony, we must give great weight to the credibility determinations of the hearing judge who evaluated respondent's testimony in the light of all evidence. (Rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 732, 734; *In the Matter of Respondent A* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 255, 261.) It is also well-settled that all reasonable doubts must be resolved in favor of the accused attorney. (See *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 694, citing *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 183.) If equally reasonable inferences may be drawn from a proven fact, the inference leading to innocence must be chosen. (See *Himmel* v. *State Bar* (1971) 4 Cal.3d 786, 793-794.)

The record is replete with evidence of considerable hostility of both respondent and X toward each other in 1989. While the feud between them gave neither any latitude regarding compliance with the State Bar Act or the Rules of Professional Conduct, neither does it prove that respondent committed the charged violations.

B. The Endorsements of X's Name to the A and B Settlement Drafts.

[3a] Essentially, the hearing judge found that X did not expressly authorize respondent to endorse his name to the A and B drafts; but prior to the endorsement of these drafts, X did not object to respondent's intended deposit of the drafts or the authority to endorse his name. After reviewing the Supreme Court's definitions of moral turpitude under charged section 6106 and applicable decisional law, including on issues of commercial and agency law, the judge concluded that respondent reasonably believed that he had the authority to endorse X's name to the drafts and was not culpable of any act of moral turpitude.

In disputing the result reached by the hearing judge, the examiner argues four points. She contends that respondent did not disclose enough facts to put X on notice that respondent would endorse his name to the drafts; that respondent did not testify or argue truthfully to the hearing judge about the facts regarding his receipt of B's file; that respondent was prepared to endorse X's name to another draft after X wrote respondent in April 1989 that he was not authorized to do so; and that the hearing judge did not consider all of respondent's conduct in its entirety, including circumstances about how F and clients A and B came to be involved with respondent. We have concluded that the examiner's points are without merit.

Regarding respondent's disclosure to X, the record warrants an additional finding which we will make: "Prior to respondent's letter of March 16, 1989, he made two telephone calls to X's office and informed a staff member of X that he wished to arrange for respondent to endorse settlement drafts in the A and B cases. No one from X's office returned respondent's calls." Respondent's testimony about his telephonic notices to X's office was uncontradicted. Respondent's March 16 letter and the two previous phone calls, taken together, conveyed ample information to X that respondent proposed to take necessary action to endorse the drafts, include placing X's name on them. With this one added finding, we adopt the remaining findings and conclusions of the hearing judge pertaining to the endorsement of the A and B drafts.

In *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 397-398, the examiner representing the State Bar took the position that the simulation by an attorney of a client's signature when endorsing a draft, without indicating that the attorney was signing under power of attorney, was an act of moral turpitude or deceit violating section 6106. We held that, under the circumstances, it was not. As we discussed in *Lazarus*, the attorney had authority under the retainer agreement to endorse his client's name, the draft was promptly placed in the attorney's trust account and there was no evidence of intent to defraud. **[3b]** Here, too, we have no evidence of misuse of any of the funds intended for the clients or medical providers and no evidence of fraud. Neither *Lazarus* nor any of the Supreme Court cases cited by it or the examiner hold that an attorney engages in moral turpitude whenever express authority to endorse is lacking, without regard to the apparent authority the attorney may believe in good

faith he or she has obtained. Respondent testified that, in his experience, previous attorneys who had represented his clients were eager to speak with him upon his settlement of cases in which they had earlier rendered services. It was therefore reasonable for respondent to have sought to contact X twice by telephone and then in writing to seek permission to endorse X's name to the drafts. Respondent waited ample time before depositing the drafts. X made no objection prior to that time.

Although the recent cases of *Sternlieb* v. *State Bar* (1991) 52 Cal.3d 317 and *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092 focus on money offense matters and did not arise from charges of an attorney's dishonesty in making representations, they are nevertheless instructive on the issue of whether moral turpitude is involved in a case such as this one. In both cases, the Supreme Court found that the respective attorneys' claim to use of trust funds, although unreasonable or unauthorized, was not dishonest. The Court therefore declined to treat the offenses as the violation of section 6106 by a wilful misappropriation of funds, but rather only as a wilful violation of rule 8-101.

The distinctions drawn by the Supreme Court in *Sternlieb* and *Dudugjian* are also reflective of that Court's past holding in the area of conduct involving deceit and misrepresentation. **[3c]** Although the term "moral turpitude" found in section 6106 has been defined very broadly by the Court (e.g., *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110), the Supreme Court has always required a certain level of intent, guilty knowledge or wilfulness before placing the serious label of moral turpitude on the attorney's conduct. (See *Sternlieb* v. *State Bar*, *supra*, and cases discussed in *In the Matter of Temkin*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 330.) At the very least, gross negligence has been required. (See *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 475-476; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91.)

[3d] In this case, the hearing judge was in an appropriate position to assess the issues of respondent's intent, state of mind, good faith and reasonable beliefs and actions—all important issues bearing on whether moral turpitude was involved in this matter. The judge concluded that the proof fell short of moral turpitude here. As we stated *ante*, we are obligated to give great weight to the hearing judge's findings and conclusions on this subject. Since they are supported by uncontradicted evidence of respondent's attempts to inform X of his intentions followed by X's silence, we uphold the hearing judge's conclusion that the State Bar failed to prove by clear and convincing evidence that respondent's actions gave rise to a violation of section 6106.

Regarding the examiner's claim that respondent made false statements below about his receipt of the B case file, the hearing judge made no such finding and we conclude that such a finding would not be warranted. We read the record as showing genuine confusion on the part of respondent as to when he received B's file, an issue collateral to the charges in this case. That respondent might have written to X again in April 1989, proposing to endorse X's name to another draft, does not prove the charge. There was no evidence that respondent caused any further endorsements of X's name to be placed on drafts after the two March 1989 endorsements.

[4] Finally, we disagree with the examiner's criticism that the judge did not consider the totality of respondent's conduct. The examiner's contrary view in attributing to respondent improper, selfish motives rests on her choice of inferences to draw from the record. Given the lack of any evidence of impropriety of respondent or of his staff in dealings with the clients, at least equally reasonable inferences support the attribution of no base motives to respondent. We have already cited the law which requires all reasonable inferences to be resolved in respondent's favor. That the hearing judge saw this case for what the record reveals it was—a bitter scrap between two attorneys over clients, files, and the first attorney's fee—is a matter for commendation, not criticism of the hearing judge.

C. The Nature of X's Claim for Fees.

As to the nature of X's claim for fees, the hearing judge found that respondent withheld no funds from the A and B drafts for X's claimed fees for the reason that X held more in medical payment amounts than the amount of his claimed liens. The judge concluded

in essence that once respondent received the A and B settlements and deposited the drafts in his trust account, paid the clients' medical expenses and distributed to the clients their remaining full shares of their settlements, all that was left were attorney fee claims of respondent and X, sums which were not of trust fund status within the meaning of charged rule 8-101.

We adopt the hearing judge's findings and conclusions as to this portion of the charges with the minor exception that we modify finding 28 to find that respondent believed that his estimate of what X was owed in fees for the A and B cases combined was less than the amount X retained in medical payments in A's case.

Without coming to grips with the extended discussion of the law by the hearing judge in his decision as to the non-trust nature of X's attorney fee, the examiner nonetheless urges that we reverse the judge's conclusion and find respondent culpable of several violations of rule 8-101. Reduced to its essence, the examiner's reasoning is this: an attorney owes fiduciary duties to third parties who have claims to funds which the attorney receives, X was a third party who made a claim, therefore the funds are trust funds. We reject the examiner's position.

[5a] Over the years, the Supreme Court and now this review department, following that Court's precedent, have looked to the elements of rule 8-101 and its predecessor, rule 9, and their purposes, in determining whether a particular transaction violated the rule. (See, e.g., *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 976-979; *Shalant* v. *State Bar*, *supra*, 33 Cal.3d at p. 489; *Baranowski* v. *State Bar* (1979) 24 Cal.3d 153, 163-164; *Silver* v. *State Bar* (1974) 13 Cal.3d 134, 144-145; *In the Matter of Lazarus*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 398-399; *In the Matter of Mapps* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 1, 10-11.) As pertinent to this case, rule 8-101(A) considers as trust funds: "All funds received or held for the benefit of clients by a member of the State Bar. . . , including advances for costs and expenses." Subdivision (A)(2) of the rule requires deposit in trust of funds "belonging in part to a client and in part presently or potentially" to the attorney and requires withdrawal of the attorney's portion from the trust account as soon as the attorney's interest becomes fixed, unless an attorney-client dispute arises.

[5b] Following the Supreme Court's analysis, we have held that funds received by a member of the State Bar which were the subject of a medical lien held by the client's medical provider for services rendered in the matter for which the client hired the attorney were trust funds within the meaning of the rule, for they were, in effect, funds held for the benefit of clients. (*In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 712; *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 10.) Similarly, the Supreme Court has recognized that the funds of certain third parties which come into a lawyer's hands are required to be treated as trust funds. (See, e.g., *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156.)

[6a] We can and should look to the label and treatment of the funds by attorney and client when considering whether they are trust or non-trust funds. However, we hold that it is the character and nature of the funds, not their label by either attorney or client, which must ultimately determine their status. Thus, a client who makes payments to an attorney solely in response to a bill for legal fees for services already rendered cannot transform those monies into trust funds by so labelling them. Similarly, an attorney who has received payment for the court filing fee for a client's lawsuit cannot label those funds as personal in nature merely because the lawsuit will not be filed for some time but the attorney has pressing office expenses to cover in the meantime. This analysis applies equally to third party claims. No one would seriously assume that a client's general creditor can reach monies held by the client's attorney, absent an enforceable lien or judgment.

[6b] In this case, we believe that the examiner may have placed too much weight on respondent's own labelling of X's claim for quantum meruit fees as a "lien" coupled with his promise in his March 16, 1989, letter, to pay the reasonable value of X's claim for fees from respondent's trust account. As we have seen, bona fide lien claims of those such as medical providers are given trust status.

[7a] The general result reached by the authorities considering the question is that attorney fees for legal services already performed are personal obli-

gations of a client, and funds held to pay them are not trust funds within the meaning of rule 8-101. In that connection, we emphasize *Shalant* v. *State Bar*, *supra*, 33 Cal.3d 485, discussed by the hearing judge. In a case very similar to this one, Shalant settled the client's personal injury case and offered what he believed to be a quantum meruit fee to the client's previous attorney. Shalant then disbursed all of the rest of the money to his client, minus Shalant's own fee. The court concluded that the record did not show that the previous attorney's claim for services was impressed with trust fund status under rule 8-101. The court noted that the client had not directed that the funds be used in a particular manner and the claim on the funds was made by the other attorney, not the client.

In attempting to distinguish the hearing judge's discussion of *Shalant*, the examiner continues to blur claims of a previous attorney's past due fees with duly established medical lien claims. **[7b]** The only case we are aware of which has raised attorney fees for past services to a trust status within the meaning of rule 8-101 is the recent case of *Baca* v. *State Bar* (1990) 52 Cal.3d 294. There the Supreme Court determined that fees to three law firms were to come from a client's worker's compensation award, and that applicable law recognized an attorney fee claim in a worker's compensation matter as a lien on the injured's award and as coming out of the injured's recovery. (*Id.* at p. 299, fn. 3.)

As the hearing judge found in his decision, A and B discharged X before X had completed services for A and B under contingent fee contracts. **[8]** The courts have long recognized a client's power to discharge an attorney at any time, with or without cause, subject to the obligation to pay the discharged attorney the reasonable value of services rendered up to the time of discharge—so-called "quantum meruit." (*Fracasse* v. *Brent* (1972) 6 Cal.3d 784, 790-792; *Cazares* v. *Saenz* (1989) 208 Cal.App.3d 279, 285.) **[6c]** We agree with the hearing judge's extended discussion of case law concluding that although the limitation of a fee obligation to quantum merit does not bar enforcement of a lien which has been created (*Weiss* v. *Marcus* (1975) 51 Cal.App.3d 590, 598), there must be adequate proof of lien creation since it is an unsettled question whether a general or "common law" charging lien exists in California. (See *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, 447, fn. 8, citing *Isrin* v. *Superior Court* (1965) 63 Cal.2d 153, 157; see also 1 Witkin, Cal. Procedure (3d ed. 1985), Attorneys, §§ 142-144, pp. 165-166.) The hearing judge concluded correctly that no evidence was presented proving that X was a lienholder with an interest in the recovery. The examiner has cited no authorities justifying a contrary result.

IV. CONCLUSION AND DECISION

[9] Since we have reached the same conclusion as the hearing judge, that the State Bar has failed to bring forth clear and convincing evidence to support any of the charges made against respondent, we order the proceeding dismissed. Although respondent is entitled to reimbursement for the reasonable expenses of preparation for hearing, in an amount to be determined by the State Bar Court, we are not authorized to award any amount for attorney fees as respondent has requested. (Bus. & Prof. Code, § 6086.10 (d).)

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KENNETH LAWRENCE CARR

A Member of the State Bar

No. 89-P-15235

Filed November 25, 1992

SUMMARY

Respondent had been placed on disciplinary probation under conditions requiring him to file quarterly reports and to report that he had abstained from intoxicants and non-prescribed drugs in any report required by the conditions of his probation. Respondent's first two quarterly reports did not contain an express statement that he had abstained from intoxicants and non-prescribed drugs. In the ensuing probation revocation proceeding, the hearing judge found that respondent had violated his probation, and recommended revoking probation and imposing respondent's previously stayed two-year suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, contending that his probation reports satisfied his probation requirements, that he was not required to report his abstinence in his regular quarterly reports, and that the hearing judge committed prejudicial evidentiary errors requiring a new hearing. The review department rejected respondent's legal argument regarding the interpretation of his probation conditions, and found that all of the facts essential to support a conclusion that respondent violated his probation were established by evidence which respondent did not challenge. Although it modified the hearing judge's findings as to aggravation and mitigation, the review department adopted her recommendation as to discipline, with minor modifications.

COUNSEL FOR PARTIES

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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] **135 Procedure—Rules of Procedure**
159 Evidence—Miscellaneous
165 Adequacy of Hearing Decision
169 Standard of Proof or Review—Miscellaneous
204.90 Culpability—General Substantive Issues

Review department did not need to reach respondent's challenges to hearing judge's evidentiary rulings in order to uphold hearing judge's ultimate findings, where all essential elements of charged violation were established by evidence to which respondent did not object, and any evidentiary errors did not result in denial of a fair hearing. Where factual findings based on challenged evidence were not necessary to decision, remand for new hearing was not necessary even if evidentiary errors underlay some non-essential findings. (Rule 556, Trans. Rules Proc. of State Bar.)

[2] **179 Discipline Conditions—Miscellaneous**
1712 Probation Cases—Wilfulness
1713 Probation Cases—Standard of Proof

Evidence needed to establish culpability of failure to comply with probation conditions regarding content of required quarterly reports was (1) text of probation conditions in question; (2) evidence that respondent had notice of such conditions; (3) text of quarterly reports at issue, and (4) evidence of wilful failure to comply with probation conditions, which was established by respondent's testimony that statement at issue was not included in reports due to respondent's interpretation of probation conditions.

[3 a-c] **172.19 Discipline—Probation—Other Issues**
1719 Probation Cases—Miscellaneous

As a matter of law, probation condition requiring respondent to include statement regarding abstinence from alcohol and drugs in any report required under probation conditions required respondent to include such statement in all required reports, including quarterly reports. Statement in quarterly reports that respondent had complied with all "valid, legally reasonable and enforceable" probation conditions did not comply with such requirement, because it was not a clear and unequivocal statement of respondent's compliance with the abstinence condition.

[4] **169 Standard of Proof or Review—Miscellaneous**
172.19 Discipline—Probation—Other Issues
1713 Probation Cases—Standard of Proof

The question of how a court order should be interpreted is a question of law for the court, not a question of fact, and the parties' subjective beliefs as to its meaning are not relevant to the court's interpretation. Whether language of respondent's probation reports complied with requirements of probation conditions was a legal issue, not a factual one. Moreover, probation order was a Supreme Court order, not a contract, and rules of contract interpretation did not apply.

[5] **172.19 Discipline—Probation—Other Issues**
199 General Issues—Miscellaneous
204.90 Culpability—General Substantive Issues
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1719 Probation Cases—Miscellaneous

Where probation conditions required that respondent abstain from intoxicants and non-prescribed drugs, and respondent stated under penalty of perjury that respondent had complied with all "valid,

legally reasonable and enforceable" probation conditions, then even if State Bar proved respondent had consumed alcohol, respondent could have avoided perjury conviction by contending he did not consider abstinence condition to be valid, legally reasonable, and/or enforceable.

[6] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
1712 Probation Cases—Wilfulness
1913.11 Rule 955—Substantive Issues—Wilfulness—Definition

Violations of probation require the same mental state to justify discipline as violations of rule 955, Cal. Rules of Court. For such purposes, wilfulness need not involve bad faith; a general purpose or willingness to comment an act or permit an omission is sufficient. Accordingly, despite respondent's asserted good faith belief that probation reports were sufficient, respondent's intentional failure to include a required statement in such reports was wilful for purposes of a probation violation. Respondent's subjective intentions were relevant only with regard to aggravation and mitigation.

[7] **130 Procedure—Procedure on Review**
146 Evidence—Judicial Notice
161 Duty to Present Evidence
802.21 Standards—Definitions—Prior Record

Where examiner failed to introduce appropriate documentary evidence of respondent's prior discipline record, review department notified parties of intent to take judicial notice of specified documents from official State Bar Court records regarding such discipline, and took such notice after neither party objected.

[8] **591 Aggravation—Indifference—Found**
1719 Probation Cases—Miscellaneous

Respondent's belief that he had not violated probation in framing his probation reports was unreasonable, at least once respondent was advised by probation department that his interpretation of probation conditions was incorrect. Hearing judge was therefore correct in treating respondent's failure to file corrected reports as a failure to rectify his misconduct and therefore an aggravating factor.

[9 a, b] **142 Evidence—Hearsay**
146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings

Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record. Notice may be taken of another court's findings of fact and conclusions of law in support of a judgment, but not of hearsay allegations, even those of a judge-declarant. Accordingly, hearing judge erred in taking judicial notice of truth of testimony by respondent's criminal probation officer in criminal probation revocation proceeding.

[10] **142 Evidence—Hearsay**
165 Adequacy of Hearing Decision
545 Aggravation—Bad Faith, Dishonesty—Declined to Find

Where aggravating factor of bad faith found by hearing judge rested entirely on inadmissible hearsay evidence, review department declined to adopt such finding.

[11] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
Where superior court appellate department had reversed decision revoking respondent's criminal probation due to municipal court's refusal to permit respondent's counsel to cross-examine prosecution's witness, transcript of municipal court proceeding could not have been considered as evidence pursuant to Business and Professions Code section 6049.2.

[12 a-c] **715.50 Mitigation—Good Faith—Declined to Find**
1719 Probation Cases—Miscellaneous
Where respondent unreasonably persisted in refusing to include certain language in probation reports even after being informed by probation department employees that his interpretation of probation conditions as not requiring such language was incorrect, this effectively refuted respondent's contention that he acted in good faith, which would have constituted a mitigating factor if factually correct.

[13] **142 Evidence—Hearsay**
146 Evidence—Judicial Notice
1711 Probation Cases—Special Procedural Issues
Documentary evidence of communications to respondent from probation department regarding interpretation of probation conditions was judicially noticeable. It was not admissible to show truth of statements contained in such documents; for that purpose, it was hearsay. However, it was admissible to show that respondent had notice of probation department's interpretation, which was relevant to issue of respondent's good faith.

[14] **142 Evidence—Hearsay**
165 Adequacy of Hearing Decision
1711 Probation Cases—Special Procedural Issues
Written report from respondent's probation monitor was inadmissible as hearsay where it did not establish that respondent had notice of anything unless probation monitor's recitals of what he told respondent were accepted as true. However, where such evidence was merely cumulative on question of notice, any reliance thereon by hearing judge was harmless error.

[15 a, b] **745.39 Mitigation—Remorse/Restitution—Found but Discounted**
750.39 Mitigation—Rehabilitation—Found but Discounted
Where respondent included declaration regarding abstinence in probation reports after hearing judge ruled that such declaration was required, such probation reports were relevant to issue of mitigation. However, respondent's change of behavior was not given very great weight in mitigation, where respondent could have avoided probation revocation proceeding altogether if respondent had heeded advice of probation department staff instead of continuing to follow respondent's own interpretation of probation conditions until rejected by source respondent considered sufficiently authoritative.

[16 a, b] **116 Procedure—Requirement of Expedited Proceeding**
755.10 Mitigation—Prejudicial Delay—Found
1714 Probation Cases—Degree of Discipline
Excessive delay in conducting disciplinary proceedings, not attributable to respondent and resulting in prejudice to respondent, should be taken into account in mitigation, especially in probation revocation proceedings which are required to be expedited. Where, due to delay in

proceedings, actual suspension in probation matter would not commence until after start of actual suspension in separate matter which was supposed to be served concurrently with prior suspensions, review department modified recommended discipline in probation matter to provide for actual suspension to be served concurrently with previously ordered actual suspension to extent it was still in effect.

[17] **135 Procedure—Rules of Procedure**
755.32 Mitigation—Prejudicial Delay—Found but Discounted
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues
Nothing in lengthy pendency of probation revocation proceeding delayed or prevented respondent's filing of application for termination of suspension pursuant to standard 1.4(c)(ii). (Trans. Rules Proc. of State Bar, rules 810-826.)

[18 a, b] **106.10 Procedure—Pleadings—Sufficiency**
1714 Probation Cases—Degree of Discipline
The respondent in a probation revocation matter may not be subjected to greater discipline than imposition of the entire period of suspension previously stayed if the notice to show cause does not appropriately charge violations that could result in greater discipline. Where notice to show cause stated that respondent was to show cause why stay of suspension should not be set aside and stayed suspension imposed, imposing entire stayed suspension was maximum discipline that State Bar Court could recommend.

[19] **801.41 Standards—Deviation From—Justified**
806.59 Standards—Disbarment After Two Priors
1714 Probation Cases—Degree of Discipline
Because of limitation on discipline available in probation revocation matter, disciplinary standard calling for disbarment in third disciplinary matter absent compelling mitigation did not apply.

[20 a, b] **511 Aggravation—Prior Record—Found**
805.10 Standards—Effect of Prior Discipline
1714 Probation Cases—Degree of Discipline
Maximum available discipline in probation revocation matter was appropriate where respondent's priors, which included a prior probation violation, combined with misconduct in current case, showed both a persistent problem with drugs and alcohol and a persistent problem with conforming conduct to requirements of law and court orders. Policy underlying disciplinary standard calling for disbarment after two priors, and standard calling for increasing severity of discipline in successive matters, also militated toward imposing severe discipline given respondent's extensive prior record.

[21] **172.20 Discipline—Drug Testing/Treatment**
172.30 Discipline—Alcohol Testing/Treatment
750.59 Mitigation—Rehabilitation—Declined to Find
1714 Probation Cases—Degree of Discipline
Absence of evidence of rehabilitation from drug and alcohol problems was significant where respondent's probation violation involved failure to give adequate assurance of compliance with probation requirement of abstention from alcohol and drugs.

[22 a, b] 176 Discipline—Standard 1.4(c)(ii)
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues

Where respondent was still on suspension in prior matter due to failure to make showing under standard 1.4(c)(ii), hearing judge's recommendation that actual suspension in current matter be consecutive to such suspension was inconsistent with recommendation that only one 1.4(c)(ii) hearing be required to terminate both suspensions. Review department therefore recommended that actual suspension in current matter be prospective to Supreme Court's order, but concurrent with balance of all suspensions in effect as of entry of such order.

[23] 135 Procedure—Rules of Procedure
179 Discipline Conditions—Miscellaneous
1715 Probation Cases—Inactive Enrollment

Where respondent in probation revocation matter had been continually suspended from practice of law for preceding four years, review department did not need to order that respondent be placed on inactive enrollment under Business and Professions Code section 6007(d) pending final Supreme Court order. (Trans. Rules Proc. of State Bar, rule 612(b).)

ADDITIONAL ANALYSIS

Discipline

1815.08 Actual Suspension—2 Years

Probation Conditions

1830 Standard 1.4(c)(ii)

Other

112 Procedure—Assistance of Counsel
173 Discipline—Ethics Exam/Ethics School
1751 Probation Cases—Probation Revoked

OPINION

NORIAN, J.:

Respondent, Kenneth L. Carr, was placed on disciplinary probation in 1988. (*In re Carr* (1988) 46 Cal.3d 1089.) In the present matter, respondent was charged with failing to comply with the conditions of that probation, by failing to state expressly in his first two probation reports that he had abstained from intoxicants and non-prescription drugs. The hearing judge found respondent violated his probation and recommended revoking it and imposing the previously stayed two-year suspension ordered by the Supreme Court.

Respondent requested review, contending that his probation reports satisfied his probation requirements by stating that he had complied with all "valid, legally reasonable and enforceable terms and conditions" of his probation. He also contends that the requirement that he report compliance with the alcohol/drug abstinence condition (probation condition number 5) did not mean that he had to include such a report in his regular quarterly reports (required by probation condition number 3). Finally, he contends that counsel should have been appointed to represent him in the probation revocation proceeding, and that prejudicial evidentiary errors committed by the hearing judge require a remand for a new hearing.

Although we modify the hearing judge's findings as to aggravation and mitigation, we adopt her conclusion that respondent was culpable of the probation violations with which he was charged. With minor modifications, we also adopt the hearing judge's recommendation as to discipline.

I. FACTS

A. Background

Respondent was admitted to practice law in California on June 28, 1976. On October 13, 1988, the California Supreme Court filed an opinion disciplining respondent in connection with two criminal convictions for driving under the influence. (*In re Carr*, *supra*, 46 Cal.3d 1089.) This discipline ("the 1988 discipline") consisted of a two-year suspension which was stayed on conditions of six months actual suspension, five years of probation and compliance with other duties recommended by the former volunteer review department and incorporated into the Supreme Court's opinion by reference. (*Id.* at p. 1091.)

Among the probation conditions imposed as part of the 1988 discipline were a quarterly reporting condition and a condition that respondent abstain from the use of intoxicants and non-prescribed drugs "and report that he has done so in *any* report that he is required to render under these conditions of probation." (Probation condition 5, emphasis added).[1] Respondent's quarterly reports dated April 10, 1989, and July 10, 1989, both stated that respondent had complied with the State Bar Act and Rules of Professional Conduct and with all "other valid, legally reasonable and enforceable terms and conditions of my probation" during the period covered by the report. The reports did not state that respondent had abstained from the use of intoxicants and non-prescribed drugs. Respondent testified at the hearing in this matter that the reports did not "attempt or intend to so state." (R.T. p. 107.) After each of the two reports was received, respondent was notified by employees of the probation department of its contention that the reports were inadequate due to their failure to state that respondent had abstained from the use of intoxicants and non-prescribed drugs as required by condition 5. Although invited to do so, respondent did not thereafter amend the two reports.

B. Procedural History and Decision Below

On September 12, 1989, a notice to show cause was filed charging respondent with violating the conditions of his probation by failing to state, in his quarterly reports filed April 10, 1989, and July 10,

1. The quarterly reporting condition read in pertinent part as follows: "3. That during the period of probation, [respondent] shall report not later than January 10, April 10, July 10 and October 10 . . . [¶] that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct . . . ."

1989, that he had abstained from the use of intoxicants and non-prescribed drugs. A hearing was held on January 8, 1990, and the hearing judge filed a decision on May 31, 1990. Respondent then requested reconsideration and a hearing de novo. The request for hearing de novo was denied, but respondent was given an opportunity to submit additional evidence, which he failed to do within the time allowed.

On January 10, 1992, the hearing judge filed an amended decision which modified the original decision in response to some of the points raised by respondent on reconsideration. The amended decision, like the original decision, found respondent to have violated his probation as charged. The judge recommended that the stay of respondent's two-year suspension be lifted and that respondent be placed on actual suspension for two years and until he shows rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct ("standards"). (Trans. Rules Proc. of State Bar, div. V.) The judge recommended that the actual suspension in this matter be "consecutive and in addition to any period of actual suspension which [r]espondent may be serving" as of the entry of the Supreme Court's order in this matter, and that respondent "be required to undergo only one [standard] 1.4(c)(ii) hearing at the conclusion of his actual suspension."[2]

II. DISCUSSION

A. Probation Violation

1. Respondent's contentions.

Respondent's principal argument on review is that his probation reports did in fact comply with the conditions of his probation. He contends, in effect, that the probation conditions did not require the quarterly reports to state explicitly, or in any particular words, that respondent had abstained from intoxicants and non-prescribed drugs. Thus, he argues, the statements in his reports that he had complied with all "other valid, legally reasonable and enforceable terms and conditions of [his] probation" constituted adequate compliance with his probation.

In the alternative, respondent contends that the correct interpretation of the conditions of his probation is that they did not require him to report his abstinence in the regular quarterly reports, but only in reports made in response to specific requests from his probation monitor, the alcohol abuse consultant, or the presiding referee or his designee. There is no evidence in the record that any such request was made. Finally, respondent contends that he should not be found culpable because he believed in good faith that his reports did satisfy the requirements of his probation conditions.[3]

2. Adequacy of respondent's probation reports.

[1a] Respondent raises several challenges to the hearing judge's evidentiary rulings. However, these arguments need not be reached in order to uphold the hearing judge's ultimate findings. All of the essential elements of the probation violation were established by evidence to which respondent did not object at the hearing and which he does not challenge on review, and any evidentiary errors did not result in the denial of a fair hearing. (See Trans. Rules Proc. of State Bar, rule 556.) **[2]** The evidence needed to establish culpability is: (1) the text of the probation conditions in question, which respondent acknowledged was admissible (R.T. p. 7); (2) evidence that respondent had notice of the probation conditions, a fact to which he repeatedly stipulated

2. Respondent had already been ordered to comply with standard 1.4(c)(ii) in connection with earlier discipline. (See discussion *post*.)

3. Respondent also argues that, as an indigent, he should have had counsel appointed to represent him at State Bar expense. Respondent's argument does not require extended discussion, since both we and the Supreme Court have previously expressly rejected it. (*In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 759, fn. 2, citing *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 447-448; see also *Slaten* v. *State Bar* (1988) 46 Cal.3d 48, 57.) Respondent himself states that he is only raising the issue before the review department in order to preserve it for Supreme Court review.

(R.T. pp. 12, 26); (3) the text of respondent's two quarterly reports which are at issue, to which respondent did not object except on the technical ground (not raised on review) that they were duplicated elsewhere among the exhibits (R.T. pp. 30-31); and (4) evidence of respondent's wilful failure to comply, which is established by respondent's testimony that he intentionally did not include the statement in his reports because of his interpretation of the conditions. (R.T. p. 107.)

[1b] The hearing judge's amended decision contains factual findings on other issues, some of which are based on evidence which respondent challenges, but these findings are not necessary to the decision. Since we can make our own factual findings, and may decline to adopt findings made by the hearing judge which are not necessary, no remand for a new hearing is necessary even if there are evidentiary errors underlying some of the hearing judge's non-essential findings. Respondent's culpability is established by a preponderance of the undisputed evidence (see Bus. & Prof. Code, § 6093 (c)), and we make our own assessment of the appropriate discipline (*post*) based on our independent review of the record.

[3a] We affirm the hearing judge's conclusion that the conditions of respondent's probation did require him to include in each quarterly report a statement that he had abstained from intoxicants and non-prescribed drugs. **[4]** In so doing, we emphasize that the question of how a court order should be interpreted is a question of law for the court, not a question of fact, and the parties' subjective beliefs as to its meaning are not relevant to the court's interpretation. In other words, whether the language in respondent's probation reports complied with the requirements of the probation conditions is a legal issue, not a factual one.[4] Moreover, respondent is in error in contending that the probation order, like a contract, should be construed against the drafter. The probation order in this case is an order of the Supreme Court, not a contract. (Cf. *John Siebel Associates* v. *Keele*, *supra*, 188 Cal.App.3d at p. 565 [stipulated judgments have same effect as judgments after trial on the merits].) The rules of contract interpretation do not apply to court orders.

[3b] As a matter of law, the hearing judge's interpretation of the probation conditions and of respondent's reports was correct. As we stated, *ante*, the abstinence condition required that respondent "abstain from the use of intoxicants and non-prescribed drugs and report that he has done so in *any* report that he is required to render under *these conditions* of probation." (Probation condition 5, emphasis added.) This language unambiguously requires respondent to report his abstinence in *all* reports required by *any* of the various conditions of his probation, including the quarterly reporting condition. Respondent's argument to the contrary strains the plain meaning of the order.

[3c] The hearing judge also correctly found that respondent's reports did not comply with the quoted requirement. Respondent's statements that he had complied with all "valid, legally reasonable and enforceable terms and conditions of [his] probation" did not necessarily mean that he had abstained from intoxicants and non-prescribed drugs, because the reports did not indicate whether respondent viewed that particular probation condition as "valid, legally reasonable and enforceable." Respondent admitted that he did not intend the reports to state that he had complied with the abstinence provision. (R.T. p. 107.) Thus, the language of the reports did not constitute a clear and unequivocal statement of

4. See *John Siebel Associates* v. *Keele* (1986) 188 Cal.App.3d 560, 565 ("The interpretation of the effect of a judgment is a question of law within the ambit of the appellate court."); see also, e.g., *Moore* v. *City of Orange* (1985) 174 Cal.App.3d 31, 34-37 (interpreting intent of prior appellate opinion in same case); *Puritan Leasing Co.* v. *Superior Court* (1977) 76 Cal.App.3d 140, 146-149 (same); *Widener* v. *Pacific Gas & Electric Co.* (1977) 75 Cal.App.3d 415, 436-437, 443, disapproved on another point by *McCoy* v. *Hearst Corp.* (1986) 42 Cal.3d 835, 846, fn. 9 (interpreting trial court's order granting new trial); *Charbonneau* v. *Superior Court* (1974) 42 Cal.App.3d 505, 513-514 (in affirming order holding attorney in contempt for violating order in limine, treating interpretation of order and question whether attorney's acts violated it as questions of law).

respondent's compliance with the abstinence condition.[5] **[5 - see fn. 5]** Respondent therefore wilfully violated his probation. (See *Potack* v. *State Bar* (1991) 54 Cal.3d 132, 138-139 [finding wilful violation of probation due to failure to comply with precise language of probation order].)

3. Respondent's good faith.

[6] Respondent also argues, in essence, that he should be found to have complied with his probation because he had a good faith belief that his reports were sufficient. We have held that violations of probation require the same mental state to justify discipline as violations of rule 955 of the California Rules of Court. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Wilfulness for purposes of such violations "need not involve bad faith; instead, a 'general purpose or willingness' to commit an act or permit an omission is sufficient." (*Ibid.*) Respondent's intentional failure to include the required statement in his reports was clearly wilful for purposes of a probation violation. His subjective intentions are relevant only with regard to aggravation and mitigation. (See discussion *post.*)

B. Aggravation

The hearing judge found three aggravating factors: (1) respondent's prior disciplinary record; (2) respondent's failure to rectify his misconduct by filing amended probation reports, and (3) respondent's deliberate, intentional, bad faith failure to comply with his probation conditions. We modify the decision to eliminate one of these factors, to wit, respondent's asserted bad faith.

1. Prior discipline.

Other than the disciplinary matter in which the probation conditions at issue in this matter were imposed, the examiner did not introduce any evidence of respondent's prior disciplinary record.[6] **[7 - see fn. 6]** In her amended decision, the hearing judge took into account as aggravating factors those of respondent's disciplinary priors which were final as of the date of her decision. These consisted of: (1) the matter in which the probation at issue in this case was imposed (*In re Carr*, *supra*, 46 Cal.3d 1089); (2) an earlier matter (Bar Misc. Nos. 4426, 4575) which was cited in the Supreme Court's opinion in *In re* Carr, *supra*, and (3) the revocation of respondent's probation in the earlier matter (Bar Misc. Nos. 4426, 4575). All of these prior matters were properly considered in aggravation by the hearing judge (see std. 1.2(b)(i)), and we consider them also.

2. Failure to rectify.

[8] The hearing judge considered respondent's refusal to amend his probation reports as a failure to rectify his misconduct and therefore an aggravating factor. (See std. 1.2(b)(v).) Although respondent does not raise this issue in his brief on review, he does contend that his decision not to file amended reports

5. **[5]** Respondent argues on review that his reports did contain the required statement, because if the State Bar had proved that he had consumed alcohol during the period covered by the reports, he could have been convicted of perjury based on the reports' statement that respondent had complied with all "valid, legally reasonable and enforceable" probation conditions. Under these hypothetical facts, however, respondent could have avoided a perjury conviction by contending that he did not consider, at the time he made the statement, that the abstinence condition was valid, legally reasonable, and/or enforceable. "Even though a declarer knows his interpretation is contrary to the interpretation found by the person making an order or posing a question, so long as the declarer states the literal truth 'in light of the meaning that he, not his interrogator, attributed to the questions and answers,' it will not support a perjury conviction." (*People* v. *Kronemyer* (1987) 189 Cal.App.3d 314, 338, quoting *Bronston* v. *United States* (1973) 409 U.S. 352, 359; see also *In re Rosoto* (1974) 10 Cal.3d 939, 949-950.)

6. **[7]** We have previously discussed the need for the examiner to introduce appropriate documentary evidence of the respondent's priors. (*In the Matter of Kizer* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 87, 93-94.) The examiner in this matter did not have the benefit of the *Kizer* opinion, which was filed after the hearing in this matter, and did not seek to introduce the relevant documents. Accordingly, we notified the parties shortly after oral argument, by letter from the clerk, that we intended to take judicial notice of specified documents from the official State Bar Court records regarding respondent's prior discipline. Neither party having objected, we hereby take judicial notice, under Evidence Code sections 459 and 452, of those specified documents.

was the result of his continued belief that the requested amendments were not required by the terms of his probation. We hold that respondent's belief that he had not violated probation in framing his reports as they originally read was unreasonable, at least once he was advised by the probation department that his interpretation of the probation conditions was incorrect.[7] The hearing judge was therefore correct in treating respondent's failure to file corrected reports as an aggravating factor. (Cf. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 700; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647.)

3. Bad faith.

The third aggravating factor found by the hearing judge was based on the transcript of a municipal court hearing on a criminal probation revocation matter involving respondent, which was introduced by the examiner for the purpose of showing that respondent had used drugs while on his State Bar probation. At the municipal court hearing, respondent's criminal probation officer testified that during June, July and August 1989, respondent's urine samples had tested positive for drugs and respondent had admitted using drugs. At the conclusion of that hearing, the municipal court judge stated from the bench that respondent's criminal court probation would be revoked.

In the matter before us, in the discipline phase of the hearing, the hearing judge took judicial notice of the municipal court transcript "for the sole purpose of looking at the state of mind" of respondent in filing his probation reports. (R.T. p. 139.) No judgment, minute order, or other document regarding the criminal probation revocation proceeding was offered or admitted in evidence. Respondent's criminal probation officer was not called to testify in this disciplinary proceeding, and no other evidence was offered regarding respondent's alleged drug use during mid-1989.

In the amended decision, on the basis of the municipal court transcript, the judge found that "In June 1989, Respondent's urine tested positive for morphine and cocaine" and that "Respondent admitted to his criminal probation officer that in June 1989 he was using drugs." (Amended decision, p. 22.) Based on these factual findings, the judge found as an aggravating factor that "Respondent's 'dirty' urine samples demonstrate that his failure to file the statement required in probation Condition No. 5 with his quarterly reports was deliberate, intentional and in bad faith." (*Id.*, p. 23.)

[9a] Respondent correctly contends that the hearing judge should not have taken judicial notice of the truth of the criminal probation officer's testimony. As one Court of Appeal has put it, there is a "widespread misunderstanding of the scope of judicial notice of court records." (*Garcia* v. *Sterling* (1985) 176 Cal.App.3d 17, 22.) Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record. (*Ibid.*, citing *Day* v. *Sharp* (1975) 50 Cal.App.3d 904, 914; see also *Magnolia Square Homeowners Assn.* v. *Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1056.)

[9b] The fact that the municipal court judge revoked respondent's criminal probation on the basis of the probation officer's testimony (no other evidence was offered) does not itself make the truth of every aspect of that testimony judicially noticeable. The transcript does not reflect any specific findings of fact by the municipal court judge, other than an ultimate finding that respondent had violated his probation. Even if it were judicially noticeable that respondent's criminal probation was revoked, the specific factual basis for that revocation is not shown from the transcript, and no findings of fact,

7. See discussion under mitigation, *post*, regarding the notice given respondent by the probation department on this issue. Respondent contends that the employees who advised him that his reports were incomplete did not have authority to do so under the terms of his probation. This argument misses the point. The employees in question may not have had authority to make a binding interpretation of respondent's probation conditions, but in failing either to heed their advice or to test it by taking the issue to someone with superior authority, respondent took the risk that he would be found to have been unreasonable in persisting in his own interpretation.

judgment, or minute order were introduced to establish what facts were found by the municipal court. "Ordinarily a court may notice the existence of another court's findings of fact and conclusions of law in support of a judgment, because they are conclusive and incontrovertible in character and not reasonably subject to dispute. But judicial notice cannot be taken of hearsay allegations as being true, even those made by a judge-declarant, just because they are part of a court record or file (citations)." (*People* v. *Tolbert* (1986) 176 Cal.App.3d 685, 690; see also *Day* v. *Sharp*, *supra*, 50 Cal.App.3d at p. 914, quoting Jefferson, Cal. Evidence Benchbook (1972) Judicial Notice, § 47.3, p. 840 ["'. . . A court . . . can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.'"].) **[10]** Thus, the aggravating factor of bad faith found by the hearing judge rested entirely on inadmissible hearsay evidence. We decline to adopt this finding.

[11] In offering and admitting the criminal probation revocation transcript, neither the examiner nor the hearing judge relied on section 6049.2 of the Business and Professions Code.[8] Because of subsequent developments in this matter, we need not decide whether the testimony in the transcript would have been admissible if offered under this section. On review, after oral argument, respondent moved to augment the record to include a superior court appellate department decision reversing the criminal probation revocation due to the municipal court's refusal to permit respondent's counsel to cross-examine the prosecution's witness (i.e., the probation officer). In his response to this motion, the examiner stated that he did not object to our considering this appellate department decision. We therefore take judicial notice of it, and hold that the transcript could not have been considered under section 6049.2 due to the lack of opportunity for full cross-examination of the criminal probation officer by respondent's defense counsel.

C. Mitigation

Respondent offered no evidence in mitigation either at the hearing or thereafter, although he was given an opportunity to do so. However, respondent argued that his good faith belief in his interpretation of the probation conditions was a mitigating factor. On review, respondent also seeks to introduce evidence that his more recent quarterly probation reports have included the requisite language regarding compliance with the abstinence provision of respondent's probation conditions. We must also consider the mitigating effect, if any, of the delay in resolving this matter, particularly the 20 months which elapsed between the filing of respondent's timely (and partially meritorious) motion for reconsideration in June 1990, and the filing of the hearing judge's amended decision in January 1992.

1. Respondent's good faith.

[12a] Respondent defends his failure to include the required abstinence language in his probation reports on the basis of his asserted good faith belief that the language was not required under the terms of his probation conditions. While not negating culpability, this contention, if factually correct, would constitute a mitigating factor. (Std. 1.2(e)(ii).)

[12b] In finding that respondent refused to rectify his misconduct, however, the hearing judge implicitly rejected respondent's testimony regarding his good faith. The record supports this finding. As already noted, respondent unreasonably persisted in refusing to include the language in his reports even after being informed by employees of the probation department that his interpretation was not correct.

[13] The hearing judge admitted evidence of the communications to respondent from the probation

8. Section 6049.2 provides in pertinent part that "In all disciplinary proceedings . . . the testimony of a witness . . . in a contested civil action or special proceeding to which the [respondent was] a party . . . may be received in evidence, so far as relevant and material to the issues in the disciplinary proceedings, by means of a duly authenticated transcript of such testimony and without proof of the nonavailability of the witness; provided, the [State Bar Court] may . . . decline to receive in evidence any such transcript . . . when it appears that the testimony was given under circumstances that did not . . . allow an opportunity for full cross-examination."

department on this subject, over respondent's hearsay objections, on the ground that it was judicially noticeable, but she stated that she was not admitting such evidence for the truth of the statements contained in the documents. This result is correct. Such evidence would not be admissible to show that the probation department's statements were true (i.e., that its interpretation was the correct one). For that purpose, it is hearsay, and in any event the issue is one of law for the court, and the probation department's interpretation is not controlling.[9] However, on the issue of good faith, evidence that respondent had notice of the probation department's interpretation (a fact which respondent admitted at the hearing (R.T. p. 26)) is both relevant and admissible. (Cf. *Potack* v. *State Bar*, *supra*, 54 Cal.3d at p. 139 [failure to comply with probation conditions after being given opportunity to do so constituted wilful violation of probation].) The probation department material admitted into evidence by the hearing judge is proper evidence on this issue.[10] **[14 - see fn. 10]**

[12c] This evidence effectively refutes respondent's contention that he acted in good faith based on his interpretation of the probation conditions. If respondent was acting on the basis of an innocent misunderstanding of the import of his probation conditions, he should not have persisted in his interpretation of the probation conditions after receiving advice to the contrary.

2. Subsequent probation reports.

Respondent has requested that we augment the record in this matter to include copies of 10 additional quarterly probation reports ("the subsequent reports"), which were filed by respondent after he had received the hearing judge's initial decision in this matter holding that the two reports at issue here were not in compliance with respondent's probation conditions. Each of the subsequent reports contains the necessary declaration regarding respondent's abstinence from intoxicants and non-prescribed drugs. The examiner does not object to our consideration of the subsequent reports on the issue of mitigation. We therefore grant respondent's request to include the subsequent reports as part of the record in this matter.

[15a] We agree with the examiner that the relevance of the subsequent reports is limited to the issue of mitigation. The examiner contends that respondent's reports should receive no weight on that issue, because of the claimed lack of credibility of respondent's assertions of abstinence. However, the question in this matter is not whether respondent was in fact abstinent, but whether respondent complied with the conditions of his probation with respect to *reporting* that he had been abstinent. We need not consider respondent's credibility here. The subsequent reports speak for themselves as to what was included therein.

[15b] The subsequent reports establish that respondent did include an abstinence declaration in his probation reports once the hearing judge had ruled that such a declaration was required. This change of behavior on respondent's part is a legitimate mitigating factor, and we consider it as such. (Cf. stds. 1.2(e)(vii), 1.2(e)(viii).) We do not give it very great weight, however, because respondent might have avoided this proceeding (and the ensuing discipline) altogether if he had heeded the advice of the probation department staff on the subject to begin with, instead of continuing to follow his own interpretation of the probation conditions until it had been rejected by a source which respondent considered

9. The hearing judge ruled that the probation file materials were relevant to show the process by which the probation department arrived at the decision to issue the notice to show cause in this matter. For that purpose, they would not be admissible, because how the probation department reached its decision to initiate this proceeding is not relevant to any issue in the case. Nonetheless, much of this evidence is relevant to rebut respondent's contention that his misconduct arose out of a good faith misunderstanding of his probation conditions, and for that purpose it is admissible.

10. **[14]** Respondent objects to the admission of exhibit 10, a report from respondent's probation monitor. As to this particular exhibit, respondent's hearsay objections are well-taken. The probation monitor's report does not establish that respondent had notice of anything unless the probation monitor's recitals of what he told respondent are accepted as true, in violation of the hearsay rule. However, this evidence is merely cumulative on the question of notice, so any reliance on this report by the hearing judge was harmless error.

sufficiently authoritative.

3. Delay.

[16a] Under the standards, we should take into account in mitigation any "excessive delay in conducting disciplinary proceedings, which delay is not attributable to the [respondent] and which delay prejudiced the [respondent]." (Std. 1.2(e)(ix).) This standard is all the more relevant in probation revocation proceedings, which are required by statute to be expedited. (Bus. & Prof. Code, § 6093 (c).)[11] In this matter, respondent's timely motion for reconsideration was not finally disposed of until some 20 months after it was filed, primarily for reasons not attributable to respondent.

It does not appear that respondent has been seriously prejudiced by the delay. He has not even raised the issue before us. During the entire pendency of this proceeding, respondent has been suspended from practice in connection with a prior disciplinary matter, subject to a requirement that he comply with standard 1.4(c)(ii) before returning to practice. (*In re Carr*, *supra*, 46 Cal.3d at p. 1091.) **[17]** Respondent has not yet sought to terminate such suspension by filing an application for a standard 1.4(c)(ii) hearing. (See Trans. Rules Proc. of State Bar, rules 810-826.) Nothing in the extended pendency of this proceeding delayed or prevented respondent's filing of such an application.

[16b] Nonetheless, there is one respect in which respondent has been slightly prejudiced by the delay in this matter. After this matter was taken under submission on review, the Supreme Court adopted our recommendation in another matter ("*Carr 1992*") that respondent be given an additional six-month actual suspension.[12] (*In re Carr* (S028443), minute order filed November 4, 1992, adopting recommended discipline in *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108.) The six-month actual suspension in *Carr 1992* must be served before respondent may apply to be relieved from his actual suspension under standard 1.4(c)(ii). If the matter now before us had not been delayed in the hearing department, the actual suspension to be served in this matter would likely have commenced prior to the filing of our discipline recommendation in *Carr 1992*. In *Carr 1992*, we recommended that the actual suspension, while prospective to the entry of the Supreme Court's order, be concurrent with any other actual suspension then in effect. (*In the Matter of Carr*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 119.) To achieve the same result, as nearly as possible, as if the delay in this matter had not occurred, we will modify the hearing judge's recommended discipline in the present matter to recommend that the actual suspension herein shall be served *concurrently* with the actual suspension in *Carr 1992*, to the extent that it is still in effect as of the entry of the Supreme Court's order in this matter.

D. Recommended Discipline

[18a] The notice to show cause in this matter stated that respondent was to "show cause why it should not be recommended to the Supreme Court . . . that the stay of the Order of your suspension entered by the Supreme Court be set aside and revoked and that you be suspended from the practice of law in the State of California for a period of up to two (2) years." Accordingly, the hearing judge's recommended discipline—lifting the stay of sus-

11. We note that a revision of the State Bar Court's rules has been proposed which would permit probation revocation to proceed by motion rather than via the filing of a separate proceeding, thus expediting the process.

12. *Carr 1992* was not referenced as prior discipline in the hearing judge's decision in this matter, evidently because it was not yet final at that time. We see no need to rely on it in aggravation. We take judicial notice of it here only in order to assess its proper temporal relationship to the discipline imposed in the matter now before us.

13. **[18b]** We need not and do not decide in this matter whether, and if so, under what circumstances, revocation of disciplinary probation may result in a degree of discipline greater than imposition of the entire period of suspension previously stayed. We decide only that the respondent may not be subjected to greater discipline if the notice to show cause does not appropriately charge violations that could result in greater discipline. **[19]** We note also that because of the limitation on the discipline available in this matter, standard 1.7(b), calling for disbarment in a third disciplinary matter unless compelling mitigation predominates, does not apply. (See also *In the Matter of Carr*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 118 [declining to apply standard 1.7(b) in disciplinary matter arising out of Vehicle Code and drug use convictions, where prior convictions and State Bar discipline all appeared to result directly or indirectly from substance abuse].)

pension and imposing the entire stayed suspension—is the maximum that we can recommend.[13] **[18b, 19 - see fn. 13]**

[20a] Despite our modifications of the decision below as to aggravation and mitigation, we concur in the hearing judge's conclusion that the maximum available discipline is appropriate here. Respondent's priors, which include one prior probation violation matter, when combined with the misconduct in this case, show both a persistent problem with drugs and alcohol and a persistent problem with conforming his conduct to the requirements of law and of court orders. **[21]** In *In the Matter of Carr*, *supra*, 2 Cal. State Bar Ct. Rptr. 108, which was heard in May 1989, respondent introduced evidence that he had taken steps toward rehabilitation from his drug and alcohol problems. (*Id.* at p. 116.) In this matter, in which the hearing took place in January 1990, no such evidence was introduced.[14] The absence of such evidence is significant since the probation violation at issue here involves respondent's failure to give the State Bar adequate assurance of his compliance with a very significant probation requirement that he abstain from alcohol and drugs. **[20b]** Moreover, even though standard 1.7(b) is not directly applicable, the policy underlying it, and standard 1.7(a), militate toward imposing severe discipline given respondent's extensive prior record.

[22a] However, there is a technical problem with the hearing judge's recommended discipline. As previously noted, respondent is still on suspension in the underlying discipline matter in which this probation was imposed, because he has not yet complied with the requirement that he make a showing under standard 1.4(c)(ii). The hearing judge recommended (1) that the additional two years of actual suspension imposed in this matter be consecutive to the existing suspension, and (2) that respondent comply with standard 1.4(c)(ii) in this matter, but that only one standard 1.4(c)(ii) hearing be held to meet the requirements in this matter and the prior. These two recommendations are mutually inconsistent. For the suspension in this matter to be consecutive, the prior suspension would have to end before the suspension in this matter can begin. But the prior suspension cannot end until respondent has complied with standard 1.4(c)(ii). Once he does so, then holding a standard 1.4(c)(ii) hearing at the end of the suspension in this matter would necessitate two separate hearings.

[22b] We resolve this problem by adopting the same approach that we did in respondent's most recent prior matter. (*In the Matter of Carr*, *supra*, 2 Cal. State Bar Ct. Rptr. 108.) We recommend that the actual suspension in this case be made prospective to the Supreme Court's order in this case, but concurrent with the balance of any and all other actual suspensions which are in effect at the time that the order is entered (including, as already noted, the actual suspension ordered on November 4, 1992). That way, respondent will serve at least two more years on actual suspension after the Supreme Court enters its order in this matter, but at the end of that two years (and assuming no further discipline in the interim), only one standard 1.4(c)(ii) hearing will be needed in order to end all of respondent's previously-imposed actual suspensions.

III. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court: (1) that the probation ordered in *In re Carr*, *supra*, 46 Cal.3d 1091 be revoked; (2) that the stay of the two-year suspension imposed by the Supreme Court in that matter be set aside; and (3) that respondent be actually suspended from the practice of law for two (2) years from the entry of the Supreme Court's order herein, and 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), provided, however, that respondent's compliance with standard 1.4(c)(ii) as ordered in prior disciplinary matters shall also satisfy such requirement in this matter.

We further recommend that the actual suspen-

14. Respondent stated at the hearing that he had not had a drink for three and one-half years (R.T. p. 146), but this statement was made during argument, not as testimony under oath, and respondent said nothing about drug use.

sion in this matter run concurrently with all other actual suspensions in effect as of the entry of the Supreme Court's order herein.

We further recommend that costs be awarded to the State Bar in this matter pursuant to Business and Professions Code section 6086.10.

Because respondent has been continually suspended from the practice of law since November 1988, we do not recommend that respondent be required to comply with rule 955, California Rules of Court. (See *In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. at p. 119.) **[23]** For the same reason we need not order that respondent be placed on involuntary inactive enrollment pending a final Supreme Court order in this matter. (Bus. & Prof. Code, § 6007 (d); Trans. Rules Proc. of State Bar, rule 612(b).) We also do not recommend that respondent be required to take and pass any professional responsibility examination, since he took and passed such an examination in August 1989 in connection with prior discipline. (*In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. at p. 119.)

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT I

A Member of the State Bar

No. 91-C-00638

Filed January 21, 1993

SUMMARY

While respondent was residing outside California and not practicing law, he was convicted twice of drunk driving. The State Bar examiner stipulated that the offenses did not involve moral turpitude, but sought suspension based on respondent's delay in completing his criminal sentence and other asserted aggravating circumstances. The hearing judge found that no nexus had been established between the offenses and the practice of law, and dismissed the disciplinary proceeding. (Hon. Christopher W. Smith, Hearing Judge.)

On review, the State Bar examiner conceded that no nexus had been established, but asserted that respondent should be given a reproval because he had not established rehabilitation and still posed a danger to the public. After reviewing case law in California and other jurisdictions regarding professional discipline for criminal misconduct generally and for drunk driving in particular, the review department concluded that no professional discipline was warranted based on the misconduct underlying the convictions, because respondent had neither acted violently nor showed disrespect for the legal system, had been found to have rehabilitated himself, and had not posed a danger to clients, courts or the public upon his return to law practice. Accordingly, the review department affirmed the dismissal of the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Teresa M. Garcia

For Respondent: Jeffrey S. Benice

HEADNOTES

[1] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
The California Supreme Court has classified driving under the influence of alcohol as a crime which may or may not involve moral turpitude, and which may, at least under certain circumstances, result in professional 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-d] **191 Effect/Relationship of Other Proceedings**
199 General Issues—Miscellaneous
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1699 Conviction Cases—Miscellaneous Issues

In 1990, the majority of the California Supreme Court expressly declined to determine whether a nexus between criminal conduct and the practice of law is required in order to impose professional discipline based on a criminal conviction. The Court unanimously agreed, however, that it would be unreasonable to hold attorneys to such a high standard of conduct that every violation of law, however minor, would constitute a ground for professional discipline. Thus, the integrity of the profession does not require professional discipline in addition to criminal sanctions for every violation of law by an attorney.

[3 a-d] **1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found**

Where respondent's two convictions for drunk driving occurred while respondent was living outside California and not practicing law, and respondent did not act violently or show disrespect for the legal system in connection with such convictions, and respondent had been rehabilitated and did not pose a danger to clients, courts or the public, respondent was not culpable of misconduct warranting discipline.

[4] **139 Procedure—Miscellaneous**
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1699 Conviction Cases—Miscellaneous Issues

Where an attorney is convicted of a crime which does not inherently involve moral turpitude, the attorney's conviction is referred to the State Bar Court Hearing Department for a determination whether the facts and circumstances surrounding the crime involved moral turpitude or other misconduct warranting discipline, and to determine the appropriate disposition. Upon a referral of that type, the appropriate disposition can include dismissal of the proceedings if the hearing judge finds that the particular misconduct did not warrant professional discipline.

[5] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**

The general policy of the State Bar is not to refer an attorney for a State Bar disciplinary hearing following the attorney's first misdemeanor conviction for driving under the influence of alcohol. First offense convictions are automatically referred when they involve a felony and may be referred if aggravating circumstances are apparent from the record of a misdemeanor conviction.

[6] **169 Standard of Proof or Review—Miscellaneous**
192 Due Process/Procedural Rights
204.90 Culpability—General Substantive Issues
1699 Conviction Cases—Miscellaneous Issues

In addressing the constitutionality of imposing professional discipline for criminal conduct not involving moral turpitude, the State Bar Court must endeavor to interpret the "other misconduct warranting discipline" standard to render its application in the particular case constitutional.

[7] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
204.90 Culpability—General Substantive Issues
1699 Conviction Cases—Miscellaneous Issues

A due process challenge to a discipline proceeding based on vagueness is appropriate where the misconduct involved is not clearly within the scope of a disciplinary standard and the standard is so broad that people of common intelligence must necessarily guess at its meaning and differ as to its application.

[8] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1699 Conviction Cases—Miscellaneous Issues

Where respondent clearly was on notice that drinking and driving could result in criminal penalties, and it was established law that any vehicular homicide or felony conviction resulting from drunk driving could result in professional discipline, respondent apparently had sufficient notice that criminal behavior of driving under the influence could, depending on circumstances, result in professional discipline. However, review department declined to decide notice issue where disciplinary proceeding was dismissed on another ground.

[9] **1513 Conviction Matters—Nature of Conviction—Violent Crimes**
1516 Conviction Matters—Nature of Conviction—Tax Laws
1519 Conviction Matters—Nature of Conviction—Other
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

Under California case law interpreting the California Supreme Court's inherent authority, professional discipline can be imposed based on a criminal conviction for violent behavior not involving moral turpitude, wilful failure to file a tax return, or repeated minor violations evincing indifference to legal obligations.

[10] **196 ABA Model Code/Rules**
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found

Under both ABA model ethics rules and California law, lawyers convicted simply of a single misdemeanor offense of driving under the influence may receive a disciplinary reprimand, but for the most part are treated like under citizens and sanctioned under the criminal law. Their suitability to practice law is called into question, however, where the incident is compounded by serious injury or death or is coupled with other aggravating behavior.

[11] **204.90 Culpability—General Substantive Issues**
750.10 Mitigation—Rehabilitation—Found
802.63 Standards—Appropriate Sanction—Effect of Mitigation
1699 Substantive Issues re Discipline—Miscellaneous

Evidence that an attorney has taken steps to deal with an alcohol problem is mitigating evidence that may properly be taken into account in determining the degree and nature of discipline, but does not eliminate the initial misconduct as an appropriate basis for discipline.

[12] **802.63 Standards—Appropriate Sanction—Effect of Mitigation**
1699 Conviction Cases—Miscellaneous Issues

Where compelling mitigation is present, a case which involves a misdemeanor conviction that otherwise would be an appropriate basis for discipline may result in dismissal in the interests of justice.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P. J.:

This case focuses on the threshold issue of the point at which drunk driving—a serious societal problem with potentially tragic results—becomes a matter subject to professional discipline against a lawyer's license. **[1]** The California Supreme Court has classified driving under the influence of alcohol as a crime which "may or may not involve moral turpitude" and which may, at least under certain circumstances, result in professional discipline.

It is stipulated that respondent did not commit any act of moral turpitude and the hearing judge found that no nexus had been established between the practice of law and respondent's two drunk driving convictions, which occurred while respondent was residing in another state and engaged in a different profession. **[2a]** In *In re Kelley* (1990) 52 Cal.3d 487, a divided Supreme Court imposed a public reproval on an active member of the State Bar after two drunk driving convictions not involving moral turpitude. The majority did not determine whether a nexus between criminal conduct and the practice of law was required in all cases, but expressly found that the facts and circumstances on the record before it demonstrated more than one such nexus. Two concurring justices also found a nexus, but would have limited discipline in all cases to misconduct that impairs or is likely to impair the attorney's performance of his or her professional duties. The dissent found no nexus and would have dismissed the proceeding.

Here, although the examiner concedes that no nexus has been established, due to delay in completion of respondent's jail sentence and other perceived aggravating circumstances surrounding the second Arizona conviction, the Office of Trials sought suspension of respondent in the hearing below and, on request for review of an order dismissing the proceedings, has modified its position to request that respondent be reproved.

Respondent argues that the current state of the law leaves a practitioner vulnerable to unwarranted prosecution and urges us to take this opportunity to formulate a uniform standard which will protect the public policy concerns of the State Bar while providing attorneys with fair notice of the actions which will lead to discipline so that they can govern themselves accordingly. In order to address the concerns raised by respondent it is necessary that we review the existing disciplinary case law with respect to drunk driving convictions.

Over 25 years ago in *In re Alkow* (1966) 64 Cal.2d 838, the California Supreme Court held that the facts surrounding a vehicular manslaughter conviction of an attorney demonstrated moral turpitude because of the attorney's repeated acts in complete disregard of the law, the conditions of a prior criminal probation order and the safety of others. In *In the Matter of Anderson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 39, same cause (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208 (review after remand), we considered whether the abusive behavior of a former criminal prosecutor in connection with several drunk driving convictions demonstrated moral turpitude. We decided that the case was closer to *In re* Kelley than *In re Alkow* and upheld the finding of no moral turpitude, but in light of prior discipline recommended two months suspension.

[3a] This proceeding raises an issue at the other end of the spectrum. It is established that respondent neither acted violently, nor at any time showed disrespect for the legal system. He also has been found to have rehabilitated himself from his prior criminal conduct which occurred at a time when he was not practicing law and, upon resumption of the practice of law, to pose no danger to his clients, the courts and the public, which was a central concern of the Court in *In re Kelley*. For the reasons discussed below, we affirm the hearing judge's determination that respondent is not culpable of misconduct warranting any professional discipline.

THE FACTS

Respondent was admitted to the California bar in 1978. He went on voluntary inactive status in 1981. He thereafter moved to Arizona and became employed as a stockbroker. On two occasions in 1986 and 1987 respondent was convicted of driving under the influence of alcohol in that state.

The 1986 Incident

The incident leading to the 1986 arrest began late one night when a police officer saw respondent's car stop abruptly past a crosswalk at a red light. The officer followed the car and observed it weave and twice cross over into the adjoining lane while travelling at 35 miles per hour in a 50-mile-per-hour zone. When the officer pulled respondent over, he noticed a strong smell of alcohol on respondent's breath and that his eyes were watery and bloodshot.

Respondent failed all field sobriety tests administered, slurred his speech almost beyond comprehension, and staggered when he walked. The officer arrested him for driving under the influence of alcohol (hereafter "DUI") and for driving with a blood alcohol level of .10 or above. In addition, the officer cited him for failing to drive in a single lane of traffic. No other parties were involved in the incident. Respondent remained cooperative throughout his arrest and subsequent visit to the police station. His blood alcohol concentration tested as .146. Respondent pled "no contest" to the DUI charge and his sentence consisted of 30 days suspension of his Arizona driver's license, followed by a 60-day work-home restriction on his license, a $373 fine, and a 6-hour alcohol education program. Respondent had completed his sentence in the first proceeding at the time of the second arrest.

The 1987 Incident

The 1987 incident involved a rear-end collision with another car which caused no serious injuries. Respondent was returning from a social function in the middle of the night when he skidded and hit the car ahead of his. He sustained the only injury in the accident, a bloodied lip. The police officer who arrived at the scene to investigate the accident noticed that respondent's breath smelled strongly of alcohol and his eyes appeared watery and bloodshot. He also noticed respondent's fat lip, his extremely slurred speech, and his trouble maintaining balance. Respondent was unable to perform any field sobriety tests, yet remained polite. After citing respondent for failing to drive in a single lane and failing to control his speed to avoid a collision, the police officer arrested respondent for DUI and took him to the police station where his blood alcohol level was tested twice. The first test result was .21 and the second was .26. The officer then added the charge of driving with a blood alcohol concentration of .10 or above.

A municipal court jury convicted respondent on both charges, and the judge sentenced him to 60 days in jail, with a work release provision allowing him to work during the day while remaining incarcerated at night. Respondent appealed that conviction.

Respondent quit drinking the day after his second arrest and within one week of that arrest began a program of intense psychotherapy which continued for more than 18 months. In July of 1990, respondent accepted a job with a federal agency in California and reactivated his California bar membership. When the unsuccessful appeal attempts of his Arizona conviction ended, respondent sought to serve his work release sentence in California in order to avoid losing his newfound legal position with the federal agency. The Arizona judge and prosecutor's office were amenable to this possibility. Respondent then began looking for a suitable California facility which met with the judge's and prosecutor's approval. He found one which met with the judge's approval and the preliminary approval of the deputy district attorney but it was ultimately rejected by the district attorney. Meanwhile, the execution of the sentence was continued several times on respondent's motion. Ultimately, the prosecutor, the Arizona judge and respondent's attorney agreed that respondent would fail to appear at the court-ordered January 18, 1991 sentence execution, thereby triggering a bench warrant for his arrest were he to appear in Arizona without immediately appearing in court. As the Arizona sentencing judge later attested, this was a procedural device used to forego the necessity of further appearances by both respondent's counsel and the prosecutor until respondent could provide the court with proof of California incarceration fulfilling the Arizona sentence.

THE HEARING BELOW

The record of the second conviction was sent to the State Bar in the spring of 1991. [4] Since the crime was not one inherently involving moral turpi-

tude,[1] it was referred by this review department to the hearing department for determination whether the facts and circumstances involved "moral turpitude or other misconduct warranting discipline" and to determine the appropriate disposition. (Cf. *In the Matter of Anderson, supra,* 1 Cal. State Bar Ct. Rptr. 39, 2 Cal. State Bar Ct. Rptr. 208.) Upon a referral order of that type, the appropriate disposition could include dismissal of the proceedings if the hearing judge found that the particular misconduct did not warrant professional discipline. (See, e.g., *In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 761, 764.) At the hearing, the parties stipulated that the facts and circumstances surrounding respondent's conviction did not involve moral turpitude and proceeded to litigate the remaining issue whether respondent was culpable of "other misconduct warranting discipline."

Prior to the hearing below, respondent finally arranged to serve his Arizona sentence at a city jail in California at a cost of $4,230.[2] In October of 1991, respondent appeared in Arizona before the sentencing judge who then quashed the bench warrant and also made a finding that respondent's failure to appear at the January hearing was not "wilful or contemptuous to the court." Respondent also took and passed an alcohol screening in Arizona. Based on the testimony by telephone of the Arizona sentencing judge and respondent's testimony in court, the State Bar Court hearing judge found that neither respondent's failure to appear at the Arizona hearing which led to the bench warrant, nor the lengthy delay in completing the sentence evidenced a lack of respect for the legal system.[3]

The hearing judge also found no nexus between respondent's misconduct and the practice of law since respondent had been on inactive status for several years prior to his arrest; was not on probation or otherwise in violation of a court order when arrested; had been cooperative with the arresting officer; and was found not to have had any alcohol since the date of his second arrest in March of 1987, to have obtained immediate professional treatment, and to be rehabilitated from the problem of abusing alcohol. He also was found to be performing his job as a government attorney in an excellent manner, which resulted in his promotion to a job with the same agency with greater responsibility, and to pose no danger to his clients, the courts and the public.

In his decision filed in May of 1992 the hearing judge distinguished *In re Kelley, supra,* and concluded that the facts and circumstances surrounding respondent's conviction did not amount to other misconduct warranting discipline. He therefore determined that the proceeding should be dismissed with costs awarded to respondent pursuant to Business and Professions Code section 6086.10.

On review, the examiner does not dispute that the relevant facts and circumstances include respondent's activities since the incidents in question, but disputes several of the factual findings and urges that discipline is still necessary because respondent is not yet rehabilitated and poses "an extreme risk of serious danger to the public." In particular, the examiner challenges the findings of the hearing judge on rehabilitation, arguing that the hearing judge improperly considered expert testimony of-

1. The California Supreme Court's determination that drunk driving does not inherently involve moral turpitude is in accord with other jurisdictions that have addressed the issue. (See, e.g., *In the Matter of Oliver* (Ind. 1986) 493 N.E.2d 1237, 1240-1241, and cases cited therein.)

2. Respondent testified that this arrangement was negotiated by a private criminal justice consultant after the same facility had rejected respondent's application on two prior occasions.

3. In her brief on review, the examiner asked us to reverse the hearing judge's determination on this issue and to revisit the Arizona sentencing judge's finding that respondent's failure to appear in response to the Arizona bench warrant was not wilful. She also asked us to find that respondent did not act with diligence to serve his sentence. She abandoned these contentions at oral argument. The evidence below was uncontradicted and the findings of the hearing judge in this regard were unassailable. The State Bar bore the burden of proof by clear and convincing evidence on issues in aggravation. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 933.) It submitted no evidence to contradict the testimony of the sentencing judge and respondent upon which the hearing judge based his findings.

fered only in mitigation as evidence affecting culpability; that the majority of respondent's therapy did not address alcohol abuse;[4] and that his participation in Alcoholics Anonymous ("AA") was not meaningful or of sufficient duration to demonstrate rehabilitation.[5] Respondent defends the findings below and the dismissal on a number of grounds including that the standard for imposing discipline for "other misconduct" is unconstitutionally ambiguous as applied to him and violates due process.

DISCUSSION

Both parties agree with the hearing judge that the most relevant Supreme Court precedent is *In re Kelley, supra,* 52 Cal.3d 487. In that case the volunteer review department recommended that Kelley be publicly reproved and placed on disciplinary probation for three years on several conditions including abstinence from the use of intoxicants and referral to the State Bar program on alcohol abuse. Kelley contended before the Supreme Court that no professional discipline was warranted because her misconduct which resulted in two drunk driving convictions[6] **[5 - see fn. 6]** was unrelated to her practice of law and not specifically proscribed by any disciplinary rule or statute. Alternatively, she argued that the ground for discipline was unconstitutionally vague, and that the discipline was excessive and violated her constitutional right to privacy.

The principal case supporting her position was *In re Fahey* (1973) 8 Cal.3d 842, 853 wherein the Supreme Court stated that "Offenses that do not involve moral turpitude or affect professional performance should not be a basis for professional discipline simply because they fall short of the highest standards of professional ethics or may in some way impair the public image of the profession." A major question raised in *In re Kelley* was what remained of the policy stated in *In re Fahey* after the high court's later decision in *In re Rohan* (1978) 21 Cal.3d 195. There, the Supreme Court decided to impose suspension for a conviction of an attorney for wilful failure to file a federal income tax return. While the justices were in complete agreement on the discipline to be meted out, neither a majority nor a plurality could agree on the rationale. Justice Clark wrote the opinion of the Court which was joined only by Justice Richardson. (*Id.* at p. 198.) Justice Tobriner wrote a concurrence joined by Justice Mosk (*id.* at p. 204), and a separate concurrence was filed by retired Justice Sullivan joined by retired Chief Justice Wright, both sitting under assignment by the Acting Chairperson of the Judicial Council. (*Id.* at p. 206.)

The opinion of the Court recited the duty of every attorney "to 'support the Constitution and laws of the United States and of this State'" (*id.* at p. 201, quoting Bus. & Prof. Code, § 6068 (a)) and observed that "An attorney as an officer of the court and counselor at law occupies a unique position in society. His refusal to obey the law, and the bar's failure to discipline him for such refusal, will not only demean the integrity of the profession but will encourage disrespect for and further violations of the law." (*Id.* at p. 203.) Nonetheless, the opinion noted that "It is manifest that particular violations of the

4. The therapy initially addressed both his alcohol abuse and the underlying problems which led to his excessive drinking. Because he had already ceased drinking, the focus soon became the underlying problems rather than alcohol abuse and therapy continued on a reduced basis until the time of the State Bar Court hearing.

5. The court below found that respondent attended AA meetings three times a week for approximately a year, which the examiner challenges as unsupported by the evidence. We modify that finding (finding no. 19) to reflect respondent's testimony that he joined AA in August of 1990 shortly after he came to California and had on his own already ceased drinking any alcohol for three years. His primary purpose for attending AA was to meet people and make friends who also had overcome alcohol abuse. He initially attended AA meetings three or four times per month for three or four months and sporadically thereafter for several months through July 1991.

6. [5] Traditionally, the State Bar has not referred first offense misdemeanor drunk driving convictions to the Supreme Court for recommendation of discipline, but has generally done so only following notice of a second conviction. The examiner in this case indicated that it was still the general policy of her office not to refer an attorney for a State Bar hearing following notice of a first misdemeanor conviction for driving under the influence. First offense convictions are automatically referred when they involve a felony and may be referred if there are aggravating circumstances surrounding a misdemeanor conviction apparent from the record of conviction itself.

law by an attorney, even certain violations for willful failures to file income tax returns, may not warrant the imposition of discipline for an oath violation." (*Id.* at p. 204.) It concluded that the particular facts and circumstances warranted discipline, pointing out that there were no mitigating circumstances excusing Rohan's conduct.

In his separate concurrence, Acting Chief Justice Tobriner criticized the vagueness of the Court's opinion and focused instead upon the relationship of the offense to the practice of law as the crucial element justifying the imposition of discipline. He would have applied the test of a specific nexus between the attorney's conduct and the practice of law and specifically urged that such a test not be evaded by the assertion that the lawyer's misconduct demeans the integrity of the legal profession or that the lawyer's conduct might encourage others to violate the law. (*Id.* at p. 205 (conc. opn.).) In so arguing he relied upon frequent statements of the Court "as a constitutional principle that a person can be barred from the practice of his profession only for reasons related to his fitness or competence to practice that profession [citation] . . . ." (*Id.* at p. 206, citing *Newland* v. *Board of Governors* (1977) 19 Cal.3d 705, 711.) He then opined that "to allow discipline for unrelated conduct on the ground that it demeans the integrity of the profession would detract from that fundamental principle." (*In re Rohan, supra,* 21 Cal.3d at p. 206 (conc. opn.).) Nevertheless, on the facts he concluded that Rohan's conduct reflected on his fitness to practice law 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." (*Ibid.*)

Retired Justice Sullivan concurred in the order imposing discipline based on the particular facts and circumstances, but, like Justice Tobriner, also expressly took issue with the attempt to reassess *In re Fahey* and to formulate general bases for discipline couched in vague language. (*In re Rohan, supra,* 21 Cal.3d at pp. 206-207 (conc. opn.).) Nonetheless, he parted company with Justice Tobriner on the test to be applied.

In re Rohan was followed by *In re Morales* (1983) 35 Cal.3d 1. There, the petitioner had been convicted of 27 misdemeanor offenses involving the failure to withhold or pay certain payroll taxes and unemployment insurance contributions. (Rev. & Tax Code, § 19409; Unemp. Ins. Code, §§ 2108, 2110, 2110.5.) He also had a prior record of private reproval for gross negligence in failing to keep complete records of clients' trust funds, and failing to maintain sufficient funds in one such account.

The volunteer hearing panel had found moral turpitude and recommended 18 months stayed suspension upon specified conditions of probation. Morales challenged the finding that he committed acts of moral turpitude and challenged the degree of discipline, but did not contend that his misconduct did not constitute "other misconduct warranting discipline." (35 Cal.3d at pp. 4, 8.) The volunteer review department adopted the disciplinary recommendation, but declined to find moral turpitude. It determined that the facts and circumstances surrounding Morales's conviction constituted "other misconduct warranting discipline." In approving the review department's analysis, the majority of the Supreme Court recapitulated the various opinions in *In re Rohan* and concluded that Morales's failure to meet similar tax obligations fully warranted the recommended discipline. The majority also noted that: "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. . . ." (*In re Morales, supra,* 35 Cal.3d at p. 6.)

In her concurrence joined by Justice Grodin, Chief Justice Bird agreed with the discipline recommendation but would have held that Morales was culpable of acts of moral turpitude and would have taken the opportunity to reaffirm the standard unanimously adopted in *Fahey* limiting discipline for criminal conduct outside the practice of law to crimes involving moral turpitude. (*Id.* at pp. 8-9 (conc. opn.).)

In re Morales presented a case that, like *In the Matter of Anderson, supra,* 1 Cal. State Bar Ct. Rptr. 39, involved conduct bordering on acts of moral turpitude. *In re Morales* contained the last extended

discussion of the issue prior to *In re Kelley*, which also generated three opinions. Between the two, however, the high court unanimously imposed discipline in *In re Titus* (1989) 47 Cal.3d 1105 (public reproval), *In re Otto* (1989) 48 Cal.3d 970 (six months actual suspension) and *In re Hickey* (1990) 50 Cal.3d 571 (30 days actual suspension) for crimes not involving moral turpitude.

In re Titus was a one-page opinion imposing discipline for Titus's conviction for carrying a concealed firearm (Pen. Code, § 12025, subd. (b)) and, on another occasion, carrying a loaded firearm (Pen. Code, § 12031) and reckless driving (Veh. Code, § 23103).

In *In re Otto* an inactive attorney and former police officer was convicted of violating Penal Code sections 245, subdivision (a) (assault by means likely to produce great bodily injury) and 273.5 (infliction of corporal punishment on a cohabitant of the opposite sex resulting in a traumatic condition) after engaging in acts of physical violence while under the influence of alcohol. *In re Hickey, supra*, similarly involved an inebriated attorney's violent behavior toward his wife and others leading to his conviction under Penal Code section 12025, subdivision (b) (carrying a concealed weapon). Both respondents argued that their misconduct was unrelated to their practice of law. The high court refused to let such arguments stand in the way of professional discipline, noting in *Hickey* that when an attorney engages in violent criminal conduct as a result of uncontrolled consumption of alcohol, the disciplinary system "need not wait until the attorney injures a client or neglects his legal duties" before imposing discipline. (*Id.* at p. 579.)

No specific nexus was spelled out in *In re Titus*, *In re Otto* or *In re Hickey*. **[2b]** When the issue of a nexus was raised again in *In re Kelley*, the majority of the high court expressly declined to resolve the issue whether a nexus to the practice of law was required to impose discipline for misconduct under the Court's inherent authority. (*In re Kelley, supra*, 52 Cal.3d at p. 495.) Resolution of the issue was unnecessary because, as it pointed out, a nexus to the practice of law did exist—Kelley's second conviction was in violation of the terms of probation of her first conviction and thus involved disobedience of a court order.[7] Another nexus found by the majority was that even though no actual interference with her practice of law had been demonstrated, Kelley's untreated problem with alcohol and lack of rehabilitation posed a continuing risk to her clients, the courts and the public. (*Id.* at pp. 495-496, citing *In re Hickey, supra*, 50 Cal.3d 571, 579.)[8]

The *Kelley* majority also noted that it had previously ordered discipline based on two convictions of drunk driving when no moral turpitude was found. (*In re Kelley, supra*, 52 Cal.3d at p. 496, citing *In re Carr* (1988) 46 Cal.3d 1089.) In *In re Carr*, however, the respondent had previously been convicted of a federal felony drug offense which resulted in lengthy disciplinary suspension. That suspension was still in force at the time of the drunk driving convictions. No Supreme Court case prior to Kelley's ever involved an attorney with an otherwise unblemished record who was subject to disciplinary proceedings solely for drunk driving convictions. **[2c]** The majority stated its agreement with Kelley's counsel that "it would be unreasonable to hold attorneys to such a high standard of conduct that every violation of law, however minor, would constitute a ground for professional discipline." (*In re Kelley, supra*, 52 Cal.3d at p. 496.) The majority then noted that that was not the case with Kelley whose "behavior evidences both a lack of respect for the legal system and an alcohol abuse problem. Both problems, if not checked, may spill over into petitioner's professional practice and adversely affect her representation of clients and

7. The Court had also noted earlier in its opinion that Kelley was uncooperative with the police officer who stopped her and that he summoned a second officer for assistance. (52 Cal.3d at p. 491.)

8. In *Hickey*, however, the respondent had argued that he had recovered from the alcoholism which caused his misconduct and resolved the marital difficulties to which it was related. (50 Cal.3d at p. 578.) The Court in that case characterized such evidence as mitigating evidence which did not "eliminate the initial misconduct as an appropriate basis for discipline." (*Id.* at p. 579.) We discuss the impact of respondent's longer period of rehabilitation below.

her practice of law. . . . [I]t is our responsibility to impose a discipline that will protect the public from this potential harm." (*Ibid.*)

In response to the argument that the standard for discipline for other misconduct is unconstitutionally vague, the majority acknowledged that prior case law lent support to the argument that "if a disciplinary standard is so vague that no reasonable consensus may be formed as to its proper meaning, its application is constitutionally suspect." (*Id.* at p. 496, citing *Morrison* v. *State Board of Education* (1969) 1 Cal.3d 214, 231-233.) However, the Court noted that one to whose conduct a statute clearly applies may not successfully challenge the statute for vagueness. (*In re Kelly*, *supra*, 52 Cal.3d at p. 497.) The Court concluded that its application of the challenged standard to the facts of the *Kelley* case was constitutional because of the focus on the "repeated failure [of attorneys] to conform their conduct to the requirements of the criminal law and court orders specially imposed on them." (*Ibid.*) This echoed the majority's earlier emphasis upon the fact that Kelley's "repeated criminal conduct call[ed] into question her judgment and fitness to practice law in the absence of disciplinary conditions designed to prevent recurrence of such conduct." (*Id.* at pp. 490-491.)

In a separate concurrence, Justice Mosk, joined by Justice Broussard, pointed out the need for lawyers to know what conduct other than moral turpitude may jeopardize their license to practice law; that the bar authorities needed a clearly articulated standard to administer the disciplinary system and the Court needed a clearly articulated standard to reach consistent and fair decisions on a "facially amorphous" ground of discipline. (*In re Kelley*, *supra*, 52 Cal.3d at p. 499 (conc. opn.).) He would have limited the application of discipline for other misconduct to "misconduct that impairs or is likely to impair the attorney's performance of his or her professional duties." (*Id.* at p. 500.) If this standard were not met he would expect the Court to "leave the matter to the sanction of the criminal law or public opprobrium." (*Ibid.*)

In his lone dissent, Justice Panelli agreed with Justice Mosk's analysis that a nexus must exist between the attorney's misconduct and the attorney's fitness to practice law, but would limit the standard to "attorney misconduct which impairs the attorney's performance of his or her duties." (*In re Kelley*, *supra*, 52 Cal.3d at p. 500 (dis. opn.).) He took issue with the majority's imposition of discipline for Kelley's law violations and "'the *indications* of a problem of alcohol abuse'" which had not yet affected her practice of law. (*Ibid.*, quoting maj. opn., 53 Cal.3d at p. 495, emphasis supplied by dis. opn.) He criticized the imposition of discipline for conduct which "may affect [the] future performance" of an attorney's duties as a "dangerous journey" and would have left the consequences of Kelley's serious violations of drinking and driving laws to the Legislature and the executive branch. (*Id.* at p. 500 (dis. opn.).)

[6] As in *In re Kelley*, respondent here asks us to address the constitutionality of imposing professional discipline. In addressing this issue, we must endeavor to interpret the "other misconduct warranting discipline standard" to render its application to respondent constitutional. (Cf. *Association for Retarded Citizens* v. *Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394; *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433.)

[7] Respondent argues that imposing professional discipline would violate due process because he was provided no advance notice of the grounds on which discipline might be imposed. The high court has indicated that a vagueness challenge is appropriate where the misconduct is not clearly within the scope of a disciplinary standard and the standard "is so broad that people 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" (*In re Kelley*, *supra*, 52 Cal.3d at p. 497, quoting *Connally* v. *General Constr. Co.* (1926) 269 U.S. 385, 391.)

At the time of respondent's two drunk driving convictions, the California Supreme Court had decided neither *In re Carr*, *supra*, 46 Cal.3d 1089, nor *In re Kelley*. There was no specific test established for "other misconduct warranting discipline" and no published precedent for disciplining any member of the California State Bar for driving under the influence under circumstances that did not involve moral turpitude. Respondent had been an inactive member

of the California State Bar for several years residing in a different state and following a different profession. Respondent has a stronger argument than did Kelley that he was not in any meaningful way put on notice that if he drank and drove on social occasions in Arizona he would be subject to professional discipline in California.

[8] Nonetheless, respondent was clearly put on notice that drinking and driving could result in criminal penalties which arguably was sufficient to alert him that such behavior might subject him to professional discipline.[9] Had he had the misfortune of causing a serious accident in his inebriated condition he could have been convicted of vehicular homicide which has long since been held an appropriate basis for professional discipline. (*In re Alkow*, *supra*, 64 Cal.2d 838; cf. *In the Matter of Morris* (1964) 74 N.M. 679, 397 P.2d 475 [indefinite suspension for a minimum of one year for felony involuntary manslaughter resulting from DUI].) Indeed, effective in 1986 any felony conviction under the laws of the United States is by itself justification for interim suspension of members of the California State Bar pursuant to Business and Professions Code section 6102 (a). It would therefore appear that respondent was put on sufficient notice that his criminal behavior could, depending on the circumstances, result in professional discipline in California. However, we need not decide this issue because of our determination to uphold dismissal of the proceeding on another ground.

Other states' disciplinary systems have recently grappled with the issue of discipline for misconduct not in the practice of law and, in particular, the impact of lawyers' drunk driving convictions as public opprobrium has caused greater focus on this dangerous behavior. The American Bar Association's Model Code of Professional Responsibility, DR 1-102(A), which is still applicable in a number of jurisdictions, states that a lawyer shall not "(3) Engage in illegal conduct involving moral turpitude [or] . . . [¶] (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

The ABA's Model Rule 8.4(b), which in many states has replaced DR 1-102(A)(6), defines as professional misconduct a lawyer's commission of a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The official comment to rule 8.4 explains: "Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude.' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."

[9] The comment to Model Rule 8.4 is consistent with California case law interpreting the California Supreme Court's inherent authority. Thus, violent behavior not involving moral turpitude can result in professional discipline. (See *In re Otto*, *supra*, 48

9. The Washington Supreme Court rejected a similar argument of unconstitutional vagueness made by a member of the Washington State Bar in *In the Matter of Curran* (1990) 115 Wash.2d 747, 801 P.2d 962, cited to us by the examiner. In that case, the Washington Supreme Court upheld a state disciplinary rule forbidding "any act reflecting a disregard for the rule of law" as constitutional when construed only to permit discipline of lawyers for violations of the criminal law. (*Id.*, 801 P.2d at p. 967.) The lawyer in that case had been convicted of two counts of vehicular homicide and sentenced to 26 months in jail. In the disciplinary case, he received a six-month prospective suspension following eighteen months interim suspension. However, the Washington Supreme Court noted that it imposed the suspension because of the deaths and its desire for consistency with other vehicular homicide cases, citing, inter alia, *In re Alkow*, *supra*. (*Curran*, *supra*, 801 P.2d at p. 974.) Focusing on the conduct of the attorney in driving while intoxicated, it noted that "whether [the] acts merit discipline and if so, what sort of discipline, are very difficult and close questions." (*Id.*, 801 P.2d at p. 966.)

Cal.3d 970.) Wilful failure to file a tax return can result in discipline (*In re Rohan, supra*, 21 Cal.3d 195) as can repeated minor violations evincing indifference to legal obligations. (*In re Kelley, supra*, 52 Cal.3d 487.)

[10] A common thread runs through all of the reported DUI cases resulting in similar treatment under the Model Code, the Model Rules and California case law. Lawyers who are convicted simply of a single misdemeanor DUI may receive a reprimand, but for the most part appear to be treated like other citizens who have violated those criminal laws and receive appropriate criminal sanctions designed to discourage repetition of their misconduct.[10] Their suitability to practice law is called into question, however, where the incident is compounded by serious injury or death or is coupled with other aggravating behavior (a high-speed chase, lack of cooperation with police, probation violation, possession of illegal drugs, etc.). (See, e.g., *In re Curran, supra*, 801 P.2d 462; *Attorney Grievance Comm. of Md.* v. *Shaffer* (1986) 305 Md. 190, 502 A.2d 502 [indefinite suspension ordered for three DUI convictions, passing bad checks, and client-related misconduct associated with alcoholism]; *In re Murray* (1985) 147 Ariz. 173, 709 P.2d 530 [disbarment ordered for various offenses against clients as well as conviction arising from arrest for DUI and possession of cocaine and remaining a fugitive after second arrest for DUI and possession of cocaine]; *Comm. on Prof. Ethics and Conduct of Iowa State Bar* v. *Williams* (Iowa 1991) 473 N.W.2d 203 [minimum six-month indefinite suspension for misconduct including offering money to arresting officer after DUI arrest]; *In re Eddingfield, supra*, 572 N.E.2d 1293 [30-day suspension for DUI arrest preceded by high-speed chase; marijuana found in car].)

[2d] The California Supreme Court has provided similar guidance which enables us to dispose of the instant case. While no majority of the high court has ever agreed upon the threshold for imposing discipline for "other misconduct," the Supreme Court has been unanimous in its adherence to the view that not every violation of law by an attorney constitutes misconduct warranting discipline against his or her license to practice law. (See *In re Kelley, supra*, 52 Cal.3d at pp. 496 (maj. opn.), 499-500 (conc. opn. of Mosk, J.), 500 (dis. opn. of Panelli, J.).) It necessarily follows that the integrity of the profession cannot require professional discipline in addition to criminal sanctions for every violation of law as an example to others.

[11] In analyzing respondent's culpability, respondent's subsequent steps to deal with his alcohol problem are not dispositive of the issue of whether discipline is warranted. The Supreme Court has held that "evidence that the attorney has taken steps to deal with his alcohol problem is mitigating evidence that may properly be taken into account in determining the degree and nature of the discipline that should be imposed, [but] such evidence does not eliminate the initial misconduct as an appropriate basis for discipline." (*In re Hickey, supra*, 50 Cal.3d at p. 579.)[11] **[12 - see fn. 11]** We must therefore examine carefully the justification for imposing discipline in this instance.

The examiner argues that respondent's misconduct evidenced a risk to the safety of the public and that the integrity of the legal profession, protection of the public, courts and the profession, maintenance of high professional standards and preservation of public confidence in the profession all warrant a finding that respondent is culpable of "other misconduct warranting discipline."

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10. One state supreme court has expressly concluded that "the sole act of operating a vehicle while intoxicated did not affect [an active lawyer's] practice or lead to any reasonable question about his suitability as a practitioner." (*In the Matter of Eddingfield* (Ind. 1991) 572 N.E.2d 1293, 1296 [referring to its earlier holding in *In re Oliver, supra*, 493 N.E.2d 1237].) Another state disciplinary system, that of Colorado, apparently has a policy of generally treating DUI convictions as at most warranting a cautionary letter. (See *People* v. *Senn* (Colo. 1992) 824 P.2d 822, 824; cf. *In the Matter of Curran, supra*, 801 P.2d 962, 974 [holding that in most cases violation of the criminal law resulting in a charge of disregard for the rule of law "should result only in a reprimand or censure"].)

11. **[12]** However, where compelling mitigation is present, a case which involves a misdemeanor conviction that otherwise would be an appropriate basis for discipline may result in dismissal in the interests of justice. (See, e.g., *In re Eliceche*, orders filed March 2, 1988 and Oct. 24, 1990 (BM 5665); *In re Eliceche*, orders filed July 20, 1988 and Oct. 24, 1990 (BM 5837).)

[3b] On these facts, we find all of these proffered justifications for professional discipline extraordinarily attenuated. The California State Bar itself does not generally consider a single misdemeanor conviction for drunk driving by an active member of the bar to warrant referral for consideration of professional discipline. It therefore cannot argue that conviction of an attorney for this crime inherently demeans the integrity of the bar. While respondent did commit the offense twice, there was no evidence and no finding as there was in *In re Kelley* that respondent demonstrated "disrespect for the legal system." (*In re Kelley, supra*, 52 Cal.3d at p. 495.) Indeed, the hearing judge made the opposite finding. Also, unlike Kelley, respondent was not in violation of probation or any specially imposed court order—a factor upon which the Supreme Court specifically relied in *In re Kelley* in justifying the constitutionality of Kelley's discipline. (*Id.* at p. 497.)

[3c] Here, the misconduct was not only unrelated to the practice of law, but occurred out of state during a time when the respondent had been inactive for several years. While an attorney may be subject to discipline for violent conduct not directly related to the practice of law (*In re Otto, supra*, 48 Cal.3d 970; *In re Hickey, supra*, 50 Cal.3d 571), we can find no precedent for disciplining respondent for two out-of-state occurrences of nonviolent misconduct unrelated to the practice of law in order to maintain high professional standards or to preserve public confidence in the California Bar. Indeed, it is difficult to see how any member of the public who became aware of the circumstances of respondent's DUI convictions could reasonably consider them a poor reflection upon the California State Bar as opposed to the dangerous behavior of an Arizona resident that was duly prosecuted as a misdemeanor under Arizona criminal laws. The examiner herself called our attention to *In the Matter of Curran, supra*, 801 P.2d 962, in which the Washington Supreme Court pointed out that "the criminal justice system bears the primary responsibility for enforcing the criminal code" and that "vigilant protection of the public from the dishonest and the incompetent will do more to enhance public confidence in the bar than enforcement of [disciplinary] rules having a more tangential relationship to practice." (*Id.* at pp. 973, 974.)

[3d] Continuing need for public protection cannot forcefully be argued as a rationale for imposing professional discipline on the facts before us here. Unlike the situations in *In re Kelley, supra*, 52 Cal.3d 487 and *In re Hickey, supra*, 50 Cal.3d 571, the record discloses that five years have passed since respondent last consumed any alcohol. During that length of time, respondent has demonstrated that he has rehabilitated himself without any State Bar intervention. Under California law, even a disbarred attorney is permitted to apply for unconditional reinstatement after five years. Common sense dictates that public protection requires no greater period of rehabilitation from the instant misconduct than has already been demonstrated.

CONCLUSION

As a result of respondent's alcohol abuse, respondent committed two serious violations of Arizona law which luckily did not injure others. Society has made him pay for those violations in jail time, fines and other conditions of his criminal conviction designed to protect the public. Respondent has taken those sanctions to heart and rehabilitated himself.

We can find no justification on this record for supplementing the criminal penalties by imposing discipline against respondent's license to practice law in California. The order of dismissal is affirmed as is the hearing judge's determination that respondent is entitled to reimbursement of reasonable expenses pursuant to section 6086.10 (d) of the Business and Professions Code.

We concur:

STOVITZ, J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT J

A Member of the State Bar

No. 85-O-11829

Filed January 26, 1993

SUMMARY

After stipulating to a stayed suspension in a disciplinary matter, respondent moved for full or partial relief from the statutory requirement that he pay disciplinary costs. Respondent argued that the standard formula cost assessment was excessive in this matter because he had attempted to negotiate a resolution of the matter prior to the filing of formal charges; he had offered to stipulate to the same level of discipline ultimately agreed upon and imposed; the failure to reach agreement prior to the filing of formal charges was due to intransigence of counsel for the State Bar, and respondent had made extraordinary efforts in cooperating with the State Bar's investigation of the matter. The hearing judge granted a partial cost reduction. (Hon. Ellen R. Peck, Hearing Judge.)

The State Bar sought review, contending that the hearing judge abused her discretion in granting partial relief. Although finding no bad faith on the part of counsel for the State Bar, the review department held that the hearing judge did not abuse her discretion either in finding good cause to grant relief or in the manner in which she arrived at the amount of the partial reduction awarded.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: R. Gerald Markle

HEADNOTES

[1 a-c] **135 Procedure—Rules of Procedure**
178.77 Relief from Costs—Showing Required
178.90 Costs—Miscellaneous

Under rules 460 and 461 of the Transitional Rules of Procedure, the costs assessed in discipline matters are derived from a formula established by a committee of the State Bar Board of Governors which reflects average chargeable costs. The level of costs assessed depends on the stage at which a matter is resolved. The use of these cost models is appropriate as a simple and efficient means

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.

of assessing costs, but does not prevent a respondent from seeking, or a hearing judge from granting, relief from costs in an appropriate case.

[2 a, b] **135 Procedure—Rules of Procedure**
178.77 Relief from Costs—Showing Required
Under Business and Professions Code section 6086.10(c) and rules 462 and 464 of the Transitional Rules of Procedure, an attorney ordered to pay disciplinary costs may be granted full or partial relief from such order, or an extension of time to pay, based on hardship, special circumstances, or other good cause. Good cause for such relief may include consideration of the conduct of counsel for the State Bar.

[3 a-d] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
167 Abuse of Discretion
178.71 Relief from Costs—Granted
It was not an abuse of discretion for the hearing judge to conclude that partial relief from costs was justified, even in the absence of evidence of bad faith on the part of counsel for the State Bar, based on the State Bar's lack of responsiveness to respondent's extraordinary efforts to provide information and good faith offers to settle the matter prior to the filing of formal charges. Elimination of all costs assessed for the stage after filing formal charges, and of half of the State Bar's costs for the pre-filing stage, was within the hearing judge's discretion.

[4] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
178.90 Costs—Miscellaneous
Where a party sought review by the Presiding Judge of an order granting relief from costs under rule 462(c) of the Transitional Rules of Procedure, and the matter presented an important question of first impression, the Presiding Judge referred the matter to the review department in bank.

[5] **167 Abuse of Discretion**
178.90 Costs—Miscellaneous
The appropriate standard of review for an order granting relief from costs is abuse of discretion, which is the standard of review for orders taxing costs in civil cases and is also the standard of review generally applied to procedural motions in the State Bar Court.

[6] **167 Abuse of Discretion**
Where the standard of review is abuse of discretion, it is inappropriate for the review department to reconsider the evidence below as if it were deciding the matter de novo. The exercise of discretion will not be disturbed unless it is abused, and while an appellate court may have ruled differently on the motion, it cannot substitute its own view as to the proper decision. To find an abuse of discretion, it must clearly appear that the result was a manifest miscarriage of justice.

[7] **178.71 Relief from Costs—Granted**
Reducing costs recoverable by the State Bar in a disciplinary matter by a significant amount where, in the interest of justice, it appears appropriate, serves the salutary purposes of both promoting substantial savings in litigant and judicial resources and enhancing public protection by discouraging unnecessary delay in the imposition of stipulated discipline.

ADDITIONAL ANALYSIS

[None.]

ORDER AND OPINION ON PETITION FOR REVIEW OF ORDER GRANTING RELIEF FROM COSTS[1]

PEARLMAN, P.J.:

This petition for review by the Office of Trials presents for the first time the interpretation of the scope of a hearing judge's authority to grant relief from costs under Business and Professions Code section 6086.10.

The hearing judge partially granted respondent's motion for relief from costs following the issuance of a Supreme Court order awarding costs to the State Bar in connection with the imposition of a nine-month stayed suspension pursuant to stipulation approved by the same hearing judge. The cost certificate totaled $3,696, consisting of State Bar Court costs of $678, and Office of Investigation and Office of Trial Counsel costs in the amounts of $2,709 and $309 respectively. **[1a]** These cost assessments, made pursuant to rules 460 and 461 of the Rules of Procedure, were derived from a formula established by a committee of the State Bar Board of Governors in 1988 and reflect average chargeable costs for cases which are resolved by stipulated disposition after commencement of formal proceedings, but before trial. Costs of cases resolved at this stage are called Level II costs, as opposed to average chargeable costs assessed on cases which result in a stipulated disposition prior to the filing of the notice to show cause which are called Level I costs.[2]

Recoverable costs do not include any attorneys' time. The Office of Investigation's costs for an investigated file are based upon the average hourly salary figures of the investigative staff, the legal assistants, and the support staff multiplied by the average amount of time spent by these individuals, plus a fixed percentage charge to cover the estimated costs of copying, postage, supplies and other miscellaneous costs. The costs of the Office of Trial Counsel and the Office of State Bar Court are similarly computed based on average non-attorney staff time and other costs, but are assessed per case, instead of per count.

Respondent petitioned the hearing judge for relief from all costs pursuant to rule 462 of the Rules of Procedure and, in the alternative, limitation of cost recovery to Level I costs.[3] Respondent argued that the Level II assessments were excessive since petitioner repeatedly and in good faith endeavored to negotiate disposition of the matter prior to filing of the notice to show cause, including offering to stipulate to the same level of discipline as was ultimately agreed upon and approved. Respondent further argued that the parties' inability to come to agreement before the filing of the notice to show cause was due solely to the intransigence of the counsel representing the State Bar. Respondent also argued that the computation and application of the various cost assessment levels resulted in an unfair distribution of the cost burden in this case because of alleged extraordinary cooperation of the respondent which substantially reduced the actual burden on the State Bar.

[2a] Business and Professions Code section 6086.10 (c) provides that "A member may be granted relief, in whole or in part, from an order assessing costs under this section, or may be granted an extension of time to pay these costs, in the discretion of the

1. Normally, no published opinion would result from a petition for review of an order pursuant to rule 462 of the Transitional Rules of Procedure of the State Bar (hereafter "Rules of Procedure" or "Rules Proc. of State Bar"). At respondent's counsel's request and there being no objection raised by the Office of Trials, this opinion does not designate the name of the respondent.

2. Not involved in this proceeding are two other levels of cost assessments: Level III which is charged in cases where a stipulation is reached at the time of trial or in which a trial is held not exceeding one day; and Level IV which is charged in disciplinary matters where the trial exceeds one day.

3. According to the formula, the difference between Level I cost assessments and Level II cost assessments is a total of $419. The costs of investigation remain the same for either level—$387 per file, totaling $2,709 for the seven counts investigated in connection with this case. The Level I cost assessment of the Office of Trial Counsel is $95 as opposed to the Level II cost of $309 per case. The Office of State Bar Court cost assessment is $473 at Level I as opposed to $678 at Level II.

State Bar, upon grounds of hardship, special circumstances, or other good cause." Consistent therewith, rule 462(a) of the Rules of Procedure permits a member assessed costs under rule 460 to petition the court for relief therefrom on "grounds of hardship, special circumstances or other good cause." A parallel rule, rule 464, permits the Chief Trial Counsel or designee, in the exercise of discretion where a case is settled prior to trial, to stipulate to relieve a member "in whole or in part" from the obligation to pay costs "upon grounds of hardship, special circumstances or other good cause."

[3a] The hearing judge considered the petition and accompanying documentation as well as the opposing papers, heard oral argument and issued a written decision addressing all of the issues raised by both parties. She concluded that the following special circumstances and good cause justified relief from Level II costs: that respondent made extraordinary efforts over an 11-month period to resolve matters at the Level I stage; that the State Bar failed to respond meaningfully to such overtures and that the State Bar ultimately agreed to a disposition which the respondent had offered at the pre-notice stage. She further found that the following special circumstances also justified reducing Level I costs by 50 percent: respondent's efforts to provide information and documentation prior to the filing of the notice were extraordinary and beyond his duties pursuant to Business and Professions Code section 6068 (i); respondent was required to repeat much of his effort due to the assignment of successive attorneys to his case prior to issuance of the notice;[4] and respondent was unable to obtain meaningful responses to his good faith written offers of settlement or his positions on factual and legal issues for a substantial period of time.

[4] The Office of Trials timely sought review before the Presiding Judge pursuant to rule 462(c) of the Rules of Procedure, and the Presiding Judge referred the matter to the Review Department in bank since it presented an important question of first impression. No case law has interpreted the hardship, good cause or special circumstances requirement of Business and Professions Code section 6086.10 or rule 462.

[5] Neither party addressed the appropriate standard of review in their briefs, but at oral argument both parties agreed that the appropriate standard of review is abuse of discretion. That is the standard applied on review of orders taxing costs in civil cases (see, e.g., *Posey* v. *State of California* (1986) 180 Cal.App.3d 836, 852) and is also the standard of review generally applied to procedural motions in the State Bar Court. (See, e.g., *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214; cases digested in Cal. State Bar Ct. Rptr. Digest, topic number 167; see also *In the Matter of Mollica* (State Bar Ct. No. 88-O-12199), order denying petition for review filed October 28, 1992 [recognizing hearing judge's discretion to grant late filing of petition for relief from costs].)

[6] It is thus inappropriate for this review department to reconsider the evidence below as if it were deciding this issue de novo under rule 450. "In situations where the trial judge has either by express statute or by rule of policy a discretionary power to decide the issue, the exercise of discretion will not be disturbed unless it is abused. While we may have ruled differently had we heard the motion, the appellate court may not substitute its own view as to the proper decision." (*San Bernardino City Unified School Dist.* v. *Superior Court* (1987) 190 Cal.App.3d 233, 240-241, citing 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 275, p. 286.) "'To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice.'" (*San Bernardino, supra*, 190 Cal.App.3d at p. 241, quoting *Brown* v. *Newby* (1940) 39 Cal.App.2d 615, 618.)

The Office of Trials contends that the hearing judge abused her discretion in granting relief to respondent, asserting that respondent did not cooperate more than he was otherwise required to do; that

4. There were a total of five successive attorneys who represented the State Bar—three prior to filing of the notice to show cause and two thereafter.

the fact that there were successive examiners with whom respondent's counsel had to renegotiate did not justify relief; that respondent did not establish that actual costs of the State Bar were reduced below the costs sought to be assessed and that even if a respondent could show that the actual costs were lower than the cost models, the cost models should be used in any event. Finally, the Office of Trials contends that to use the ultimate settlement as a basis for granting relief from costs sets a dangerous precedent in which the court is put in the position of second-guessing either party's reasons for not settling sooner. All of these arguments were raised below and rejected by the hearing judge.

In opposition, respondent's counsel argues that the Office of Trials' petition for review is without foundation and brought in bad faith and that the only available remedy for harm caused by failure on the part of counsel for the State Bar to act reasonably and in good faith is to request relief from disciplinary costs. Respondent's counsel contends that the position taken by counsel for the State Bar against stipulating to a waiver of disciplinary costs, and its conduct in fighting relief therefrom at two levels in the court, penalizes respondents to the point of rendering their ability to seek court intervention economically unfeasible. He also argues that the policy is "penny-wise and pound foolish" and "disserves the disciplinary system" by increasing the cost of disciplinary proceedings unnecessarily.

[3b] First of all, the hearing judge did not find that counsel for the State Bar acted in bad faith and we see no evidence of bad faith. **[1b]** We also agree with the Office of Trials that the use of cost models is a simple and efficient means of assessing costs and that recovery of costs in eligible cases should be the norm in order to effectuate the statutory goal of recouping part of the costs of imposing discipline from the specific attorneys found culpable of misconduct. No benefit would have been obtained from a review by the parties and the hearing judge of the manner of computation of the average costs and a determination of whether the actual costs in this case exceeded or were lower than such costs.

[1c] We disagree, however, with the examiner's assertion that the formulaic method of cost assessment should prevent a respondent from seeking relief from costs in a particular case on grounds such as those presented here. The purpose of a cost formula, fairly computed, is to take the place of individualized assessment. An enormous amount of time and effort would be involved if the disciplinary system had to track particular costs associated with every case. It is therefore deemed appropriate for the presumptive amount of recoverable costs in any case to be the amount established by the formula adopted by the State Bar pursuant to its rulemaking authority regardless of its actual costs in the particular case. The formulaic method of attributing costs does not, however, in any way impede the hearing judge from determining that good cause exists for relief in an appropriate case.

[2b] The question therefore arises as to the scope of good cause. No case law or legislative history has been cited to guide us, but the examiner conceded at oral argument that good cause for relief from costs could include, on appropriately egregious facts, consideration of the conduct of counsel for the State Bar. He contended, however, that on the facts of this case such relief was not warranted. That argument was considered and rejected by the hearing judge below. **[3c]** The elimination of all Level II costs, including court costs, was clearly within her discretion in the interest of justice since Level II assessments are only made if the settlement occurs after filing of the notice to show cause and there was a determination that no notice needed to have been filed here.

[3d] The hearing judge also exercised her discretion to halve the Office of Trial Counsel's Level I costs.[5] No abuse was shown in this regard either.

5. Although the decision below referred to all Level I costs, the hearing judge only ordered the Office of Trial Counsel to prepare a new certificate of costs consistent with the reduction of Level I costs by 50 percent and made no similar directive to the clerk of the State Bar Court with respect to halving Level I court costs. Nor does any rationale appear in her decision for reducing Level I court costs, which respondent would have had to pay in any event. We therefore construe the ambiguity in the decision as not intending to reduce court costs below Level I. If we were to construe it otherwise, we would have to conclude that it was an abuse of discretion for the judge to halve the recoverable Level I court costs without any explanation for doing so.

Respondent recognized that no matter how cooperative he was and how responsive counsel for the State Bar were, certain costs would be chargeable to him in connection with the stayed suspension to which he stipulated, even if such result had been reached very early in the negotiations. The hearing judge determined, however, that his cooperation was extraordinary, saving the disciplinary system substantial effort in analyzing his prior trust account balances and providing the State Bar with a road map of the client accounts in controversy. She also determined that the lack of timely response by counsel for the State Bar significantly delayed the disposition of the proceeding.

Reduction of formulaic costs for savings which are difficult to quantify cannot be done with precision and any attempt to so require would defeat the exercise by the consumption of undue litigant and court time. [7] Reducing recoverable costs by a significant amount where, in the interest of justice, it appears appropriate, serves the salutary purposes of both promoting substantial savings in litigant and judicial resources and enhancing public protection by discouraging unnecessary delay in imposition of stipulated discipline. To reject the authority of the judge to interpret good cause in this manner would disserve the disciplinary system and the general membership of the State Bar which pays for the system with its dues.

The requested relief from the hearing judge's order is DENIED. The clerk is directed to prepare a revised certificate of costs awarding a total of $1,875 consisting of Office of Investigation costs in the amount of $1,354.50; Office of Trial Counsel costs in the amount of $47.50, and State Bar Court costs in the amount of $473.

We concur:

NORIAN, J.
VELARDE, 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

SHARON LYNN LAPIN

Applicant for Admission

No. 91-M-07563

Filed February 11, 1993

SUMMARY

In a moral character proceeding in which the applicant waived confidentiality, the hearing judge granted the applicant's motion to compel the State Bar to answer interrogatories seeking the identities of persons who had discussed the applicant with the Committee of Bar Examiners. (Hon. Jennifer Gee, Hearing Judge.) After the case was reassigned for trial to a judge pro tempore, the applicant moved to preclude the use of testimony by two distantly located witnesses against the applicant, due to problems in obtaining their depositions. The trial judge ordered the State Bar to produce the two witnesses for deposition before putting on its case at trial as a condition of allowing the witnesses to testify. (Vivian L. Kral, Judge Pro Tempore.)

The State Bar sought discovery review of the order compelling interrogatory answers, and, when the Presiding Judge upheld the order, sought reconsideration by the review department in bank. The applicant sought discovery review of the trial judge's order, asserting that the State Bar should be precluded altogether from offering the two witnesses' testimony or any other evidence about their assertions regarding the applicant. The applicant's request for discovery review was referred to the review department in bank.

The review department overruled the State Bar's objections to the interrogatories, including those based on the statutory official information privilege and the constitutional right to privacy, except that, on privacy grounds, it modified the order compelling discovery to allow the State Bar to withhold the identities of persons whom it did not intend to call as trial witnesses under any circumstances. The review department also modified the order with regard to the two witnesses. It ordered the State Bar, as a condition of being permitted to call the witnesses at trial, to subpoena them for deposition prior to trial and either to produce them for deposition in the trial venue or to pay applicant's counsel's travel expenses to the location of the deposition.

COUNSEL FOR PARTIES

For Office of Trials: Jill Sperber

For Applicant: Richard Lubetzky

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] **101 Procedure—Jurisdiction**
199 General Issues—Miscellaneous
2690 Moral Character—Miscellaneous

Admission of attorneys to practice law is an exercise of one of the inherent powers of the California Supreme Court, which relies on the Committee of Bar Examiners of the State Bar to administer and carry out the bar admission process, including examining applicants for admission and investigating their fitness. An applicant who is denied certification by the Committee may seek independent adjudication by the State Bar Court. The determination of moral character made by that court is final and binding, subject to review by the Supreme Court.

[2] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
2604 Moral Character—Discovery

Under rule 835 of the Transitional Rules of Procedure, various discovery provisions applicable in disciplinary proceedings are also applicable in moral character proceedings.

[3 a-c] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
2604 Moral Character—Discovery

Rule XI of the Rules Regulating Admission to Practice Law in California, providing that the files of the Committee of Bar Examiners are confidential, does not have any bearing on the Committee's duty to respond to interrogatories from the applicant in a moral character proceeding, and, when read in conjunction with other applicable rules, only precludes the Office of Trials from disclosing documents voluntarily as opposed to pursuant to appropriate discovery requests or by court order.

[4] **113 Procedure—Discovery**
143 Evidence—Privileges
148 Evidence—Witnesses

The identities of persons who have knowledge of relevant facts and who may be potential witnesses are outside the scope of both the attorney-client and work product privileges. The added fact that such a person is a member of the State Bar is a matter of public record and cannot appropriately be claimed to be privileged.

[5] **113 Procedure—Discovery**
130 Procedure—Procedure on Review
194 Statutes Outside State Bar Act
2604 Moral Character—Discovery

Normally, discovery objections not raised in a timely fashion will not be considered, and this provision applies in discovery in moral character proceedings even though the Civil Discovery Act has not been made applicable to such proceedings in its entirety. However, where a claim of privilege from discovery had been belatedly presented to the hearing judge without objection and raised an important issue, the review department considered its applicability on review.

[6 a-e] **113 Procedure—Discovery**
148 Evidence—Witnesses
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
2604 Moral Character—Discovery

The State Bar is a public entity within the scope of the statutory official information privilege (Evid. Code, § 1040). The procedure to be followed in State Bar Court proceedings where the official information privilege is asserted is the same as in civil cases. In a moral character proceeding, where the information sought was the identities of persons whom the State Bar had reserved the right to call as impeachment or rebuttal witnesses at trial, the official information privilege did not apply to such information, either because the consent exception was applicable, or because the reservation of the right to call such persons reduced the Committee of Bar Examiners' need for secrecy to the interest of a party in the outcome of the proceeding, which is not protected under section 1040 and which was outweighed by the interests of the public and the applicant in a fair trial.

[7] **113 Procedure—Discovery**
119 Procedure—Other Pretrial Matters
136 Procedure—Rules of Practice
148 Evidence—Witnesses

The rule permitting a party to exclude rebuttal or impeachment witnesses from a pretrial statement (Prov. Rules of Practice, rule 1222(g)) has no bearing on the broader issue of discoverable information. Discovery of identities of individuals is not limited to persons who may be called in the opposing party's case in chief.

[8 a, b] **113 Procedure—Discovery**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous

Generally, when a lower court ruling favors disclosure of materials requested in discovery, in camera inspection cannot be requested for the first time on review. There is an exception for questions of first impression, but this exception did not apply where the authority relied on in requesting the inspection had been decided over 30 years earlier. Where the party requesting in camera inspection did so for the first time on a motion for reconsideration before the review department in bank, and gave no explanation of its failure to request such inspection earlier, the review department declined to conduct an in camera inspection.

[9] **113 Procedure—Discovery**
141 Evidence—Relevance
148 Evidence—Witnesses

In camera inspection was not appropriate before ordering a party to disclose names of potential witnesses in response to an interrogatory, because the court was ill-equipped to evaluate the potential relevance of the undisclosed names without argument from the counsel of the party requesting them, which could only be made after the names were disclosed.

[10 a-f] **113 Procedure—Discovery**
139 Procedure—Miscellaneous
148 Evidence—Witnesses
193 Constitutional Issues
2604 Moral Character—Discovery

Private personal information about a non-party to a proceeding may be privileged from discovery under some circumstances pursuant to the California constitutional right to privacy. The privacy

right to be protected is that of the non-party, and the custodian of the private information may not waive it. The right to privacy is not absolute, but must be balanced against the need for disclosure. In a moral character proceeding, it was unreasonable for material witnesses against the applicant to claim a right of privacy preventing the disclosure of their identities to the applicant during discovery, while consenting to testify against the applicant at trial. However, as to the identities of persons whose testimony would not be used under any circumstances, the applicant had not made a sufficient showing of need to overcome these persons' privacy rights, and their names could be withheld from disclosure.

[11] **159 Evidence—Miscellaneous**
204.90 Culpability—General Substantive Issues
A hearing judge should scrutinize with care any evidence bearing the earmarks of private spite. Nevertheless, any instigating factor or personal motive in the initiation of a State Bar proceeding is not a matter of controlling concern where the facts disclosed justify disciplinary action.

[12] **113 Procedure—Discovery**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
Declaration regarding facts relating to discovery motion was stricken as untimely, where it related to facts which should have been presented to hearing judge, not offered for the first time on review.

[13 a-c] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
113 Procedure—Discovery
114 Procedure—Subpoenas
148 Evidence—Witnesses
Where examiner's conduct in connection with obtaining depositions of State Bar's non-party witnesses, while not in bad faith, clearly fell short of her duty under the circumstances, review department upheld hearing judge's order permitting such witnesses to testify only if first deposed, and modified such order to require examiner to subpoena the witnesses and to pay transportation costs as a condition of permitting witnesses' testimony.

[14] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
The Civil Discovery Act has not been adopted in its entirety in the conduct of State Bar proceedings. The imposition of monetary costs as discovery sanctions is precluded under rule 321, Trans. Rules Proc. of State Bar. Authorized discovery sanctions include orders precluding a party from supporting or opposing designated claims or defenses or from introducing evidence or testimony.

[15] **101 Procedure—Jurisdiction**
119 Procedure—Other Pretrial Matters
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
Judges in State Bar proceedings have inherent authority to exercise reasonable control over the proceedings in front of them.

ADDITIONAL ANALYSIS

[None.]

OPINION AND ORDER ON REVIEW OF DISCOVERY ORDERS

PEARLMAN, P. J.:

We have before us two significant issues involving discovery in moral character proceedings. The applicant, Sharon Lynn Lapin, has waived confidentiality of these proceedings pursuant to Business and Professions Code section 6060.2.

The first issue involves the propriety of the hearing judge's order compelling the Committee of Bar Examiners (hereafter "the Committee") to answer two interrogatories propounded by the applicant's counsel seeking the identity of all persons who initiated a complaint with the State Bar against applicant or provided information to the State Bar regarding applicant. The Committee had objected on the grounds of confidentiality and sought review of the judge's order, pursuant to rule 324, Transitional Rules of Procedure of the State Bar, before the Presiding Judge who affirmed the order. The Committee then sought reconsideration of the Presiding Judge's order before the review department in bank and the Presiding Judge exercised her discretion to refer the matter to the review department.

The second issue involves both parties' challenge to the subsequent pretrial order of the judge pro tempore who was assigned to the case for trial. The order involved two previously uncooperative State Bar witnesses who had failed to honor deposition subpoenas. The judge pro tempore ordered the State Bar to produce the witnesses for deposition on the morning of the first day of the State Bar's presentation of evidence or be precluded from calling them at trial. The Presiding Judge referred the ensuing request for discovery review to the review department in bank for consideration together with the other discovery issue already before the review department. Discovery and trial proceedings in the hearing department have been stayed pending the outcome of these discovery review proceedings.

Both issues have been extensively briefed and argued.[1] We basically agree with the analysis applied by both judges below, but have considered arguments more fully developed on review and modify the orders accordingly.

DISCUSSION

[1] Admission of attorneys to practice law is an exercise of one of the inherent powers of the California Supreme Court. (*In re Lacey* (1938) 11 Cal.2d 699, 701; see also Cal. Const., art. VI, § 1.) The California Supreme Court relies on the Committee of Bar Examiners created by the State Bar Board of Governors as its primary agent to administer and carry out the bar admission process. (*In re Admission to Practice Law* (1934) 1 Cal.2d 61, 67; *Chaney* v. *State Bar* (9th Cir. 1967) 386 F.2d 962, 966; Bus. & Prof. Code, § 6046.) Among the activities the Committee undertakes is the onerous duty of examining applicants for admission and investigating their fitness. (*Spears* v. *State Bar* (1930) 211 Cal. 183, 191.) If the Committee denies certification of an applicant, pursuant to rule X, section 2(d), Rules Regulating Admission to Practice Law in California, the applicant may initiate a proceeding in the State Bar Court for its independent adjudication. In such proceeding the Committee, represented by the Office of Trials, is the opposing party. The determination of moral character ultimately made by the State Bar Court is final and binding on the applicant and the Committee, subject to discretionary review by the Supreme Court at the applicant's request.[2] The instant proceeding was initiated by applicant's application for hearing filed November 5, 1991.

1. Additional briefing was requested by the court following oral argument on September 1, 1992. Thereafter, the applicant requested additional oral argument to address issues of first impression. Submission was vacated and a second oral argument was held on November 17, 1992, following which the matter was again taken under submission.

2. A rule change currently pending before the Supreme Court would, if adopted, also extend the right to petition for Supreme Court review to the Committee, parallel to the right extended in 1991 to the Office of Trials in disciplinary proceedings.

A. Review of the Order Compelling Answers to Interrogatories

[2] Rule 835 of the Transitional Rules of Procedure of the State Bar (hereafter "Rules of Procedure" or "Rules Proc. of State Bar") makes various discovery provisions applicable in disciplinary proceedings such as those concerning interrogatories, depositions and requests for admission, also applicable to moral character proceedings. Applicant's counsel propounded a set of interrogatories to the Committee on April 22, 1992, pursuant to rules 319 and 835. Interrogatory number 9 sought the identity of "all persons who initiated a complaint with the State Bar regarding the Applicant, either informal or formal, without having first been contacted the State Bar." Interrogatory number 10 sought the identity of "all members of the Bar of the State of California who have provided information to the State Bar regarding the Applicant." In its response, the Committee objected to interrogatories 9 and 10 on grounds of the confidentiality provisions of rule XI of the Rules Regulating Admission to Practice Law in California ("rule XI") and, as to interrogatory 10 only, the work product and attorney-client privileges. In opposition to the applicant's motion to compel and again in the petition for discovery review, the Committee has also relied on the California constitutional right to privacy and the official information privilege set forth in Evidence Code section 1040.

The hearing judge granted the motion to compel, reasoning as follows: "After reviewing the parties' arguments on this motion, I am not persuaded by the State Bar's argument that the interrogatories cannot be answered because of confidentiality and privacy considerations. Though moral character proceedings are confidential, Rule XI of the Rules Regulating Admission to Practice Law in California specifically provides that the applicant may request 'all records, exhibits, findings, conclusions, reports and hearing transcripts . . . .' Moreover, as to the individuals' expectations of privacy, any right of privacy was not absolute. The Committee of Bar Examiners had the authority to release confidential information under Rule XI. In any event, the Applicant has waived her right to confidentiality in this proceeding." (Order filed June 24, 1992.)

On petition for review before the Presiding Judge, the Committee for the first time presented a declaration from the Senior Executive, Admissions, who is the chief staff officer for the Committee. He attested in pertinent part as follows: "4. All inquiries are conducted in a completely confidential manner, and neither the applicant nor anyone other than the staff processing the application is permitted to review raw information received. In fact, those who provide information to the Committee as part of its moral character determination inquiry do so on the assurance of the Committee that all information provided will be held confidential and will not be used against the applicant without the provider's consent. To do otherwise would create a chilling effect on the provision of information which could and in my experience does result in the refusal of persons having relevant information about applicants to come forward with the information because of fear of retribution by the litigant, usually through litigation.

"5. However, no applicant is finally determined to not be of good moral character on the basis of information from a person who has not consented to its use. A determination that an applicant is not of good moral character is made only on the basis of documents and information which are not confidential and on the basis of testimony of a person subject to cross-examination. The Committee will not use adverse information received from a person who will not consent to its use or who will not testify against the applicant nor will it rely on anonymously received information unless that information can otherwise be attested to in open court. For that reason and to protect the confidentiality of persons who communicate with the Committee regarding applications, the Committee's raw moral character files are considered to be confidential and not available to the public, to other offices of the State Bar or to the applicant." (Declaration of Jerome Braun, exh. C to petition for review of discovery ruling filed July 6, 1992.)

The Presiding Judge ordered a temporary stay of the hearing judge's order to permit the applicant to respond to the Committee's request under rule 324

for discovery review. In her response, the applicant did not object to reliance by the Committee on the California constitutional right to privacy and the official information privilege although these grounds had not been raised as objections in the original interrogatory responses. The applicant also did not object to the submission of the chief staff officer's declaration on behalf of the Committee for the first time on review.[3]

1. Rule XI

[3a] With respect to the argument that rule XI justified the Committee's objection, the author of this opinion, as Presiding Judge, upheld the hearing judge's determination that no privilege to withhold any documents was set forth in that rule. Sitting in bank on reconsideration, we find no basis for reaching a different conclusion and adopt as part of our opinion that portion of the Presiding Judge's order filed July 21, 1992, which reads as follows:

"*Rule XI* [¶] Rule XI states that the Committee's 'files, records and writings within the meaning of Evidence Code Section 250' are confidential, but the rule also provides that at the investigation stage, the Committee's 'records, exhibits, findings, conclusions, reports and hearing transcripts' may be requested by the applicant, or by a 'Court or agency charged with exercising licensing . . . authority over attorneys,' if the request 'is to facilitate the investigation of the conduct of the applicant to determine admission . . . to the practice of law.' The third paragraph of rule XI ('rule XI, paragraph 3') provides that in the event of a request for a State Bar Court hearing, 'the files, records and writings of the Committee which have remained confidential . . . shall not be disclosed by the Office of Trial Counsel.'

[3b] "All of these provisions concern Committee *documents*, not *information* in the possession of the Committee. The discovery requests at issue on this review are interrogatories—i.e., requests for information—not requests for inspection and copying of documents. It is by no means clear that the provisions of rule XI regarding confidentiality of the Committee's records have any bearing on the Committee's duty to respond to interrogatories.

"In any event, rule XI, paragraph 3 does not appear to provide any basis for the Office of Trials to object on confidentiality grounds to discovery requests of the kind made by applicant herein. As already noted, notwithstanding the general confidentiality of Committee records vis-a-vis the world at large, rule XI provides that at the investigation stage, the applicant and the applicant's counsel may have access to the Committee's 'records, exhibits, findings, conclusions, reports, and hearing transcripts.' The court notes that the duty of the Committee and the State Bar to respond to otherwise proper discovery requests *by the applicant* is unaffected by whether or not the applicant has waived confidentiality *vis-a-vis the general public* under Business and Professions Code section 6060.2.

"The limitation of rule XI, paragraph 3 does not apply to documents previously disclosed to the applicant upon request as provided in rule XI, paragraph 2, nor does it purport to prohibit discovery otherwise allowable in the State Bar Court. To the contrary, rule XI, paragraph 1 provides that the Committee's records 'may not be released . . . except . . . as provided elsewhere in these Rules [Regulating Admission to Practice Law in California].' With respect to proceedings before the State Bar Court, section 2(d) of rule X of the Rules Regulating Admission to Practice Law in California provides that 'discovery shall be conducted pursuant to chapter 18 of the [Transitional] Rules of Procedure of the State Bar (rules 830-836).' Rule 835 of the Transitional Rules of Procedure incorporates by reference most of the discovery rules applicable in formal State Bar Court proceedings generally, including rule 319 permitting the service of interrogatories. Thus, the State Bar's rules expressly authorize the use of interrogatories in

3. The applicant thereafter did object to a second declaration offered on review attesting to the Committee's upcoming meeting schedule in connection with the Committee's request for a date after August 21, 1992, for oral argument on reconsideration. We overruled this objection because the declaration was limited to a scheduling issue on review which only became relevant after issuance of the Presiding Judge's July 21, 1992 order.

moral character proceedings.

"These rules must be construed together to render a sensible interpretation which, if possible, makes all of them meaningful. The rules clearly provide that an applicant may obtain Committee records during the investigation stage and may promulgate interrogatories at the State Bar Court stage. Assuming that the Committee has records containing the information sought in these interrogatories, it would not make sense to construe rule XI, paragraph 3 as making unavailable in formal discovery the very same information that would have been available at the investigation stage, had the appropriate records been requested at that time. To do so would make the discovery provisions superfluous, since the applicant could obtain through discovery only those records that had already been provided at the investigation stage.

"Nor does it make sense to read into rule XI a confidentiality exception to otherwise appropriate discovery in the State Bar Court based on what records a particular applicant sought in the investigation stage or what unprivileged information the Committee had but chose not to memorialize in a record to preclude its disclosure at the investigation stage. This would render otherwise relevant and unprivileged information arbitrarily protected from discovery based on the parties' previous conduct. This interpretation is further supported by the fourth paragraph of rule XI, which states that nothing in the rule precludes or supersedes access to or disclosure of Committee records as provided in sections 6060.2 and 6090.6 of the Business and Professions Code. Section 6060.2 provides that records of a confidential moral character investigation may be subject to a lawfully issued subpoena. It would make little sense to uphold rule XI confidentiality as an implied bar to applicants obtaining through other discovery methods the very same records that they would be able to obtain by subpoena under section 6060.2. **[3c]** Accordingly, in light of rule X, rule XI and Transitional Rules of Procedure 830-836 adopted by the Board of Governors, we construe rule XI, paragraph 3 only to preclude the Office of Trials from disclosing documents voluntarily, as opposed to pursuant to appropriate discovery requests or by court order. Therefore, any privilege not to answer the two challenged interrogatories must find support in authority other than rule XI." (Order filed July 21, 1992.)

To the extent that the Committee relies on *Chronicle Publishing Co.* v. *Superior Court* (1960) 54 Cal.2d 548 as a basis for claiming the confidentiality of the requested information, that argument rests on the applicability of Evidence Code section 1040 discussed below and not on any exception provided in rule XI. The appropriate body to consider the Committee's argument that policy reasons should justify State Bar rules specifically protecting certain raw materials in its files against discovery in subsequent contested moral character proceedings is the State Bar Board of Governors. Since rule XI does not currently carve out any exceptions from discovery, we turn to the other claimed bases for asserting the confidentiality of the requested information.

2. Attorney-Client Privilege and Work Product Doctrine

We also find no justification for reaching a different conclusion than set forth in the Presiding Judge's order with respect to the attorney-client privilege and work product doctrine. Although the Committee originally raised these objections in response to interrogatory number 10, it apparently abandoned them thereafter. They were not mentioned in opposition to applicant's motion to compel or raised in the Committee's petition for discovery review. We therefore also adopt as part of our opinion that portion of the Presiding Judge's July 21, 1992 order which reads as follows:

"In any event, the objections [based on the attorney/client privilege and work product doctrine] are not supported by any authority. The interrogatory in question does not seek the contents of any communications, or the results of any attorney's mental processes or research. **[4]** The mere identities of persons who have knowledge of relevant facts and who may be potential witnesses are outside the scope of both the attorney-client and work product privileges. (See *Willis* v. *Superior Court* (1980) 112 Cal.App.3d 277, 291; *City of Long Beach* v. *Superior Court* (1976) 64 Cal.App.3d 65, 73.) The added fact that such a person is a member of the State Bar is a matter of public record, and cannot appropriately be

claimed to be privileged."

3. Evidence Code Section 1040

[5] The Committee did not in its interrogatory responses assert Evidence Code section 1040 as justification for refusing to answer interrogatories 9 and 10. Normally objections not interposed in a timely fashion will not be considered. (Code Civ. Proc., § 2030, subd. (a); see generally 1 Hogan, Modern Cal. Discovery (4th ed. 1988) Interrogatories to a Party, § 5.16, p. 279, fn. 84, and cases cited therein.) Moral character proceedings incorporate various provisions of the Civil Discovery Act, but not the act in its entirety. Accordingly, the requirement that claims of privilege must be raised in the interrogatory responses absent good cause for relief is not expressly applicable. On the other hand, there is nothing in the rules regulating moral character proceedings to abrogate the general requirement of timely objections. (Cf. *Coy* v. *Superior Court* (1962) 58 Cal.2d 210, 216-217.) No good cause has been offered for the examiner's failure to raise all claims of privilege in the original discovery responses, but because this important issue was presented to the hearing judge at the next opportunity without objection, we will consider its applicability.

[6a] In deciding whether the Evidence Code section 1040 privilege applies we are guided by the test applied in civil cases. In *Shepherd* v. *Superior Court* (1976) 17 Cal.3d 107, the California Supreme Court determined the procedures to be followed in civil suits where the official information privilege is asserted. First, the court must determine whether the moving party has met the statutory foundational requirements for discovery without considering the privilege issue; second, the court must ascertain whether the information was "acquired in confidence" as required by Evidence Code section 1040; and third, the court must balance the competing interests to determine whether the conditional privilege applies. (*Id.* at pp. 127-128; see Comment, *California's Evidence Code Section 1040: Discovery of Governmental Information after Shepherd v. Superior Court* (1977) 10 U.C. Davis L. Rev. 367, 370-372, 375-386.)

Evidence Code section 1040, subdivision (a) defines official information to mean "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Subdivision (b) provides in pertinent part as follows: "A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] . . . [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

[6b] We accept the Committee's assertion that the State Bar is a "public entity" within the scope of section 1040, subdivision (b), since it is both a public corporation under Business and Professions Code section 6001 and a constitutional agency in the judicial branch of government. (Cal. Const., art. VI, § 9.) We also accept the assertion that the requested information was "acquired in confidence" as established by the declaration of the Committee's chief staff officer. However, the official comment to Evidence Code section 1040 provides that "the official information privilege does not extend to the identity of an informer." The Committee contends that per-

4. Although there is no definition of informer in section 1040, it is certainly arguable that the comment only intended to exclude from the scope of section 1040 persons covered by Evidence Code section 1041. Evidence Code section 1041 pertains to informers and provides a similar balancing test to that of Evidence Code section 1040 but limits the applicability of that statute to persons who furnish confidential information to: "(1) A law enforcement officer; [¶] (2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or [¶] (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2)." The Committee has never relied on Evidence Code section 1041 which both parties argue is inapplicable to the Committee's claim of confidentiality in this proceeding.

sons providing information to the Committee are not "informers" within the meaning of the official comment to Evidence Code section 1040.[4] It therefore argues that the names of such persons constitute protected "official information" as defined in section 1040, subdivision (a).

The Committee relies primarily on the holding in *Chronicle Publishing Co.* v. *Superior Court*, *supra*, 54 Cal.2d 548 interpreting the provisions of former Code of Civil Procedure section 1881 which was the predecessor of Evidence Code sections 1040-1042. In that case, an attorney brought a libel action against the Chronicle alleging the publication of a libelous article in its newspaper. The Chronicle, in discovery, sought unpublished information from the State Bar concerning the attorney's disciplinary history. The State Bar, which was not a party to the proceeding, obtained a court order precluding most of the requested discovery on grounds of confidentiality.

In *Chronicle Publishing* the high court issued a limited peremptory writ permitting discovery of a statement from the State Bar as to whether or not the attorney received a private reproval, and if so, the information upon which it was based. The high court explained that former rule 8 of the State Bar Rules of Procedure[5] provided "in effect, that the *preliminary investigation shall not be made public and that all files, records and proceedings of the board are confidential and no information concerning them can be given without order of the board or unless disciplinary action is taken against the attorney accused*." (54 Cal.2d at p. 571, emphasis supplied in the Committee's brief.)

Unlike the situation in *Chronicle Publishing*, *supra*, the information sought by the interrogatories at issue here is solely the identities of persons who initiated a complaints with the State Bar regarding applicant or provided information to the State Bar concerning applicant. Also, the discovery request is in the context of an adversary proceeding following denial by the Committee of Lapin's application for admission which appears parallel to the "disciplinary action" taken against an attorney, the basis for which the high court found to be discoverable in *Chronicle Publishing*.[6]

The Committee's brief argues that information given in confidence *which is not subsequently used* by the State Bar to deny the applicant certification must be protected. However, in its brief the Committee also expressly reserved the "right" to call persons not disclosed in discovery as impeachment and rebuttal witnesses at the hearing on applicant's moral character in order to defeat her evidentiary showing of fitness to practice law. The Committee contends that to compel disclosure of their names would have a chilling effect due to fear of retribution by the litigant.

The reluctance of complainants and others who have communicated with the State Bar to make themselves available to testify and be cross-examined is natural, but it ill serves the public, the State Bar and the legal profession if persons who may not be fit to become attorneys are certified for lack of persons with material evidence willing to come forward to speak against them. Nor does it serve the public interest, the State Bar or the profession if a person is denied admission without being given the right to prepare adequately to defend herself against adverse witnesses. The Committee asserts that the unnamed persons may fear being sued, but that fear should be put to rest. The Committee's counsel attaches as an exhibit a successful motion by General Counsel of the State Bar to dismiss a lawsuit filed against a State Bar Court judge, witnesses, the Committee and State Bar employees who participated in another moral character proceeding. The threat of meritless lawsuits did not deter the witnesses who testified in that case or other witnesses who have come forward in other moral character proceedings, nor has it apparently dissuaded the 20 witnesses

5. See current rules 220 et seq., Rules Proc. of State Bar.

6. The Supreme Court in *Chronicle Publishing* specifically pointed out that "If the information is relevant there is no reason that in a proper case such information should not be available by discovery." (*Id.* at p. 574.)

subpoenaed by the Committee in this proceeding whom the Committee has listed in its pretrial statement as persons it intends to call in its case in chief. It is difficult to credit the concerns of the remaining unnamed persons if they may eventually be called to testify in rebuttal or impeachment of applicant's showing.

Chronicle Publishing does not support the conditional assertion of the official information privilege. In protecting from discovery any investigatory files which resulted in no discipline, the high court noted that the State Bar "is not a party to the litigation and is asserting no rights, which in the interests of fairness would require it to divulge information." (*Id.* at p. 573.)

[6c] Here, in contrast, the State Bar is the opposing party and has promulgated a rule, rule 835, which expressly provides for discovery by the applicant in a contested case such as the one before us. No privilege from disclosure is set forth in rule XI or elsewhere and neither Evidence Code section 1040 nor *Chronicle Publishing* appears to protect the identity of complainants or other informants in order to preserve the element of surprise in the rebuttal evidence of the Committee in the adversary proceeding which applicant must litigate with the State Bar to seek to obtain a license to practice law. To the contrary, in weighing whether to except from disclosure otherwise relevant official information, Evidence Code section 1040 expressly precludes consideration of the interest of the public entity as a party in the outcome of the proceeding.

In *Rider* v. *Superior Court* (1988) 199 Cal.App.3d 278, the court applied the balancing test of section 1040, subdivision (b)(2) to the assertion by the police in a defamation case of the privacy rights of an alleged rape victim, determining that no privilege against disclosure existed. While it recognized a valid privacy interest, it noted that "On occasion, one person's right to privacy may conflict with another's right to a fair trial. When this happens 'courts must balance the right of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery.'" (*Id.* at p. 282, quoting *Vinson* v. *Superior Court* (1987) 43 Cal.3d 833, 842.) Ultimately, the court decided that Rider's interests in disclosure of the information necessary for proving his defamation case—and thereby clearing him of the rape allegations—outweighed the interests in keeping the rape victim's statement to the police confidential.[7] (199 Cal.App.3d at pp. 285-287.) Here, applicant will likewise suffer a harsh penalty unless she can prevail in the pending proceeding—she will be unable to pursue her chosen profession due to a determination that she is morally unfit to practice.

The Committee also relies on the court's decision in *Johnson* v. *Winter* (1988) 127 Cal.App.3d 435 which found requested records exempt from disclosure under Government Code section 6255. The California Supreme Court has recognized that the balancing test in Evidence Code section 1040, subdivision (b)(2) is similar to that required by Government Code section 6255. (*ACLU Foundation* v. *Deukmejian* (1982) 32 Cal.3d 440, 446-447, fn. 6.) It has also stated that rejection of the section 6255 exemption from disclosure on the ground that the public interest weighs in favor of disclosure requires it to reject a claim of privilege under section 1040, subdivision (b)(2). (*Ibid.*) In other words, if the court determines that certain information is not exempt under section 6255, it should also find that it is not privileged under section 1040, subdivision (b)(2).

In *Johnson* v. *Winters*, *supra*, Johnson's application for special deputy sheriff status was denied, he

7. In its opinion denying the section 1040 privilege and ordering disclosure, the *Rider* court stated that "It is difficult to imagine any material more relevant to a defamation case based on a false accusation of rape than the statements by the alleged victim to the police." (*Rider* v. *Superior Court*, *supra*, 199 Cal.App.3d at p. 284.) We also note that in *Rider*, the rape victim was warned by the police that her accusation would be made public *if* she pressed charges. Here, similarly, the persons whose identity is sought were told that their communications would be confidential *unless* they consented to testify, which the Committee has reserved the right to have them do.

8. The Public Records Act (Gov. Code, §§ 6250 et seq.) gives individuals the right to request public records from public entities.

was not told the reasons for the denial, and he was refused access to his application file. (127 Cal.App.3d at p. 437.) After reconsideration, Johnson was granted special deputy status, but still denied access to his application file. (*Ibid.*) He then sought disclosure of his file under the Public Records Act.[8] (*Ibid.*) The sheriff's department again refused, claiming the file was exempt from disclosure under Government Code section 6255, which provides that "The agency shall justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (*Id.* at pp. 437-438.)

In balancing the interests involved, the court acknowledged the public interest in monitoring the selection of deputy sheriffs, as well as Johnson's personal interest in correcting any inaccurate information contained in his files so that in the future he would not be denied advancement or favorable employment. (*Id.* at p. 438.) It also, however, recognized "that assurances of confidentiality may be a prerequisite to obtaining candid information about applicants for special deputy status, and that nondisclosure of such information given in confidence serves the public interest." (*Id.* at p. 439.) The court concluded that as to "matters obtained with the understanding implicit or explicit that such matters could be kept confidential," the balance of interests was in favor of confidentiality, thus the denial of disclosure was proper. (*Ibid.*)

One important factual distinction exists between *Johnson* and the present case bearing on the weight accorded the interests involved. Although the sheriff's department initially denied Johnson's special deputy sheriff application, it had granted him such special status by the time he applied to the court for access to his job application file. Thus, Johnson had little demonstrable interest in the information. In contrast, applicant Lapin has not yet been certified morally fit for California bar membership, nor will she be unless she prevails in this moral character proceeding. Thus, she has the interest in pursuing her chosen profession, a goal Johnson had already achieved prior to seeking disclosure. The California Supreme Court recognizes the importance of a State Bar applicant's interest. (*Hallinan* v. *Committee of Bar Examiners* (1966) 65 Cal.2d 447, 452, fn. 3.)

[7] The examiner's reliance on the ability to exclude rebuttal or impeachment witnesses from a pretrial statement is misplaced. (See rule 1222(g), Provisional Rules of Practice of the State Bar Court.) Such rule has no bearing on the broader issue of discoverable information. There is no statutory or case law limiting civil discovery of identities of individuals to persons that may be called as witnesses in the opposing party's case in chief.

[6d] Generally, the identities of persons sought to be disclosed by interrogatories need only be reasonably calculated to lead to the discovery of admissible evidence. The Committee has never argued that the names sought were not relevant or that the evidence would not be admissible. To the contrary, by seeking to reserve the right to call the persons targeted by the interrogatories as rebuttal or impeachment witnesses, the Committee underscores the materiality of their identities and potential testimony. It also affirmatively establishes that it either already has the consent of such persons to testify in rebuttal or impeachment or anticipates that such consent might readily be obtained. The declaration of its chief staff officer unequivocally states that "The Committee will not use adverse information received from a person who will not consent to its use or who will not testify against the applicant." (Declaration of Jerome Braun, *supra*, at p. 3.)

Evidence Code section 1040 specifies that "no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceedings." It appears that the Committee, by reserving the right to call the persons for impeachment or rebuttal, may well have established the applicability of this exception to the official information privilege.

[6e] We conclude that Evidence Code section 1040 does not protect the information sought in the two interrogatories at issue here. Even assuming that the persons sought to be identified are not informers within the meaning of the official comment to Evidence Code section 1040, we find that the reservation of the right to call such persons in rebuttal or impeachment either comes within the consent exception

to Evidence Code section 1040 or reduces the Committee's need for secrecy to that of a party in the outcome of the proceeding. On the other hand, the public has an interest in seeing that justice is done in a particular case. (Official Comment to Evid. Code, § 1040; cf. *Board of Trustees* v. *Superior Court* (1981) 119 Cal.App.3d 516, 525 ["another state interest lies in '"facilitating the ascertainment of truth in connection with legal proceedings"'"].) The interest of the public and the applicant clearly outweighs the Committee's need for secrecy in this situation and Evidence Code section 1040 does not protect the requested names from disclosure. Unlike the situation in *Chronicle Publishing*, the Committee *is* a party to the litigation and *is* asserting rights which in the interests of fairness require it to divulge the requested information. Unlike the situation in *Johnson*, the applicant has a strong interest at stake.

[8a] In ruling on this issue, we must reject the Committee's request for an in camera inspection of the requested information prior to determining whether the applicant's discovery rights in preparing for the contested hearing outweighs the Committee's interest in secrecy. This request was made for the first time on motion for reconsideration on review. Generally, when a lower court ruling favors disclosure, in camera review cannot be requested for the first time on review. (*Williams* v. *Superior Court* (1974) 38 Cal.App.3d 412.) In *Williams*, the court rejected a criminal prosecutor's belated request for an in camera hearing under Evidence Code section 1042 both out of concern for avoiding duplicative effort and because disclosure was warranted as a matter of law, rendering in camera review unnecessary. (*Id.* at p. 425.) *People* v. *Allen* (1980) 101 Cal.App.3d 285, cited by the Committee, is not authority to the contrary since there the trial court had declined to order disclosure, putting the case in a different posture on appeal than in *Williams* or here.

[8b] We also have been provided with no explanation for the examiner's failure to ask either the hearing judge or the Presiding Judge for an in camera inspection prior to ruling on the requested discovery although the primary authority on which the examiner now relies for an in camera inspection is *Chronicle Publishing* which was decided over 30 years ago. The exception for a case of first impression made in *Goodlow* v. *Superior Court* (1980) 101 Cal.App.3d 969 therefore does not support the extremely belated request for in camera inspection.

[9] In any event, Evidence Code section 1040 does not itself grant any right to request in camera review. Evidence Code section 915, subdivision (b) authorizes the court in its discretion to order in camera review if it cannot rule on the matter without it. We see no merit to an in camera inspection at this juncture. The court is ill-equipped to evaluate the potential relevance of the undisclosed names absent argument from applicant's counsel which could only be made after the names were disclosed to applicant. In this respect, this matter is similar to *Saulter* v. *Municipal Court* (1977) 75 Cal.App.3d 231, in which the Court of Appeal reversed a trial judge's denial of a criminal defendant's motion for discovery of prior complaints against the victim police official, based on the judge's in camera inspection of the requested records. In ordering the matter remanded, the Court of Appeal in *Saulter* pointed out that "'The fact remains that under our constitutional system the burden for preparing a criminal defendant's case rests with his counsel . . . . That burden cannot be properly discharged unless counsel has direct access to potential witnesses, for it is counsel who must decide if they can aid his client . . . .'" (*Id.* at p. 239, quoting *Kelvin L.* v. *Superior Court* (1976) 62 Cal.App.3d 823, 829.)

4. Constitutional Right of Privacy

[10a] Under *Valley Bank* v. *Superior Court* (1975) 15 Cal.3d 652, private personal information about a non-party to a proceeding may be privileged from discovery under some circumstances pursuant to the California constitutional right to privacy. The privacy right to be protected is that of the persons sought to be identified and not that of the Committee which asserts the privilege. The custodian of the allegedly private information may not waive the privacy right. (*Board of Trustees* v. *Superior Ct.*, *supra*, 119 Cal.App.3d at p. 526.)

[10b] The constitutional right to privacy is not absolute; it must be balanced against the need for disclosures. (*Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 20.) Privacy expectations must be reasonable as a

matter of law. Case law indicates that certain personal interests and rights may deserve more weight than others in balancing tests. In *Kahn* v. *Superior Court* (1987) 188 Cal.App.3d 752, for example, the court granted a writ of mandate precluding Kahn from deposing a professor regarding what transpired at a faculty meeting regarding Kahn's appointment to a tenured faculty position, despite Kahn's insistence that he needed the testimony to prove his defamation suit against the university and professors employed thereby based on his denial of tenure.

The court balanced the constitutional right to privacy against Kahn's right to and need for discovery, finding in favor of confidentiality. The court expressly noted that Kahn's interest was only in monetary damages, since he had no right to be employed by the university which denied him tenure. (*Id.* at p. 770.) This denial of discovery is in contrast with the subsequent result in *Rider* v. *Superior Court*, *supra*, 199 Cal.App.3d 278. Although the court in *Rider* was asked to interpret the scope of section 1040, subdivision (b)(2), it also considered the constitutional right of privacy as a countervailing interest in the defamation case before it. (*Id.* at p. 282.) One factor the *Rider* court used to distinguish *Kahn* was the nature of the interest at stake. The *Rider* court characterized the consequences of nondisclosure of testimony about Kahn's tenure review, resulting in his inability to prove his defamation case, as injury to his scholarly reputation and the loss of monetary damages. (*Id.* at p. 287.) The court contrasted this with the severe opprobrium from the public at large caused by the allegations of rape against Rider. (*Ibid.*)

[10c] Since applicant has a right to practice her profession important enough to deserve due process protection (*Hallinan* v. *Committee of Bar Examiners*, *supra*, 65 Cal.2d at p. 452, fn. 3), and since she seeks to clear her name by overturning the denial of her admission for lack of sufficient moral character, her need for seeking discovery appears to merit at least as much weight as Rider's interest in clearing his name.

Porten v. *University of San Francisco* (1976) 64 Cal.App.3d 825, cited by the Committee, presents a different issue. There, the defendant had given the plaintiff's private personal information (college grade transcript) to a third party without the plaintiff's consent. The situation would be parallel here if the Committee furnished confidential information about applicant to third parties without applicant's consent. Here, the information sought is only the identities of the persons who discussed applicant with the Committee, not the substance of what they told the Committee. Applicant has waived confidentiality and is formally requesting in accordance with applicable State Bar rules that the Committee, as opposing party, furnish her with information relevant to the presentation of her case. *Porten* does not stand for the proposition that the plaintiff's privacy rights would have been violated if the defendant had released plaintiff's transcript *to him* in litigation to which such information was relevant. *Craig* v. *Municipal Court* (1979) 100 Cal.App.3d 69 is distinguishable on similar grounds.

[10d] We conclude that it would be unreasonable for potential material witnesses to have the Committee claim a right of privacy on their behalf while at the same time consenting or indicating their amenability to come forward to testify at a later date in the very same public proceeding if it appears tactically advantageous to the interest of the Committee for them to do so. Since the Committee is at this stage merely preserving the constitutional rights of these nonparties, we cannot be sure of their intentions.

[10e] If the Committee were to indicate on remand that the undisclosed persons who are covered by the interrogatories in question would not consent to be called to testify in the moral character proceeding under any circumstance, the applicant would have to make a greater showing of need than she has to date to overcome these persons' privacy rights. Applicant's own brief indicates that her primary reason for requiring disclosure is "if the State Bar intends to use the information sought by applicant against her."

Applicant also argues that obtaining the requested names is material to her claim that this proceeding is being manipulated and that many of the State Bar's witnesses have been pressured into testifying against her. **[11]** The hearing judge should

scrutinize with care any *evidence* bearing the "'earmarks of private spite.'" (*Sodikoff* v. *State Bar* (1975) 14 Cal.3d 422, 431, quoting *Peck* v. *State Bar* (1932) 217 Cal. 47, 51.) Nevertheless, it is settled that "'Whatever may have been the instigating factor, or whatever may have been the personal motive, in the initiation of the State Bar proceeding, are not matters of controlling concern in a case where the facts disclosed independently lead to the conclusion that the attorney is subject to some disciplinary action.'" (*Sodikoff* v. *State Bar*, *supra*, 14 Cal.3d at p. 431, quoting *Rohe* v. *State Bar* (1941) 17 Cal.2d 445, 450.) By the same token, the judge pro tempore will decide whether or not to find applicant to be of good moral character based on the evidence presented. **[10f]** In preparation for that hearing applicant has the right to compel discovery of the identities of persons whom the Committee itself indicates remain potentially willing to waive confidentiality in order to testify. However, the balance shifts when we consider the privacy rights of persons unconditionally refusing to testify. Applicant would have to make a greater showing to overcome these persons' privacy rights than has been made on this record.

We hereby modify the hearing judge's order to require the Committee to answer interrogatories 9 and 10 within 10 days of the date this order is served as to all persons covered by such interrogatories except those who have unconditionally refused to testify in this proceeding and will not be called by the Committee for any purpose.

B. The Conditional Order Regarding the Smiths' Depositions and Trial Testimony

During the discovery period, the examiner noticed the depositions of two nonparty witnesses, Edwin and Sandy Smith, for April 25, 1992, in Nevada City, California where the Smiths reside. Depositions are expressly authorized to be taken in moral character proceedings under rules 318 and 835. Rule 318 specifically provides that: "Except as otherwise stipulated or as authorized by section 1987(b) of the Code of Civil Procedure, attendance of the deponent . . . shall be compelled by subpoena." Business and Professions Code section 6050 provides that any person subpoenaed who refuses to appear or testify is in contempt and Business and Professions Code section 6051 provides the mechanism for punishment of disobedient subpoenaed witnesses.

The examiner failed to subpoena either of the Smiths for their April depositions. Mr. Smith did not appear at the deposition. Mrs. Smith stayed for direct examination by the examiner and left the deposition shortly after applicant's prior counsel commenced cross-examination. Both the examiner and the applicant's counsel remonstrated with her to no avail. Thereafter, the parties disagreed about who should bear the expense of rescheduling the deposition and it was not rescheduled.

On May 21, 1992, the examiner filed a motion to extend time for discovery to complete the deposition of Mrs. Smith and to take the deposition of Mr. Smith because she expected him to be unavailable for trial. On May 27, applicant moved for an order suppressing the deposition of Sandy Smith and on June 2 moved for a protective order against the renoticing of the deposition of Edwin Smith. Applicant's counsel stated that he was willing to hold the depositions in San Francisco but would not travel back to Nevada City unless the Office of Trials would pay for applicant's attorneys' expenses in doing so. On June 10, 1992, the issue was discussed at a status conference before the hearing judge which resulted in an order dated June 11, 1992, denying applicant's motion to suppress the Sandra Smith deposition, granting the State Bar's motion to extend the deadline for completion of formal discovery to June 26, 1992, and the following additional provisions:

"After extensive discussion, it was agreed that the Applicant's counsel and the Examiner will agree on a site within 70 miles of Nevada City that involves less costly travel expenses to complete the deposition. They will further agree on a date and time for the continued deposition. The State Bar was ordered to insure Ms. Smith's appearance by having her subpoenaed to appear for the deposition. The applicant's attorney indicated that he may also separately subpoena her to appear. [¶] . . . [¶] After discussion about Mr. Smith's deposition, it was agreed that his deposition will be handled in the same manner as Ms. Smith's with respect to the place, time and location. The State Bar was also ordered to subpoena his

appearance at the agreed upon date, time and location for the new deposition." (Order filed June 11, 1992.)

The applicant's counsel thereafter notified the examiner that he would like to take the depositions on June 24, 1992, in Sacramento. There is a dispute as to whether she agreed to that date or simply "tentatively" agreed. On June 12, the applicant subpoenaed Mr. Smith for his deposition on June 24 and subpoenaed Mrs. Smith the following day. On June 12, Mrs. Smith notified the examiner that the Smiths were leaving on a prepaid vacation on June 22 and would not return until July 8, thereby precluding *any* date during the extended discovery period for their depositions to be taken. The examiner states that she was previously unaware of any such vacation plans. She conveyed them to applicant's counsel on June 15 and memorialized them in a letter to the hearing judge the same date. The examiner then unilaterally decided she would not subpoena the witnesses for deposition in light of their alleged unavailability and asked the Smiths to send a letter to applicant's counsel concerning their travel plans. She apparently made no mention to the Smiths of any need to move to quash the subpoenas which had been served by applicant's counsel. She then subpoenaed the Smiths for trial.

Applicant's counsel served a notice of deposition on June 17 and advised the Smiths that they were required to appear on June 24. They failed to do so, as did the examiner. Applicant and an investigator filed affidavits attesting to the Smiths' presence at work through June 24 and the examiner concedes that they were not on vacation as they had stated in seeking to avoid their depositions and that they could have attended the depositions. Applicant then filed a motion to preclude the State Bar from presenting any evidence on the Smith matter, including their testimony.

According to applicant, the Smiths indicated that the examiner led them to believe that if she did not subpoena them for deposition but subpoenaed them for trial they did not need to appear to honor the applicant's deposition subpoenas. The examiner disputes this and takes no responsibility for the fact that applicant has expended over $4,000 in connection with the Smiths' aborted depositions.

The judge pro tempore, who had been assigned the case for trial due to the originally assigned hearing judge's unavailability, denied outright issue preclusion as a sanction, but issued an order on July 27, 1992, requiring the State Bar to produce the Smiths for deposition on the first day of trial or be precluded from calling them to testify at the hearing if they failed to appear at the deposition. She also ordered that applicant would be permitted an additional opportunity for investigation or discovery if necessitated by new issues raised in the depositions. On August 10, 1992, her order was clarified to require the Smiths to be produced for deposition on the first day of the examiner's presentation of rebuttal evidence which would be the same day as the Smiths' scheduled trial testimony. The order required applicant to prepare the notices if applicant intended to take the depositions.[9] **[12 - see fn. 9]** Both sides are dissatisfied with this ruling.

On review, applicant seeks to have us vacate the judge pro tempore's order and issue an order precluding the Smiths from testifying at trial, an order suppressing the deposition of Sandra Smith and an order precluding the State Bar from introducing any

9. We grant applicant's motion to augment the record to include the order of the judge pro tempore as modified on August 10, 1992. **[12]** On applicant's motion, we strike the supplemental declaration of the examiner as untimely offered, and we deny the examiner's counter-motion to augment the record to include such declaration. This declaration related to facts surrounding events in June of 1992 which should have been presented, if relevant, to the judge pro tempore in connection with the order we review, not offered for the first time on review.

10. Applicant's motion to strike the examiner's request to vacate the hearing judge's order is denied. Even if such request would have been untimely if embodied in a petition for discovery review of the original unmodified order, it was still proper as part of the examiner's response to applicant's timely petition and as a request for review of the order as modified on August 10.

evidence at trial concerning the Smith matter. The examiner argues that applicant's allegation of prosecutorial misconduct is frivolous and also argues that the judge pro tempore's order should be vacated because it would be unjust to the public to preclude the Smiths' testimony or to require them to be deposed the same day as a condition thereof.[10] She argues that the condition of a deposition on the same day would dissuade the Smiths from participating.[11]

[13a] While there is no evidence that the examiner acted in bad faith, the examiner's conduct clearly fell short of her duty under the circumstances. The Smiths had a legal obligation to honor applicant's subpoenas which could not be discharged by letter as suggested by the examiner. Applicant's subpoenas would have been unnecessary if the examiner had discharged her original duty under rule 318 to subpoena the Smiths for deposition in April or her duty to fulfill the ensuing order of the court to subpoena them for deposition in June.

The examiner conceded at oral argument that if Code of Civil Procedure section 2025, subdivision (j) were applicable, it would expressly make her office subject to monetary sanctions for applicant's attorney's wasted trip to Nevada City in April for the depositions of the Smiths. This is because section 2025, subdivision (j)(2) provides that "If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, the court shall impose a monetary sanction . . . unless the court finds that . . . circumstances make the imposition of the sanction unjust."

[14] However, the Civil Discovery Act has not been adopted in its entirety in the conduct of State Bar proceedings. Rule 321 expressly renders inapplicable provisions in the Civil Discovery Act for the imposition of monetary costs or sanctions in disciplinary or moral character proceedings. It does expressly authorize as sanctions an order "that the disobedient party shall not be allowed to support or oppose designated claims or defenses or introduce in evidence documents or items, or testimony of the physical or mental condition of the person sought to be examined . . . ."

In *Waicis* v. *Superior Court* (1990) 226 Cal.App.3d 283, 287, an appellate court noted that "The sanction of preclusion of the testimony of a noncooperative deponent is authorized by the discovery statutes." The court then upheld the evidentiary sanction precluding from trial the testimony of a noncooperative expert witness. As the court noted, "Since Waicis selected Dr. Frankel as an expert witness, she must bear adverse consequences which flow from his failure to comply with the requirements of the legal process." (*Id.* at p. 288, fn. omitted.) Case law from other jurisdictions provides additional persuasive authority in support of the judge pro tempore's order. The Supreme Court of Michigan held that a trial court did not abuse its discretion in striking an expert witness from a party's witness list, in light of prior express orders of the court ordering that plaintiffs produce the witness for continued deposition. (*Korsh* v. *Boji* (Mich. 1984) 348 N.W.2d 4.)

This analysis is not limited to expert witnesses. In a New York case involving a situation where the court had no jurisdiction over a non-party and could not subpoena him to appear at deposition or at trial, the court was within its discretion to order that any witness's failure to appear for deposition would preclude that witness from testifying at trial. This was within the court's power to "control the proceedings in its own courtroom and insure that the trial to be conducted would be a fair one." (*Sarac* v. *Bertash* (N.Y. 1989) 148 A.D.2d 436, 437.) **[15]** Judges in State Bar proceedings have similar inherent authority to exercise reasonable control over the proceedings in front of them. (Cf. *Jones* v. *State Bar* (1989) 49 Cal.3d 273, 287.)

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11. The position of the examiner is curious in light of the fact that the examiner has subpoenaed the Smiths for trial and has the power to pursue penalties for contempt if they fail to appear. If she is signaling her unwillingness to hold subpoenaed witnesses to their legal duty, then she is undermining the entire premise of compelled testimony. She must apprise the Smiths of the serious penalties that could follow if they fail to honor the subpoenas.

[13b] We uphold the judge pro tempore's authority to permit the testimony of the Smiths only if they first are deposed. However, we modify her order to require the examiner, as a condition of the Smiths' ability to testify at trial, to subpoena the Smiths for their deposition as the examiner was required to do under rule 318 in the first instance and was ordered to do by the hearing judge.

[13c] Pursuant to rule 318 of the State Bar rules, the deposition expenses shall be borne by the party taking the deposition. We read rule 318 to permit the Office of Trials to pay for the cost of transporting applicant's counsel to Nevada City for purposes of the Smiths' depositions or of transporting the Smiths to San Francisco for their depositions. We deem these expenses reasonable expenses of the renoticed depositions under the circumstances and we further modify the conditional order to require these expenses of the depositions to be paid as a condition of permitting the use of the Smiths' testimony at trial. Had the Committee's counsel elected to pay these expenses in the spring following its original failure to subpoena the witnesses, it could have avoided the far more considerable time and expense incurred in its motion to extend discovery and the ensuing paper war over this issue.

Both parties also challenge the timing of the Smiths' deposition ordered by the judge pro tempore, who was understandably trying not to delay the proceedings if it could be avoided. Applicant asserts that taking the depositions the same day as the Smiths are to testify will not give her sufficient time to prepare following their depositions. The examiner argues the Smiths would be exhausted if twice cross-examined in one day. The hearing date has necessarily been delayed for purposes of seeking review of both discovery orders and discovery has not yet been completed pursuant to our determination of the motion to compel answers to interrogatories. In light of that delay, a new hearing date has yet to be set. To accommodate both parties' concerns, we order that the depositions be noticed by the examiner for a date at least one week in advance of the commencement of that hearing.

The stay of proceedings in the hearing department previously ordered by the Presiding Judge is hereby vacated, and the hearing department shall resume conduct of this proceeding in a manner not inconsistent with this opinion.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID M. LYBBERT

A Member of the State Bar

No. 91-C-04924

Filed February 23, 1993

SUMMARY

While in law school, respondent signed blank welfare eligibility forms which his wife then filled out, fraudulently failing to report respondent's income so that the welfare grant needed to feed their nine children would not be reduced. Shortly after his admission to practice, respondent was convicted of welfare fraud and placed on interim suspension. Respondent was candid and cooperative with the welfare authorities and the State Bar, was remorseful, had made substantial restitution despite financial problems, and presented evidence of good character. In light of these mitigating circumstances, the hearing judge recommended three years stayed suspension, three years probation, and eighteen months actual suspension with credit for the time spent on interim suspension. (Philip L. Johnson, Judge Pro Tempore.)

Both parties requested review, the examiner arguing for disbarment and respondent seeking a reduction of the actual suspension to the time already served on interim suspension. The review department held that disbarment was not warranted, and found no reason in the record to depart from the two-year minimum actual suspension called for by the Standards for Attorney Sanctions for Professional Misconduct, except by crediting respondent for the time served on interim suspension.

COUNSEL FOR PARTIES

For Office of Trials: Billy R. Wedgeworth

For Respondent: Ellen A. Pansky

HEADNOTES

[1] 101 Procedure—Jurisdiction
1699 Conviction Cases—Miscellaneous Issues

Where respondent was convicted after being admitted to practice law for criminal conduct occurring before such admission, there was statutory authority for disciplining respondent as an attorney, based on the conviction. Had the conviction occurred earlier, the disciplinary system would still have had jurisdiction over the misconduct under the Supreme Court's inherent authority.

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] **162.20 Proof—Respondent's Burden**
165 Adequacy of Hearing Decision
795 Mitigation—Other—Declined to Find
1512 Conviction Matters—Nature of Conviction—Theft Crimes

Where respondent, who had pleaded guilty to welfare fraud based on eligibility statements signed by him but filled out by his wife, attempted to establish in mitigation that he did not know of his wife's fraudulent conduct, it was respondent's burden to prove such mitigation, and review department gave great weight to hearing judge's contrary finding based on evaluation of credibility of respondent and his wife.

[3 a, b] **159 Evidence—Miscellaneous**
162.19 Proof—State Bar's Burden—Other/General
164 Proof of Intent
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1691 Conviction Cases—Record in Criminal Proceeding

Where respondent's knowledge of welfare fraud perpetrated by his wife was conclusively established by his guilty plea to a crime of which fraud was an essential element, the State Bar did not need affirmative evidence beyond the conviction itself to prove respondent's participation in the fraud.

[4] **730.10 Mitigation—Candor—Victim—Found**
735.10 Mitigation—Candor—Bar—Found
745.10 Mitigation—Remorse/Restitution—Found
1092 Substantive Issues re Discipline—Excessiveness
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply

Where respondent, after authorities' discovery of welfare fraud committed by him and his wife, was cooperative with welfare authorities and remorseful, took full responsibility, and stipulated to most of the facts at the State Bar hearing, hearing judge was justified in recommending lengthy suspension in lieu of disbarment.

[5] **745.31 Mitigation—Remorse/Restitution—Found but Discounted**
760.12 Mitigation—Personal/Financial Problems—Found

In light of respondent's very limited ability to pay, it was appropriate to consider in mitigation fact that restitution ordered by criminal court was nearly complete, but such fact was given less weight than if restitution had begun earlier as a voluntary act.

[6] **791 Mitigation—Other—Found**

Uncontroverted evidence of respondent's church, community, and volunteer activities was appropriate to consider in mitigation.

[7] **1099 Substantive Issues re Discipline—Miscellaneous**
1549 Conviction Matters—Interim Suspension—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues

Whether a suspension is interim or actual, the effect on the attorney is the same. The issue is what is the appropriate total length of suspension under the circumstances of each case.

[8] **795 Mitigation—Other—Declined to Find**
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1518 Conviction Matters—Nature of Conviction—Justice Offenses
It was not mitigating that when respondent signed a declaration that the information on welfare eligibility forms was true, the forms were actually still blank, and untrue information was filled in thereafter by respondent's wife. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

[9] **141 Evidence—Relevance**
1699 Conviction Cases—Miscellaneous Issues
In recommending discipline in a matter arising from a criminal conviction, 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.

[10] **1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply**
The Supreme Court has effectively modified the standard calling for a minimum two-year prospective suspension in matters arising from convictions for crimes of moral turpitude, by rejecting the requirement that the suspension be automatically prospective.

[11 a, b] **801.45 Standards—Deviation From—Not Justified**
801.47 Standards—Deviation From—Necessity to Explain
1093 Substantive Issues re Discipline—Inadequacy
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
The Supreme Court has expressed concern that the State Bar Court should make clear the reasons for departure from the standards in any case where the recommended discipline differs therefrom. Where hearing judge did not articulate basis for recommending 18 months suspension instead of two-year minimum called for by applicable standard, respondent would have had to wait two years to reapply for admission if criminal conviction had occurred prior to admission to practice, and no reason appeared on record to depart from standard except to give credit for time spent on interim suspension, review department recommended actual suspension of two years.

[12] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
113 Procedure—Discovery
139 Procedure—Miscellaneous
Issue of alleged misconduct of examiner during pretrial discovery was moot, where issue had been addressed by order of hearing judge which respondent did not challenge on review, and where only prejudice alleged was unnecessary prolongation of interim suspension for which review department gave respondent credit against recommended actual suspension.

[13 a, b] **176 Discipline—Standard 1.4(c)(ii)**
Requiring respondent to show rehabilitation and fitness to practice before termination of two-year actual suspension was particularly appropriate where respondent was placed on interim suspension shortly after admission to practice due to conviction for criminal conduct committed before admission, which, if conviction had occurred prior to admission, would likely have resulted in denial of admission and requirement to reapply after two years.

[14] **171 Discipline—Restitution**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

In hearing to establish fitness to return to practice after suspension, respondent could either show that restitution had been completed or that restitution had been made to the best of respondent's financial ability.

[15] **173 Discipline—Ethics Exam/Ethics School**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

Where time period between effective date of discipline and eligibility to apply to return to active practice would not necessarily be long enough for respondent to take and pass professional responsibility examination before hearing on fitness to practice, review department did not recommend that respondent be given less than the normal one-year period to pass such examination. Passage of the examination would be relevant evidence at fitness hearing but was not a condition precedent to return to practice.

ADDITIONAL ANALYSIS

Mitigation
Found but Discounted
740.32 Good Character
Standards
801.20 Purpose
Discipline
1613.09 Stayed Suspension—3 Years
1615.08 Actual Suspension—2 Years
1616.50 Relationship of Actual to Interim Suspension—Full Credit
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
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION ON REVIEW AND ORDER DENYING MOTION TO VACATE ORDER OF INTERIM SUSPENSION

PEARLMAN, P. J.:

This matter involves a criminal misdemeanor conviction for welfare fraud by respondent, David M. Lybbert, a law student who was admitted to practice shortly before his guilty plea. Had respondent's criminal conduct come to light sooner, he would presumably have been denied admission and required to wait two years to reapply.[1] **[1 - see fn. 1]** The hearing judge pro tempore, in light of mitigating circumstances, recommended 18 months suspension with credit for time served on interim suspension. Respondent has been on interim suspension since September 1991.

Both respondent and the Office of Trials sought review. The respondent's counsel contends the recommendation is too severe and urges that his suspension be limited to time already served; the examiner seeks disbarment or, in the alternative, two years prospective suspension pursuant to standard 3.2 of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("the standard(s)").

Respondent's petition for review was accompanied by a simultaneous motion to vacate respondent's interim suspension. Since the issue of the propriety of vacating the interim suspension order was intertwined with the determination of the cross requests for review, the motion was set for oral argument together with the review requests and determined at the same time.

The only basis for deviating from the standards which has been presented is the appropriateness of credit for time already spent on interim suspension. We find the credit appropriate in this case. We therefore increase the recommended suspension to include actual suspension for two years and until satisfaction of the standard 1.4(c)(ii) requirement that respondent prove present fitness to practice and ability in the general law before relief from actual suspension is granted. Because respondent has already been required to comply with rule 955 of the California Rules of Court in connection with his interim suspension, we delete that requirement. In all other respects, we affirm the decision below. Accordingly, we also deny the motion to vacate the order of interim suspension.

FACTS

On September 13, 1990, respondent, along with his wife, entered a plea of guilty to a misdemeanor violation of California Welfare and Institutions Code section 10980, subdivision (c) in the Riverside County Municipal Court, thereby admitting that they both wilfully and unlawfully, by means of false statement, obtained and retained aid under the provisions of division 9 of the Welfare and Institutions Code for themselves and their children in an amount exceeding $400. Neither respondent nor his wife was sentenced to any jail time, but they were placed on summary probation and ordered to make restitution and to complete 300 hours of community service.

Thereafter, discharging authority delegated by the Supreme Court, we ordered that respondent be placed on interim suspension from the practice of law, effective September 21, 1991, since he had been convicted of a crime involving moral turpitude. (Bus. & Prof. Code, § 6102 (a).)[2] We also ordered that the matter be referred for a hearing and decision recommending the discipline to be imposed.

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1. **[1]** Because respondent's conviction occurred after his admission to practice, there is statutory authority for disciplining him as an attorney, based on the conviction. (Bus. & Prof. Code, §§ 6100-6101; *In re Bogart* (1973) 9 Cal.3d 743, 749.) Had the conviction occurred earlier, the disciplinary system would still have jurisdiction over his misconduct under the Supreme Court's inherent authority. (*Stratmore v. State Bar* (1976) 14 Cal.3d 887.)

2. The original effective date of suspension was ordered to be September 1, 1991, but was postponed temporarily to consider respondent's "Motion to Vacate, Delay the Effective Date of and Temporarily Stay the Effective Date of Interim Suspension . . . ." That motion was opposed by the Office of Trial Counsel and denied by the review department by order filed September 11, 1991.

In proceedings before a judge pro tempore of the hearing department pursuant to the notice of hearing re conviction in this matter, respondent and the Office of Trials entered into a partial stipulation as to facts which were deemed admitted with no additional proof required or contradictory evidence allowed during the hearing. The stipulated facts included the fact that on or about November 4, 1987, respondent and his wife applied for cash aid and food stamps at the Riverside County Department of Public Social Services ("DPSS") at which time respondent personally signed three forms acknowledging his duty to report all income received. Beginning November 4, 1987, respondent knew he was legally required to report to the DPSS any receipt of money from any source.

From November 1987 through January 1989, respondent received income each month from his work as a law clerk for the law firm of Garrett, Fisher, Jensen & Sanders, totalling approximately $7,400. Subsequent to November 4, 1987, during 15 consecutive months, respondent signed monthly eligibility reports which failed to disclose the income he received from Garrett, Fisher, Jensen & Sanders. Respondent's failure to report his earnings resulted in a cash overpayment of $7,489 and a food stamp overissuance of $2,751 from DPSS.

BACKGROUND

Respondent was born on June 27, 1942, in Utah and married his wife, Marsha, on November 11, 1969. He obtained a bachelor of science degree in microbiology in 1975 from Colorado State University. After completing college, respondent began work with a small pharmaceutical laboratory in Denver, Colorado, where he worked for about six months. He then obtained a job in southern Colorado, as a caretaker of a cattle range, until the end of October 1976.

Thereafter, the Lybbert family moved to Denver, and respondent worked as a lab technician at a community college until about July 1980. He then unsuccessfully tried to sell life insurance during the latter part of 1980 and early 1981.

In the summer of 1981, the Lybbert family moved to Oklahoma to join some friends who were attempting a land development project which terminated unsuccessfully in about December 1981. Lybbert then began working part-time as a custodian at a church. He made contact with some people who had developed an acid process to enhance recovery of oil from Oklahoma oil fields. The company for which respondent first began to work in connection with the oil recovery project went bankrupt. The process was sold to a Denver firm, for which respondent continued to work until December 1985. At that time, the Denver firm also closed down.

In 1986, respondent could not find work in either Oklahoma or Colorado. On a friend's recommendation, he came to California to look for work, was unable to find any, and eventually applied for and was accepted at Western State University Law School. Meanwhile, his wife Marsha and their then eight minor children were in Oklahoma, receiving assistance from her father. Respondent stayed with friends when he commenced law school at Western State in January 1987, and for part of that year worked part-time with Norrell Temporary Services.

In September 1987, Marsha Lybbert won a car in a contest, and elected to take cash instead of the car. Using the $5,000 Marsha had won, she and the children moved to California in September 1987 to reunite the family. Other than respondent's part-time income, the only asset the family had to support themselves was the remainder of Marsha's prize money. In about November 1987, the Lybberts applied for public assistance.

With respect to the facts underlying the criminal conviction, respondent testified at the hearing that he knew that if his family experienced a change in income, it was to be reported; that he began working for the Garrett law firm on approximately Thanksgiving 1987 and that he never reported to DPSS that he had begun working. Between November 1987 and January 1989, he was the sole source of support for his wife and, by then, nine minor children, except for welfare benefits.

In explanation of his misconduct, respondent testified that while he was attending law school from

1987 through 1989, he was usually gone from the home by 6:30 a.m., returning at 10 p.m. On other nights he studied until midnight. During this time he had no household responsibilities. His wife was responsible for the family finances, including the responsibility to report any income to DPSS. Respondent testified that the monthly eligibility reports would come in the mail approximately the last day of each month. He would take the blank form and sign it. His wife would then complete it and submit it. He testified that he never discussed with her what she was or was not including as income, and he never saw the DPSS checks. In 1989, after their benefits were cut off, he learned from his wife that they had failed to report his income. After learning that his income had not been reported, he decided to contact the DPSS and find out how much they owed. During his interview with the DPSS investigator, he never denied responsibility. He further testified that the "failing was—he didn't supervise it," meaning the filing of the monthly reports, but acknowledged that without welfare benefits he would not have been able to make it through law school. At the time of the hearing respondent had repaid more than $7,000 of the $10,000 owed in restitution to the government.

Marsha Lybbert, respondent's wife, also testified on his behalf. She testified that, upon receipt of the monthly eligibility forms, she would pin them on the bulletin board and respondent would sign them in blank. He would always be away when she filled them out. She completed all the reports and never told respondent she was not reporting his income. She agonized over that monthly. She acknowledged that she knew, based on a prior episode in Colorado when she and the children were living separately from her husband, that if she reported any income, the government would take that much away in dollars and food stamps. She knew that she should report the income and expressed remorse that she did not report it. However, she found it very hard to see her nine children go hungry. Although she spoke with her husband all the time, she testified that she did not tell him what she had done until the initial letter arrived from DPSS asking them to report for an investigation. She testified that she told the DPSS investigator that they were sorry, that they did not deny what they had done, and that respondent had signed the forms in blank.

The DPSS investigator was called as a witness and testified that both the Lybberts were cooperative with her investigation and that either respondent or his wife, she could not recall which, informed her that they needed extra money for respondent to attend law school.

The judge below found that even if the forms were, in fact, signed by respondent in blank, as respondent and his wife testified, respondent was nonetheless certifying that the information contained on each form was correct. The judge rejected the credibility of both of the Lybberts on the issue of whether they ever discussed respondent's income and its effect on their welfare benefits. He also found it implausible that a law student would sign such a form in blank and then fail to ensure that the information contained in said form was complete and accurate.

MITIGATING CIRCUMSTANCES

The judge pro tempore found no aggravating circumstances. In mitigation, he found that respondent was open, candid and cooperative during the Riverside County DPSS investigation.

Several witnesses testified as to respondent's good character. John Hemphill Frost, an attorney in private practice in Riverside, met respondent in 1990, when he represented the plaintiff and respondent represented the defendant in an automobile accident case. They became friends and met on a weekly basis. The judge below found that Frost was told by respondent about the facts of the welfare fraud and that, despite such knowledge, Frost testified that he had the highest regard for respondent and would not hesitate to hire him for his own law firm.

John Michael Harris, in-house counsel for Continental Insurance Company, also met respondent in law school. He testified that respondent had never denied violating the law. Harris had not heard of any dishonest acts by respondent, other than the admitted fraud. He had not seen respondent exhibit any other

unethical conduct and believed respondent fit to practice law.

Attorney Edgar C. Johnson was also a classmate of respondent's during law school. Although Johnson was aware of some problems respondent had with welfare, he was not aware of respondent's conviction. Johnson, however, considered respondent to be "of high integrity" and believed respondent fit to practice law.

The court also admitted into evidence and considered five letters from friends and associates of respondent and the bishop of the Mormon Church of which he is an active member. Although the writers of the letter did not indicate their familiarity with respondent's conviction, each letter attested to respondent's integrity.

The judge below also took into account the economic circumstances faced by the Lybberts while respondent was in law school, working to better their condition.

DISCUSSION

[2a] Respondent's counsel argues that we should reverse the factual findings of the hearing judge rejecting the credibility of the Lybberts on the issue of respondent's knowledge of the fraud. This overlooks the legal implications of the crime he pleaded guilty to committing. **[3a]** Respondent's knowledge of the welfare fraud perpetrated by his wife by failing to report his part-time income from clerking during law school is established conclusively by the conviction. (Bus. & Prof. Code, § 6101 (a); see *In re Higbie* (1972) 6 Cal.3d 562, 570; *In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201; *People* v. *Ochoa* (1991) 231 Cal.App.3d 1413, 1420, fn. 1.) **[2b]** To the extent that respondent sought to establish in mitigation that he was too immersed in his law studies to pay attention to family finances, it was his burden of proof, not that of the State Bar. The judge pro tempore was in the best position to evaluate the witnesses' credibility and we give great weight to his determination. (Rule 453, Trans. Rules Proc. of State Bar.)

Respondent's counsel cites *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737 for the proposition that rejection of uncontroverted testimony does not create affirmative evidence. *In the Matter of DeMassa* is not apposite. **[3b]** Prior to the State Bar proceeding, respondent had already pleaded guilty to obtaining or retaining aid for himself for a child not entitled thereto "by means of false statement or representation . . . or other fraudulent device." Unlike the situation in *In the Matter of DeMassa*, the State Bar did not need affirmative evidence beyond the conviction itself to prove respondent's participation in the fraud, since it was an essential element of the crime to which he pleaded guilty. (See *People* v. *Ochoa*, *supra*, 231 Cal.App.3d at p. 1420, fn. 1.) The State Bar's production of proof of the guilty plea conclusively established that respondent committed all of the elements of the crime. (*In re Higbie*, *supra*, 6 Cal.3d at p. 570.) **[2c]** It was respondent who had the burden of establishing the mitigating circumstances and his rehabilitation. (*Warner* v. *State Bar* (1983) 34 Cal.3d 36, 42-43; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 699.)

[4] The examiner, on the other hand, argues that there was no cognizable evidence in mitigation, thereby justifying disbarment. The record discloses that the hearing judge did have mitigating evidence on which to base his recommendation of lengthy suspension in lieu of disbarment. As soon as the DPSS raised the Lybberts' failure to report income, respondent was cooperative and remorseful and took full responsibility for the fraud. This was taken into account in the recommendation of the welfare investigator that a misdemeanor be charged and not a felony. The welfare investigator also testified to the same effect at the State Bar hearing. Respondent also cooperated by stipulating to most of the facts at the State Bar hearing. Cooperation and remorse are appropriately taken into account in mitigation. (Std. 1.2(e)(vii).)

[5] Although restitution was ordered as part of respondent's criminal probation, given his very limited ability to pay, it does not appear inappropriate to consider in mitigation that restitution is almost complete. (Std. 1.2(e).) We give this less weight, however, than if the restitution had begun earlier as a voluntary

act. (See *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 213; *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 13.)

[6] It is also appropriate to consider in mitigation uncontroverted evidence offered below of respondent's church and community activities including 10 to 15 hours per month of volunteer work to counsel people in crisis. (See, e.g., *In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.) This was in addition to fulfilling the community service imposed as part of his criminal probation. Attestation to his good moral character by others is also entitled to some weight in mitigation. Three witnesses testified at the hearing and five letters were submitted on Lybbert's behalf, including one from the bishop of his church. The letters were objected to as hearsay, but the examiner did not raise this issue on review and, in response to questions from the bench, he stated that he had withdrawn any objection. We therefore consider all eight character attestations, but give the letters little weight because they do not indicate knowledge of the misconduct.

DISCIPLINE

Respondent's counsel relies on several inapposite cases in arguing that we should cut short the suspension here to the time already served on interim suspension. For example, she again cites to *In the Matter of DeMassa* in which two months actual suspension was ordered. That analogy is misplaced since DeMassa's crime (harboring a fugitive overnight) was committed in overzealous representation of a client for no personal gain 12 years before the State Bar Court Review Department acted. DeMassa had enjoyed an excellent reputation prior to the conviction and, in the intervening 12 years, there was overwhelming evidence of mitigation and rehabilitation, including numerous judges and highly reputable attorneys attesting to DeMassa's good character.

Respondent's counsel also cites *In re Rohan* (1978) 21 Cal.3d 195 and *In re Morales* (1983) 35 Cal.3d 1, neither of which involved acts of moral turpitude. It is simply not true as respondent's counsel argues that "there is virtually no difference between" Morales' repeated failure to withhold or pay payroll taxes and employment insurance contributions and Lybbert's repeated fraudulent declarations under penalty of perjury.

Respondent's counsel also cites *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502 and *In re Kristovich* (1976) 18 Cal.3d 468, both of which involved attorneys convicted of perjury, but neither of these attorneys committed it repeatedly for an extended period of time as did Lybbert.[3] Kristovich's lenient discipline was imposed in light of a lengthy otherwise unblemished record of practice, the lack of any personal gain from his misconduct and many character references to his otherwise distinguished career. Katz was on interim suspension for seven years which was taken into account in determining the minimum of six months prospective suspension recommended by this review department in 1991, which was coupled with a requirement of a hearing under rule 1.4(c)(ii) prior to resuming practice. Similarly, in *In re Effenbeck* (1988) 44 Cal.3d 306, the one-year prospective suspension followed five years of interim suspension.

[7] As the Supreme Court succinctly stated in crediting the respondent with his four years of interim suspension in *In re Leardo* (1991) 53 Cal.3d 1, 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." The judge below similarly took into account the time respondent has spent on interim suspension. The issue is what is the appropriate total length of suspension under the circumstances of each case. If anything, the *Katz* and *Effenbeck* cases would suggest that lengthy

3. *In re Chira* (1986) 42 Cal.3d 904, in which no actual suspension was ordered, is similarly distinguishable. Chira's tax fraud conviction for a single incident involving backdated documents was the only misconduct in an otherwise unblemished legal career of 24 years. Chira was so devastated he did not practice law for 3 years after his conviction and underwent about 100 hours of therapy prior to the Supreme Court's review of his record for purposes of assessing discipline. *In re Chernik* (1989) 49 Cal.3d 467 involved a similar incident of backdating in a tax shelter scheme only in the practice of law and not in connection with personal affairs as in *In re Chira*. Chernik received one year actual suspension for this single fraudulent transaction after taking into account his otherwise unblemished record in 20 years of practice.

actual suspension is also warranted here.

[8] Respondent signed his name under penalty of perjury to 15 monthly welfare forms which deliberately omitted mention of income which would have disqualified his family from receiving some of the welfare benefits they obtained. He and his wife signed a statement which acknowledged that this was done to allow him to pay law school tuition in the accelerated program in which he had enrolled. Declarations under penalty of perjury are documents which go to the heart of the role of attorneys as officers of the court. Respondent sought to downplay his misconduct by explaining that he signed blank forms under penalty of perjury without any regard to how they would later be completed. His attempt at mitigation is misguided. It is not mitigating that respondent irresponsibly signed them in blank rather than signing them after they were completed improperly by his wife. Such conduct is equally reprehensible. "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." (Pen. Code, § 125.) Respondent wilfully represented to the DPSS that each completed monthly form was personally attested to as true and cannot deny knowledge that such representations were fraudulent. (See generally 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1983) §§ 602-611, pp. 680-695.) Indeed, it gives the appearance of an attempt in advance to create deniability on his part of any personal wrongdoing.

In assessing the appropriate discipline we are not persuaded that the disbarment cases of *In re Crooks* (1990) 51 Cal.3d 1090 and *Stanley* v. *State Bar* (1990) 50 Cal.3d 555, cited by the examiner, are analogous. Crooks's and Stanley's misconduct was far more egregious. Crooks was sentenced to two years in jail for conspiracy to defraud the United States in a multi-million dollar fraudulent tax shelter investment scheme involving thousands of investors. *Stanley* involved an attorney who was convicted of 3 crimes of moral turpitude; committed more than 30 acts of misconduct against more than 20 clients; and misappropriated more than $20,000. **[9]** Respondent's counsel is correct that in recommending discipline "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 the Matter of DeMassa*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 747.)

The examiner has made alternative recommendations of disbarment or a minimum of two years actual suspension. He has not persuaded us that the facts and circumstances warrant disbarment here. Neither party cited *Stratmore* v. *State Bar*, *supra*, 14 Cal.3d 887 which is somewhat analogous to the present case. There, a law student defrauded 11 New York firms who interviewed him for a job and misappropriated a similar amount of money as respondent did here if we consider the effect of inflation.[4] The primary question was whether Stratmore could be disciplined for misconduct before becoming a member of the bar when there was no legislative authorization for the Supreme Court to discipline an attorney in an original proceeding under such circumstances. The Supreme Court answered that question in the affirmative. In assessing discipline, the Court ordered Stratmore suspended for two years, stayed, on conditions including actual suspension for nine months.

Here, instead of multiple simultaneous acts of fraud, we have 15 consecutive months of fraud which presents more troubling extended deceit. (Cf. *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300 [two years actual suspension primarily for repeated fraud on the probate court]; *In the Matter of Hertz*, *supra*, 1 Cal. State Bar Ct. Rptr. 456 [two years actual suspension primarily for extended fraud on the court and opposing counsel].) Here, we also have far more mitigation offered than appears to have been offered by Stratmore, but we do have a criminal conviction which was not obtained in the *Stratmore* case. We also have more recent high court decisions favoring more substantial discipline and standards for discipline which are far more stringent than the prevailing

4. Respondent received approximately $10,000 worth of benefits in 1987-1988 by concealing over $7,000 in income. Stratmore obtained over $5,000 by larceny in 1971.

case law at the time *Stratmore* was decided. (See *Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131.)

The standards were adopted by the State Bar Board of Governors in 1985 in order to provide guiding principles in fixing discipline for lawyer misconduct. Standard 3.2 calls for a minimum of two years prospective suspension for final conviction of a crime of moral turpitude, regardless of mitigating circumstances.

[10] The Supreme Court has effectively modified standard 3.2, by rejecting the requirement that the suspension be automatically prospective since "strict reliance on standard 3.2 does not appear to adequately fulfill the goal of ensuring that the State Bar Court's disciplinary recommendations are fair and consistent." (*In re Young* (1989) 49 Cal.3d 257, 268, fn. omitted.) **[11a]** The Supreme Court has in other cases expressed its concern that the State Bar Court should make clear the reasons for departure from the standards in any case where the recommended discipline differs therefrom. (See, e.g., *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [increasing recommendation of 18 months suspension by the former volunteer review department to 2 years actual suspension in a case where standard 1.7(b) called for disbarment absent the most compelling mitigating circumstances].)

[11b] Here, the judge below did not articulate the basis for recommending 18 months suspension instead of following standard 3.2. We note that had Lybbert's 15 months of fraud in 1987 and 1988 on the Riverside County DPSS while a law student come to light before he was admitted in 1989, he would presumably have been denied admission and required to wait two years to reapply. (Former rule X, § 104, Rules Regulating Admission to Practice Law in California (as amended to May 13, 1989); see now rule X, § 3, Rules Regulating Admission to Practice Law in California (as amended to July 13, 1991).) This period of time coincides with the minimum called for under standard 3.2 for a crime of moral turpitude. No reason appears on the facts established in this record for us to depart therefrom except to extend credit for time spent on interim suspension. (*In re Young*, *supra*, 49 Cal.3d at p. 261; *In re Leardo*, *supra*, 51 Cal.3d at p. 18.)[5] **[12 - see fn. 5]**

[13a] Because the recommended length of actual suspension is two years, we also include the normal recommendation of a standard 1.4(c)(ii) hearing prior to resumption of practice. We made such a recommendation in *In the Matter of Passenheim* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 62, 69, recommended discipline imposed by Supreme Court, May 19, 1992 (S014161). In that proceeding respondent had similarly practiced for a short period of time before he was interimly suspended for a conviction stemming from criminal conduct prior to admission to practice law.[6]

[13b] Here, in light of the fact that respondent would in all likelihood have faced denial of admission and a reapplication hearing two years later had his criminal conviction occurred before he was admitted to practice, it seems particularly appropriate to impose the requirement of a standard 1.4(c)(ii) hearing in conjunction with his two-year suspension. **[14]** Since restitution is not yet complete, respondent may be permitted to show either that he has completed restitution or that he has made restitutionary payment 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.)

We therefore adopt the recommendation of the judge below of three years stayed suspension and three years probation upon the conditions set forth in

5. **[12]** Respondent's counsel also raised in her brief on review alleged misconduct on the part of the examiner during pretrial discovery which was addressed by the judge below in a pretrial order. Since respondent's counsel does not challenge that order on review and the only prejudice alleged is unnecessary prolongation of respondent's interim suspension, we consider the issue moot in light of the discipline we recommend.

6. The Supreme Court, in accepting the recommendation of the review department, ordered that Passenheim receive the recommended credit for time already served on interim suspension, rendering him immediately eligible to petition the State Bar Court for termination of suspension upon fulfilling the standard 1.4(c)(ii) requirement. (Trans. Rules Proc. of State Bar, rule 812.)

the decision filed July 24, 1992, as amended by his order dated August 4, 1992, with the following modifications: that the stay of the three-year suspension be conditioned on respondent receiving actual suspension for two years and until satisfaction of standard 1.4(c)(ii) instead of eighteen months actual suspension; that credit be given for time spent on interim suspension; and that respondent not be ordered to comply with rule 955, California Rules of Court since respondent has already complied with rule 955 in connection with his ongoing interim suspension. (See *In the Matter of Katz*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 516, fn. 13.)[7] **[15 - see fn. 7]** In making our 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, Trans. Rules Proc. of State Bar.)[8] If our recommendation is adopted by the Supreme Court, the prospective portion of respondent's suspension should approximate that time period. We also recommend that costs be awarded the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

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7. **[15]** As in *In the Matter of Katz*, *supra*, we do not recommend shortening the one-year period of time recommended below for proof of passage of the California Professional Responsibility Examination ("CPRE"). "While passage of the [CPRE] 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 [CPRE] before the standard 1.4(c)(ii) hearing and therefore have recommended the standard period of one year for passage of such examination." (*Id.*, 1 Cal. State Bar Ct. Rptr. at p. 516, fn. 12.)

8. Rules 810 through 826 of the Transitional Rules of Procedure of the State Bar 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.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WALDO A. BROWN

Petitioner for Reinstatement

No. 90-R-17664

Filed February 24, 1993

SUMMARY

Between 1974 and 1977, petitioner engaged in two illegal schemes, which resulted in convictions for conspiring to obstruct justice and falsifying documents and public records. He resigned in 1985 after a hearing panel recommended his disbarment. On his second attempt to obtain reinstatement, the hearing judge denied his petition on the ground that he had failed to prove rehabilitation and present moral qualifications for readmission. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Petitioner requested review. His evidence was not contradicted, nor was testimonial credibility an issue. Considering his 15 years of good behavior since 1977, extensive pro bono work, recognition of the seriousness of his misconduct, remorse, and fundamental change of values, as well as the testimony by his 7 character witnesses and the 19 reference letters on his behalf, the review department concluded that his undisputed showing of rehabilitation and present moral qualifications equalled or exceeded the showings by others whom the California Supreme Court had reinstated. The review department recommended his reinstatement upon his paying the necessary fees and taking the required oath.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Lily Barry

HEADNOTES

[1] 135 Procedure—Rules of Procedure
2590 Reinstatement—Miscellaneous

The fact that a person resigned with disciplinary charges pending instead of suffering disbarment does not affect the necessity for a reinstatement proceeding. (Trans. Rules Proc. of State Bar, rule 662.)

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**
136 Procedure—Rules of Practice
2509 Reinstatement—Procedural Issues

Where reinstatement petitioner's employer offered favorable character testimony at trial, and petitioner requested augmentation of the record to add the employer's declaration executed over 14 months later updating and reiterating such testimony, the review department considered the record incomplete without the declaration and granted petitioner's unopposed request to augment the record with the declaration. (Prov. Rules of Practice, rule 1304.)

[3] **146 Evidence—Judicial Notice**
191 Effect/Relationship of Other Proceedings
2509 Reinstatement—Procedural Issues

Where decisions by the former State Bar Court concerning a petitioner's prior reinstatement petition helped illuminate the petitioner's subsequent progress toward rehabilitation, the review department took judicial notice of such decisions pursuant to Evidence Code section 452(d).

[4] **135 Procedure—Rules of Procedure**
2504 Reinstatement—Burden of Proof

A petitioner for reinstatement must pass the Professional Responsibility Examination, show present ability and learning in the general law, and show rehabilitation and present moral qualifications for readmission. (Trans. Rules Proc. of State Bar, rule 667.)

[5 a, b] **2504 Reinstatement—Burden of Proof**

A petitioner for reinstatement bears a heavy burden of proof, and must show rehabilitation by the most clear and convincing evidence and provide overwhelming proof of reform. However, no absolute guarantee that the petitioner will never engage in misconduct again is possible, nor must a petitioner show perfection. The law favors the regeneration of erring attorneys and should not place unnecessary burdens on them in proving rehabilitation.

[6 a, b] **162.90 Quantum of Proof—Miscellaneous**
166 Independent Review of Record
2504 Reinstatement—Burden of Proof

The hearing judge's determinations of testimonial credibility must receive great weight because the hearing judge observed the witnesses' demeanor. However, the review department, examining the record independently, must reweigh the evidence and pass upon its sufficiency. Where testimonial credibility was not an issue and the determination to be made was whether the quality and quantity of a party's evidence met the applicable burden of proof, the issue was a question of law.

[7] **2504 Reinstatement—Burden of Proof**

A petitioner for reinstatement must provide stronger proof of present honesty and integrity than an applicant who is seeking admission for the first time and has never had his or her character questioned. Such proof must overcome the prior adverse judgment which resulted in the petitioner's disbarment or resignation with discipline charges pending. The evidence must be considered in light of the petitioner's prior moral shortcomings.

[8] **2504 Reinstatement—Burden of Proof**
2590 Reinstatement—Miscellaneous

Egregious misconduct does not preclude reinstatement. The law favors rehabilitation. Reformation is open to all attorneys who have erred.

[9] **135 Procedure—Rules of Procedure**
2502 Reinstatement—Waiting Period
2503 Reinstatement—Showing to Shorten Waiting Period

A petition for reinstatement may be filed five years after the effective date of interim suspension, disbarment, or resignation. For good cause, reinstatement may be sought three years after disbarment. (Trans. Rules Proc. of State Bar, rule 602.)

[10] **159 Evidence—Miscellaneous**
2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted

The passage of an appreciable period of time is an appropriate consideration in determining whether a petitioner for reinstatement has made sufficient progress towards rehabilitation. Where the evidence is uncontroverted and shows exemplary conduct for eight to ten years with no suggestion of wrongdoing, a petitioner would seem to have established rehabilitation.

[11 a, b] **159 Evidence—Miscellaneous**
2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted

Evidence of pro bono or charitable work reflects on an erring attorney's rehabilitation and present moral qualifications. Where a petitioner for reinstatement had volunteered one full day every week for several years at a legal services program, such extensive pro bono work was a significant factor in favor of the petitioner's reinstatement.

[12 a, b] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted

Although the law demands neither fraudulent penitence nor artificial contrition, a petitioner for reinstatement must understand his or her professional responsibilities and must show a proper attitude toward his or her misconduct. Where a petitioner acknowledged the seriousness of his wrongdoing, expressed remorse, and described a fundamental change in values likely to prevent future misconduct, such testimony, which hearing judge found credible, was a significant factor in favor of his reinstatement.

[13 a-c] **159 Evidence—Miscellaneous**
2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted

Although testimony by character witnesses and letters of reference are not conclusive, favorable character evidence deserves heavy weight in determining whether a petitioner for reinstatement has proved rehabilitation and present moral qualifications. Favorable character testimony and reference letters from employers and attorneys are entitled to special weight. Petitioner's current employer's testimony expressing a high opinion of petitioner's character, demeanor and behavior, and confirming petitioner's sensitivity and concern for proper ethical behavior, merited significant weight.

[14 a, b] **148 Evidence—Witnesses**
199 General Issues—Miscellaneous
2590 Reinstatement—Miscellaneous

Judges should not testify voluntarily as character witnesses. Judges should respond to requests from the State Bar, but absent such a request, should not write a letter of reference for an attorney facing discipline or a petitioner seeking reinstatement.

[15] **148 Evidence—Witnesses**
2510 Reinstatement Granted
Testimony by psychologist who had tested reinstatement petitioner and interviewed him 10 times, and who opined that risk of petitioner's recidivism was very low, was entitled to significant weight.

[16 a, b] **148 Evidence—Witnesses**
2590 Reinstatement—Miscellaneous
Favorable character testimony in reinstatement proceeding should not have been devalued based on lack of frequent current contact with petitioner by witnesses who knew him at time of original misconduct, or based on failure to call family members to testify, where misconduct was unrelated to home or family.

[17] **141 Evidence—Relevance**
2504 Reinstatement—Burden of Proof
2590 Reinstatement—Miscellaneous
Where evidence about the manner in which a reinstatement petitioner has handled positions of trust is available, such evidence is of probative value. But evidence that the petitioner has occupied positions of trust is not a requirement of reinstatement, and favorable testimony about the petitioner's trustworthiness should not be discounted because the witnesses have failed to observe how the petitioner would handle a fiduciary relationship.

[18 a-c] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted
The standard for rehabilitation and present moral qualifications in a reinstatement proceeding is objective, and whether the petitioner has met the heavy burden of proof depends on a comparison of the facts of the current proceeding with the facts in other reported proceedings. Where petitioner's showing of rehabilitation and present moral qualifications was at least comparable to the showings by others who had obtained reinstatement, and reported cases denying reinstatement were distinguishable, review department recommended reinstatement.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P. J.:

We review the decision by a hearing judge of the State Bar Court to deny reinstatement to petitioner, Waldo A. Brown, in his second attempt at reinstatement following his resignation with disciplinary charges pending in 1985. The evidence which was introduced on petitioner's behalf below was uncontradicted and found credible by the hearing judge. The main issue before us is whether as a matter of law petitioner has presented sufficient evidence to meet his heavy burden of proving rehabilitation and present moral qualifications in light of the criminal acts he committed 15 years ago. We conclude that his undisputed showing is equal to or greater than that of others who have been reinstated by the Supreme Court and we recommend that he be reinstated.

I. FACTS AND PROCEEDINGS BEFORE THE STATE BAR COURT

After gaining admission to the California bar in 1959, petitioner worked in a district attorney's office. He formed a partnership in 1963 and practiced law by himself from 1966 onwards. His private practice focused on criminal defense.

In November 1974, the deputy clerk of a municipal court suggested an illegal scheme to petitioner for the handling of cases in which his clients were charged with driving under the influence of alcohol ("DUI"). Petitioner used this scheme in approximately 54 cases. Without the knowledge of the judge or the prosecuting attorney, the DUI charge against each client was dismissed upon the client's guilty plea to a lesser charge of reckless driving. Because of weak evidence, petitioner would have expected the prosecuting attorney to offer such a plea bargain in most of the cases. The clerk did not seek or receive compensation for her part in the scheme, nor did petitioner ask more than his usual fee from the affected clients. The scheme ended when a new judge changed the court's operating procedures in January 1975.

In May 1976, petitioner began another scheme, which resulted in the illegal manipulation of approximately 85 DUI cases. Exploiting the trust and lax practices of another judge, petitioner had the DUI convictions of many persons ruled unconstitutional without the knowledge of a prosecuting attorney,[1] although a number of these convictions were sound. The rulings prevented the convictions from being used to enhance punishment in other DUI cases against the same defendants. Petitioner did not ask for any additional payment from the defendants, many of whom were no longer represented by him and had no new DUI cases against them. Petitioner's second scheme ended when the judge retired in September 1977.

Petitioner's misconduct led in May 1980 to his conviction of conspiracy to obstruct justice and in May 1982 to his conviction of falsifying documents and falsifying public records. As a result of his first conviction, he was incarcerated for nine months in 1983, was in a work furlough program for the next three months, and spent one year on parole. As a result of his second conviction, he received a five-year probation, which ended in 1987.

In February 1981, the California Supreme Court placed petitioner on interim suspension because of his initial criminal conviction. He remained on interim suspension while a disciplinary proceeding ensued. In October 1984, a State Bar hearing panel recommended petitioner's disbarment. Petitioner later tendered his resignation, which the California Su-

1. The hearing judge found that the judge in the second scheme was not aware of petitioner's misconduct at the time of the scheme. Petitioner argues that the judge joined petitioner in declaring closed cases unconstitutional without the presence of a deputy district attorney. There is evidentiary support in the record for petitioner's argument with regard to some closed cases, but the evidence is not clear about all the approximately 85 closed cases. Whether or not the second judge was also involved in petitioner's scheme makes no difference in terms of the issues involved in this reinstatement proceeding.

preme Court accepted in November 1985 and which became effective the following month.[2] **[1 - see fn. 2]**

Since July 1986, petitioner has worked as a paralegal in two law offices. Since July 1987, he has volunteered his services for one full day every week to a legal services program. In 1989, the program awarded him a certificate recognizing his outstanding and valuable service.

In 1987,[3] petitioner submitted his first reinstatement petition. In June 1988, a State Bar Court referee recommended reinstatement. In September 1988, the former volunteer review department of the State Bar Court denied reinstatement on the ground that petitioner had failed to prove his rehabilitation. Petitioner did not seek review of this denial by the California Supreme Court.

In December 1990, petitioner filed his current reinstatement petition. A two-day hearing occurred in July 1991. In a July 1992 decision, the hearing judge found that petitioner had passed the Professional Responsibility Examination and concluded that petitioner had proved present learning and ability in the general law, but not rehabilitation and the present moral qualifications for readmission. In August 1992, petitioner requested review.

In October 1992, petitioner requested augmentation of the record with a declaration from petitioner's employer. The declaration updates and reiterates the employer's favorable testimony at the July 1991 hearing, which testimony was found to be credible. The examiner filed no opposition to petitioner's request and asserted at oral argument that she did not oppose petitioner's proposed augmentation of the record.

II. DISCUSSION

A. Augmentation of the Record

[2] As a preliminary matter, we consider petitioner's unopposed request to augment the record with a declaration updating the favorable testimony offered by petitioner's employer during the 1991. The original record must be incomplete or incorrect in order for us to grant such a request. (Provisional Rules of Practice of State Bar Court, rule 1304.) Because the character evidence offered by an employer weighs heavily in determining rehabilitation and present moral qualifications (*Feinstein* v. *State Bar* (1952) 39 Cal.2d 541, 547; *In re Andreani* (1939) 14 Cal.2d 736, 749-750; *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 675; see also *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 36) and because more than 14 months elapsed from the date of the employer's strong character testimony to the date of the declaration reiterating a favorable opinion of petitioner's character, we consider the record incomplete without the declaration and grant the request.

[3] Pursuant to Evidence Code section 452, subdivision (d), which permits judicial notice to be taken of the record of any court of this state, we informed counsel for both parties at oral argument of our intent to take judicial notice of a copy of the former referee's 1988 decision recommending petitioner's reinstatement and a copy of the former volunteer review department's 1988 decision denying reinstatement. Since neither party objected we admitted both of these decisions into evidence.[4] They reflect the former State Bar Court's reasoning about petitioner's showing of rehabilitation approximately five years ago and help illuminate petitioner's

2. **[1]** That petitioner resigned with disciplinary charges pending after a disbarment recommendation, instead of actually suffering disbarment, does not affect the necessity for a reinstatement proceeding. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1092, fn. 4; see also *Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 745; *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 398; Trans. Rules Proc. of State Bar, rule 662.)

3. The parties stipulated, and the hearing judge found, that petitioner submitted his first petition for reinstatement in May 1987. The first petition shows no submission date, but bears a filing date of June 16, 1987.

4. We added these decisions to exhibit W, which already contains the reporter's transcript and petitioner's reference letters for petitioner's former reinstatement proceeding.

progress toward rehabilitation since then.

B. Requirements for Reinstatement

[4] Reinstatement requires (1) the passage of the Professional Responsibility Examination, (2) a showing of present ability and learning in the general law, and (3) a showing of rehabilitation and present moral qualifications for readmission. (Trans. Rules Proc. of State Bar, rule 667.) The examiner does not argue that petitioner has failed to satisfy the first two requirements, nor does the record support such an argument. Thus, the only remaining question is whether petitioner made an adequate showing of rehabilitation and present moral qualifications.

C. Petitioner's Burden of Proof

[5a] An erring attorney who seeks reinstatement bears a heavy burden of proof. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1091; *Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 745; *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 222; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.) Such a petitioner "must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful." (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1092.) "[O]verwhelming proof of reform" is necessary. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547, and cases cited therein.)

[5b] Yet "'no absolute guarantee that petitioner will never engage in misconduct again'" is possible. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404, quoting *Resner* v. *State Bar* (1967) 67 Cal.2d 799, 811.) Nor must petitioner show perfection. (*In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 37.) Reformation is a state of mind which "may be difficult to establish affirmatively" and "may not be disclosed by any certain or unmistakable outward sign." (*In re Andreani*, *supra*, 14 Cal.2d at p. 749.) The law favors "'the regeneration of erring attorneys and should not place unnecessary burdens upon them'" in proving rehabilitation. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404, quoting *Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 811; see also *In re Gaffney* (1946) 28 Cal.2d 761, 764; *In re Andreani*, *supra*, 14 Cal.2d at p. 749; *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373, 382.)

D. Independent Review of the Record

The task of the review department is to independently review the record. In doing so, we may adopt findings and conclusions different from those of the hearing judge who heard and saw the witnesses and observed their demeanor. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 807; see also Trans. Rules Proc. of State Bar, rule 453(a); *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *In the Matter of McCray*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 382; *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.)

[6a] Citing *Resner* v. *State Bar*, *supra*, 67 Cal.2d 799, the examiner argues that the hearing judge was in a superior position to evaluate the weight of the evidence "because of the opportunity to weigh the evidence first hand." *Resner*, however, stands for the familiar proposition that the hearing judge's determinations of testimonial credibility must receive great weight because the hearing judge heard and saw the witnesses and observed their demeanor. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 807; see also Trans. Rules Proc. of State Bar, rule 453(a); *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *In the Matter of McCray*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 382; *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.) Our review requires us not only to examine the record independently, but also to reweigh the evidence and pass upon its sufficiency. (*In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30.)

[6b] Testimonial credibility is not an issue in this proceeding. The hearing judge believed both petitioner and his witnesses and we adopt all of her findings of material fact. Our task here is to determine whether the quality and quantity of petitioner's evidence meet his heavy burden of proof. This is, as the examiner acknowledged at oral argument, a question of law based on the undisputed record

below.

E. Petitioner's Prior Misconduct

The hearing judge stressed petitioner's misconduct between November 1974 and January 1975 and between May 1976 and September 1977. She correctly observed that his schemes were sophisticated, occurred over a sustained period of time, took place in the absence of any notable duress or compulsion, were not voluntarily terminated by him, and involved his abuse of a position of trust. As she observed, he had sufficient maturity and experience at the time of his misconduct to realize "that his actions were terribly wrong."

[7] Contrary to petitioner's suggestion, reinstatement proceedings differ from admission proceedings. Unlike an applicant for admission, an erring attorney must provide stronger proof of present honesty and integrity than one who seeks admission for the first time and has never had his or her character questioned. Such proof must overcome the prior adverse judgment which resulted in petitioner's disbarment or resignation with discipline charges pending. Petitioner's evidence must be considered in light of petitioner's prior moral shortcomings. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403; *Roth* v. *State Bar* (1953) 40 Cal.2d 307, 313; *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 30; see also *Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1092; *Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 746.)

[8] The egregiousness of petitioner's misconduct, however, does not preclude his reinstatement. The law favors rehabilitation. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 811; *In re Andreani*, *supra*, 14 Cal.2d at p. 749; *In the Matter of McCray*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 382.) Reformation is open to all attorneys who have erred. (*In re Andreani*, *supra*, 14 Cal.2d at p. 749.) "'It is not the policy of the law, and is not considered to be in the interest of justice, that an attorney who has been disbarred for misconduct shall never under any circumstances be readmitted to practice.'" (*Ibid.*, quoting *In re Nisbet* (1926) 77 Cal.App. 260, 261.) Thus, for example, in *In re Aquino* (1989) 49 Cal.3d 1122, the Supreme Court disbarred Aquino who had been convicted on multiple counts of violating federal immigration and naturalization laws by engaging in a fraudulent scheme involving sham marriages. Between October 1980 and June 1981, he repeatedly counseled clients to perjure themselves. Nonetheless, the high court noted that, by the time of his disbarment, Aquino had already made substantial progress toward rehabilitation. (*Id.* at pp. 1131-1132; see *id.* at pp. 1134-1135 (conc. opn. of Kaufman, J.).) Pursuant to Evidence Code section 452, subdivision (d), we take judicial notice of the fact that, following a hearing department decision recommending reinstatement from which the State Bar did not seek review, Aquino was ordered to be reinstated upon paying the necessary fees and taking the required oath by California Supreme Court order filed August 6, 1991. (*In the Matter of Aquino*, order filed Aug. 6, 1991 (S022071).) We must likewise determine whether petitioner's evidence dispels the cloud of his prior misconduct.

F. Passage of a Very Long Time Since Petitioner's Misconduct

[9] The rules governing reinstatement proceedings allow a petition for reinstatement to be filed five years following the effective date of interim suspension, disbarment or resignation. Depending on the showing made, this five-year period may be sufficient to demonstrate rehabilitation. For good cause, reinstatement can be sought three years following disbarment. (Rule 602, Trans. Rules Proc. of State Bar.) In arguing that he has proved rehabilitation, petitioner stresses that he has not practiced law for 12 years, that his misconduct occurred 15 to 18 years ago, and that he has engaged in no misconduct since then. In discussing her adverse conclusion regarding petitioner's rehabilitation, the hearing judge failed to mention the very long time since his misconduct; nor does the examiner address this issue.

[10] "The passage of an appreciable period of time" constitutes "an appropriate consideration" in determining whether a petitioner has made sufficient progress towards rehabilitation. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1095.) In a reinstatement proceeding, an erring attorney must "'show by sustained exemplary conduct over an extended period of

time that [he has] reattained the standard of fitness to practice law.'" (*In re Giddens* (1981) 30 Cal.3d 110, 116, quoting *In re Petty* (1981) 29 Cal.3d 356, 362; see also *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223.) "Where the evidence is uncontroverted . . . and shows exemplary conduct extending over a period of from eight to ten years without even a suggestion of wrongdoing, it would seem that rehabilitation had been established." (*Werner* v. *State Bar* (1954) 42 Cal.2d 187, 198 (conc. opn. of Carter, J.).)

G. Petitioner's Pro Bono Work

[11a] In discussing her conclusion that petitioner had failed to prove rehabilitation and present moral qualifications, the hearing judge also did not mention that as of the 1991 hearing in the current proceeding, petitioner had donated one full day of his time every week for four years to doing pro bono work for a legal services program. Citing *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933, 941, the examiner described petitioner's pro bono work as an activity which was not extraordinary and which merely constituted what is expected of a member of society. *Seide* provides no basis for such a characterization.

[11b] Case law establishes that petitioner's extensive pro bono work is another significant factor in favor of his reinstatement. Evidence of pro bono or charitable work reflects on an erring attorney's rehabilitation and present moral qualifications. (*In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 675.) In granting reinstatement, the California Supreme Court has observed that one petitioner donated his services to civic and public projects for a considerable portion of six years (*In re Andreani*, *supra*, 14 Cal.2d at p. 748); that a second petitioner took an active part in community affairs, donated time to the Red Cross, and was active in his church for a number of years (*Werner* v. *State Bar*, *supra*, 42 Cal.2d at p. 190); and that a third petitioner attended church regularly and participated in community affairs for five years. (*Allen* v. *State Bar* (1962) 58 Cal.2d 912, 914.)

H. Petitioner's Testimony About His Misconduct, Remorse, and Change of Values

[12a] Rehabilitation is a state of mind. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 811; *In re Andreani*, *supra*, 14 Cal.2d at p. 749.) Although the law demands neither fraudulent penitence nor artificial contrition (*Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 747), a petitioner for reinstatement must understand his or her professional responsibilities (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 548; see also *Roth* v. *State Bar*, *supra*, 40 Cal.2d at p. 314) and must show a proper attitude toward his or her misconduct. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *Wettlin* v. *State Bar* (1944) 24 Cal.2d 862, 870.) In granting reinstatement, the California Supreme Court has observed that a petitioner took his punishment in proper spirit, evidenced an appreciation of the gravity of his misconduct, and manifested a steady determination to rehabilitate himself. (*In re Gaffney*, *supra*, 28 Cal.2d at p. 763.)

[12b] In his testimony during the current proceeding, petitioner acknowledged unequivocally the seriousness of his wrongdoing, expressed remorse, and described a fundamental change which he had experienced in his values and which he believed would prevent future misconduct if he were reinstated. The hearing judge determined that his testimony was credible, and the examiner does not challenge this credibility determination. In addressing the factors which he believes show his rehabilitation and present moral qualifications, petitioner stresses his testimony about his misconduct, remorse, and change of values. Pursuant to case law, such testimony is a significant factor in favor of his reinstatement.

I. Testimony by Character Witnesses and Letters of Reference

[13a] Testimony by character witnesses and letters of reference are not conclusive. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404; *Roth* v. *State Bar*, *supra*, 40 Cal.2d at p. 315; *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 675; *In the Matter of McCray*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 385; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 37.) Nevertheless, in determining whether an erring attorney has proved rehabilitation and present moral qualifications, the California Supreme Court has heavily weighed "the

favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living" of such an attorney. (*In re Andreani*, *supra*, 14 Cal.2d at pp. 749-750; see also *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404; *Resner* v. *State Bar*, *supra*, 67 Cal.2d at pp. 805-806; *Roth* v. *State Bar*, *supra*, 40 Cal.2d at p. 315; *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 675.) The Court has stated that favorable character testimony and reference letters from employers and attorneys are especially entitled to considerable weight. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; see also *Preston* v. *State Bar* (1946) 28 Cal.2d 643, 651.)

In this proceeding, petitioner presented favorable testimony by seven character witnesses: three judges,[5] **[14a - see fn. 5]** three attorneys, and a psychologist. They testified that petitioner has demonstrated good character, honesty, and integrity and that they did not believe he would do wrong in the future. In addition, petitioner submitted nineteen reference letters urging his reinstatement: ten from attorneys, five from judges,[6] **[14b - see fn. 6]** two from legal secretaries, one from a court administrator, and one from a law office manager. Among the letter writers were a number of persons who had been in good positions to observe petitioner's daily conduct. These writers included an attorney who had been the law partner of petitioner's employer from December 1989 onwards, an attorney who had been the executive director of the legal services program since petitioner began doing pro bono work for the program, a staff attorney who had supervised petitioner's pro bono work at the program for two years, a staff attorney who had observed petitioner's work at the program since 1989, a staff attorney who had worked with petitioner on cases handled by the program for two years, a legal secretary who had worked at the program during the entire time of petitioner's pro bono service to the program, and the office manager for petitioner's current employer during the entire time of his work for the employer.

The hearing judge carefully and accurately summarized the testimony of the seven witnesses who appeared on petitioner's behalf. She accepted their testimony as credible and described it as laudatory and considerable. Yet in discussing her conclusions of law, she asserted that their testimony failed to dispel the unfavorable conclusions established by petitioner's misconduct 15 to 18 years earlier. According to the hearing judge, none of the witnesses had a close or personal relationship with petitioner after his separation from the State Bar, and most had spent little time with the petitioner during the year or two before their testimony. She discounted the testimony of witnesses who had known petitioner when he was secretly committing misconduct on the grounds that their favorable perceptions of petitioner at that time were incorrect. She expressed concern that none of petitioner's family members or close personal friends testified on his behalf. Also, she stated that petitioner's evidence lacks a tested quality because his moral character has yet to be proven in a situation in which he would again be tempted to engage in misconduct and would be likely to succeed in so doing.

The examiner presented no witnesses to rebut

5. **[14a]** The record does not reveal whether the judges who testified in this proceeding did so under subpoena or voluntarily. Judges should not testify voluntarily as character witnesses. (Cal. Code Jud. Conduct, canon 2B; *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 28, fn. 1; *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 290, fn. 4; *In re Rivas* (1989) 49 Cal.3d 794, 798, fn. 6.)

6. **[14b]** The record does not reflect whether the letters of reference were requested by the hearing judge. Judges' input can be of vital importance when they are possessed of substantial personal knowledge of the petitioner. However, the California Judicial Conduct Handbook treats character references in bar disciplinary proceedings in a similar manner as letters of reference in criminal sentencing proceedings, stating that: "Absent a request, a judge should not write a letter of reference for a lawyer accused of misconduct and facing bar discipline. A judge should, however, respond to any request from the State Bar." (Rothman, California Judicial Conduct Handbook (Cal. Judges Assn. 1990) § 210.340; see also *id.*, § 210.330 [letters of reference in criminal proceedings].) Letters of reference offered in a reinstatement proceeding would appear to fall in the same category as letters of reference offered in the disciplinary proceeding which preceded the reinstatement hearing. (See generally *In re Rivas*, *supra*, 49 Cal.3d at pp. 801-802.)

the extremely favorable testimony by petitioner's character witnesses, but discounts the value of this testimony, reiterating the views of the hearing judge.

The hearing judge also carefully and accurately summarized the reference letters, but apparently discounted them as well. Although she did not mention the reference letters in discussing her adverse conclusion regarding petitioner's rehabilitation and present moral qualifications, she found as facts that none of the letter writers had "a close or personal relationship" with petitioner, that none reported "frequent current contacts" with petitioner, and that petitioner had not recently acted in a fiduciary capacity on behalf of any of them. The examiner presented no evidence to rebut these favorable reference letters. She also fails to discuss them.

[13b] Petitioner points out that his current employer, for whom he has worked as a paralegal since July 1987, expressed a high opinion of his character, demeanor, and behavior and has been in an excellent position to observe him because he has spent most of his waking hours since 1987 in his employer's office. The employing attorney testified at the July 1991 hearing that petitioner was honest, had disclosed his misconduct before being hired, and expressed remorse and the belief that his punishment had been just. In addition, the employer testified that petitioner had demonstrated his sensitivity to, and concern over, proper ethical behavior. In the October 1992 declaration, the employer updated and repeated his favorable testimony. The examiner conceded at oral argument that the employer's testimony and declaration merit significant weight.

[15] We also give significant weight to the testimony by the psychologist, who tested petitioner and who interviewed him 10 times in 1991, the last time with his wife of 40 years. The psychologist testified that petitioner did not try to defend or excuse his misconduct and expressed remorse. According to the psychologist, petitioner's misconduct was "an ego trip," not "a get-rich-quick scheme." Also, the psychologist testified that the risk of petitioner's recidivism was very low because of his shift in basic values, his pride, and the likelihood of his retirement in the near future. Neither the hearing judge nor the examiner sought to discredit the psychologist's testimony.

[16a] Petitioner argues against devaluing the testimony of the attorneys and judges who knew him when he was secretly engaged in misconduct and who had a high opinion of him at that time. As petitioner points out, these witnesses came forward despite their previous extreme disappointment in petitioner and with full knowledge of the extent of his wrongdoing. These witnesses have a strong interest in maintaining the honest administration of justice. Having once been deceived by petitioner, it is very unlikely that they would have testified on his behalf unless they were convinced that he was rehabilitated and would not repeat his misconduct. Yet, based on their observations of petitioner's behavior and their conversations with petitioner, these attorneys and judges urged petitioner's reinstatement. Their testimony thus deserves significant weight in conjunction with that of his employer and the psychologist. Not every character witness need testify to close, continuous contact. It is the cumulative effect of a cross-section of witnesses with varying relationships to the petitioner that paints a picture of his present character.

[16b] Petitioner also argues against devaluing the favorable character testimony on his behalf on the ground that he did not call family members to testify. As petitioner points out, his misconduct did not occur at home or within his family and the testimony of a presumably biased family member could only have been cumulative. Petitioner's wife attended the 1991 hearing, and the psychologist's testimony about petitioner's remorse and change in values was partially based on an interview including petitioner's wife. Thus, we do not discount the favorable character testimony on petitioner's behalf on the ground that he failed to call a family member to testify.

[17] Nor do we discount such testimony on the grounds that it lacks what the hearing judge called "a tested quality." Where evidence about the manner in which a petitioner has handled positions of trust is available, such evidence is of probative value. Yet "evidence that the petitioner has occupied positions of trust is not a requirement of reinstatement." (*Werner* v. *State Bar*, *supra*, 42 Cal.2d at p. 194.) Where a petitioner has not acted in a fiduciary capacity since

his or her disbarment or resignation with disciplinary charges pending, the testimony of character witnesses about his or her trustworthiness should not be discounted on the ground that they have failed to observe how the petitioner would handle a fiduciary relationship. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404.)

[13c] We also find that the letters bolster the favorable testimony by petitioner's character witnesses. As discussed with regards to petitioner's testimonial evidence, it was not necessary for all of the letter writers to have close or personal relationships with petitioner or for petitioner to have acted recently in a fiduciary capacity on behalf of any of them. Although no letter writers explicitly reported frequent current contacts with petitioner, at least seven had been in good positions to observe petitioner's behavior for extended periods of time since 1987.

J. Comparison of Petitioner's Showing of Rehabilitation and Present Moral Qualifications with the Showings of Rehabilitation and Present Moral Qualifications in Other Reported Reinstatement Proceedings

[18a] The standard for rehabilitation and present moral qualifications in a reinstatement proceeding is objective. Whether petitioner has met his heavy burden depends on a comparison of the facts of the current proceeding with the facts in other reported California reinstatement proceedings. Petitioner's showing of rehabilitation is at least comparable to the showings of rehabilitation and present moral qualifications by others who have gained reinstatement over the years. (See, e.g., *Calaway* v. *State Bar*, *supra*, 41 Cal.3d 743; *Resner* v. *State Bar*, *supra*, 67 Cal.2d 799; *Allen* v. *State Bar*, *supra*, 58 Cal.2d 912; *Werner* v. *State Bar*, *supra*, 42 Cal.2d 187; *Jonesi* v. *State Bar* (1946) 29 Cal.2d 181; *In re Gaffney*, *supra*, 28 Cal.2d 761; *Preston* v. *State Bar*, *supra*, 28 Cal.2d 643; and *In re Andreani*, *supra*, 14 Cal.2d 736.)

Research has revealed no reported reinstatement proceeding in which the California Supreme Court failed to find rehabilitation and present moral qualifications on a showing as strong as petitioner's. Nor at oral argument could the examiner cite any such proceeding.

[18b] Further, the current proceeding is distinguishable from reported reinstatement proceedings in which the California Supreme Court failed to find rehabilitation and present moral qualifications. For example, in *Hippard* v. *State Bar*, *supra*, 49 Cal.3d 1084, 1098, Hippard showed neither a meaningful attempt to make restitution in whole or in part nor an inability to do so. In *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d 395, 405, Tardiff continued his misdeeds long after his disbarment; that he finally stopped engaging in such misconduct did not demonstrate rehabilitation. In *Roth* v. *State Bar*, *supra*, 40 Cal.2d 307, 314-315, Roth's own testimony indicated in several ways a more than careless attitude toward the rules of professional conduct; most of his character witnesses were mere casual acquaintances; one character witness knew nothing about his present moral character; he misinformed one character witness about the reasons for his disbarment and informed none of the character witnesses of previous conduct for which he had been investigated or disciplined; and several character witnesses indicated that such knowledge might have altered their opinion of him.

In *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d 541, 548, Feinstein's repeated assertions that he had done no wrong despite a criminal conviction and other disciplinary proceedings against him, as well as his failure to make any attempt to determine whether his activities had resulted in losses to others or to reimburse his victims, indicated a continuing failure to comprehend his professional responsibilities. The current proceeding presents no adverse evidence of the sort which led to denials of reinstatement petitions in *Hippard*, *Tardiff*, *Roth*, and *Feinstein*.

The current proceeding is also distinguishable from prior reinstatement proceedings in which we have failed to find rehabilitation and present moral qualifications. For example, in *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. 219, 227-228, we denied reinstatement because Wright made no effort to pay certain creditors, displayed a lack of concern to keep his creditors informed of his whereabouts, demonstrated indifference towards them, produced character evidence limited to an affidavit from an attorney employer, failed to inform the employer of his disbarment, and omitted from his reinstatement application a relatively recent lawsuit

against the employer. In *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. 25, 32-33, 37-38, we denied reinstatement because Giddens displayed an inexcusable carelessness in his application for reinstatement by failing to disclose two lawsuits to which he was a party. No lack of evidence or adverse evidence of the sort which troubled us in *Wright* and *Giddens* affects the current proceeding.

III. CONCLUSION AND RECOMMENDATION

[18c] Upon our independent review of the record, we conclude that petitioner has met the requirements for reinstatement. We thus recommend to the California Supreme Court that he be reinstated as a member of the State Bar upon his paying the necessary fees and taking the required oath.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BERT B. BABERO

A Member of the State Bar

Nos. 91-N-00909, 90-C-17834

Filed March 16, 1993

SUMMARY

Respondent was charged with failure to obey the Supreme Court's order in his prior disciplinary case requiring him to comply with rule 955 of the California Rules of Court. This charge was consolidated with a conviction referral matter arising from respondent's 1987 conviction for driving under the influence of alcohol and fighting in public. The hearing judge dismissed the conviction matter, concluding that the facts and circumstances surrounding the conviction did not involve moral turpitude or conduct warranting discipline. As to respondent's failure to comply with rule 955, the hearing judge concluded that the failure was wilful, and, balancing the mitigating and aggravating circumstances and reviewing the Supreme Court case law, concluded that disbarment was appropriate. (Richard D. Burstein, Judge Pro Tempore.)

Respondent sought review, admitting his culpability on the rule 955 charge but contending that disbarment was too harsh in light of mitigating evidence in the record. The review department affirmed the dismissal of the conviction referral matter, which neither party contested. On the rule 955 matter, the review department found that respondent's efforts at compliance were inadequate, and that his failure to comply was aggravated by his transfer of cases to successor counsel in an irresponsible manner and by his submission of an inaccurate declaration regarding his efforts to comply. Concluding that respondent's mitigation evidence was not equal to that presented in the rare Supreme Court cases in which rule 955 violations have not led to disbarment, the review department recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Billy R. Wedgeworth

For Respondent: Bert B. Babero, 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] **110 Procedure—Consolidation/Severance**
130 Procedure—Procedure on Review
166 Independent Review of Record

Where two unrelated matters were consolidated in the hearing department, and a party requested review in order to challenge the result in one of the matters, the entire matter was placed before the review department and reviewed by it even though in the other matter neither party challenged the findings and conclusions of the hearing judge.

[2] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1513.90 Conviction Matters—Nature of Conviction—Violent Crimes
1519 Conviction Matters—Nature of Conviction—Other
1527 Conviction Matters—Moral Turpitude—Not Found
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found

Convictions combining concealed firearms and driving offenses can result in lawyer discipline. However, no moral turpitude or misconduct warranting discipline occurred where respondent's conviction for driving under the influence and fighting in public, under circumstances involving a concealed weapon, was found by the hearing judge to have been a singular instance, and did not involve disrespect for the law, dangerous or violent criminal behavior, or an alcohol dependency problem, and respondent's possession of the weapon was understandable because of recent threats to his life.

[3 a, b] **161 Duty to Present Evidence**
162.20 Proof—Respondent's Burden
715.50 Mitigation—Good Faith—Declined to Find
795 Mitigation—Other—Declined to Find
1913.19 Rule 955—Wilfulness—Other Issues

Respondent's contention that he detrimentally relied on advice from his probation monitor and counsel regarding compliance with rule 955 might have been persuasive as mitigation if respondent had raised it at the hearing level and produced supporting evidence. However, where record did not support and even contradicted such contention, review department rejected respondent's attempt to argue it as mitigation.

[4] **715.50 Mitigation—Good Faith—Declined to Find**
1913.42 Rule 955—Compliance—Notice

Respondent's failure to notify a client of respondent's disciplinary suspension was not justified by respondent's belief that he had been retained only for limited services, where respondent had accepted a retainer fee and filed a civil complaint listing himself as the plaintiff's attorney. There was no legal support for the distinction respondent attempted to draw between being attorney of record and "attorney in fact."

[5] **715.50 Mitigation—Good Faith—Declined to Find**
1913.42 Rule 955—Compliance—Notice

Where respondent in a rule 955 matter gave different explanations at the hearing and on review for his failure to advise eight clients of his disciplinary suspension, and had not taken responsibility for making sure that substitutions of counsel he executed in the clients' cases had been filed, his attempted explanations constituted questionable mitigation.

[6] **561 Aggravation—Uncharged Violations—Found**
1911.30 Rule 955—Record
Fact that respondent's failure to take responsibility for substituting out of two cases properly had not been the subject of respondent's prior disciplinary matter did not preclude Office of Trials from raising such incidents in subsequent proceeding against respondent for failure to comply with rule 955.

[7 a-c] **582.10 Aggravation—Harm to Client—Found**
584.10 Aggravation—Harm to Public—Found
715.50 Mitigation—Good Faith—Declined to Find
795 Mitigation—Other—Declined to Find
1913.49 Rule 955—Compliance—Generally
In rule 955 proceeding, respondent's claim that his failure to withdraw from one matter after suspension resulted from an oversight in transferring over 200 files to successor counsel was not a factor in mitigation. Respondent's conduct in connection with such transfer constituted evidence in aggravation, because respondent irresponsibly executed in blank hundreds of substitution association or substitution of counsel forms and relinquished of the client files to successor counsel without obtaining the clients' consent, safeguarding their interests, or even keeping a list of the clients or case names transferred. This conduct posed a significant potential harm to the clients and to the public interest generally.

[8 a, b] **611 Aggravation—Lack of Candor—Bar—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
1913.24 Rule 955—Delay—Filing Affidavit
1913.44 Rule 955—Compliance—Affidavit
Respondent's declaration presented in an attempt to comply with rule 955 bore little mitigating weight when it was submitted almost two months after respondent's rule 955 affidavit was due to be filed with the Supreme Court, contained inaccurate information and misrepresented a hearing date in one case. The inaccurate declaration raised serious doubts as to respondent's credibility and was an aggravating circumstance.

[9] **1913.29 Rule 955—Delay—Generally**
1913.49 Rule 955—Compliance—Generally
Respondent's miscalculation of the time deadlines for compliance with rule 955 and failure to file his affidavit for other reasons were neither reasonable nor mitigating given respondent's failure to consult the applicable court rules or contact his former counsel, the Supreme Court's clerk's office, or the State Bar for clarification in a timely fashion.

[10] **720.50 Mitigation—Lack of Harm—Declined to Find**
1913.60 Rule 955—Not in Active Practice
1913.90 Rule 955—Other Substantive Issues
Respondent's claim of lack of harm to his clients in mitigation of rule 955 violation overlooked fact that parties protected by rule 955 include not only clients, but co-counsel, opposing counsel or adverse parties, and any tribunal in which litigation is pending. Moreover, nothing in rule 955 or case law distinguishes between a substantial or insubstantial violation of the rule, and respondent would have been required to comply with rule 955 whether or not he had any clients.

[11] **795 Mitigation—Other—Declined to Find**
1913.19 Rule 955—Wilfulness—Other Issues
1913.90 Rule 955—Other Substantive Issues
Respondent's failure to comply with rule 955 was not excused by criticism of its wording as complex. The mandate of rule 955 is clear and requires little if any assistance to fulfill its requirements.

[12] **515 Aggravation—Prior Record—Declined to Find**
691 Aggravation—Other—Found
802.21 Standards—Definitions—Prior Record
Suspension resulting from respondent's failure to pass professional responsibility examination as ordered by Supreme Court did not constitute prior discipline, but was relevant to determination of appropriate discipline for failure to comply with rule 955 as required by same Supreme Court order.

[13] **591 Aggravation—Indifference—Found**
1913.49 Rule 955—Compliance—Generally
In rule 955 matter, where respondent did not present any evidence of remedial steps to assist clients in four cases in which he had failed to substitute out when suspended, and remained attorney of record in three of such cases in which litigation was still pending, respondent's inaction indicated indifference to the consequences of his misconduct and was an aggravating circumstance, as was his continued failure to file an affidavit conforming to the requirements of rule 955.

[14] **565 Aggravation—Uncharged Violations—Declined to Find**
695 Aggravation—Other—Declined to Find
A respondent's criminal conduct might well be relevant as an aggravating factor in a different case, but where respondent's criminal conviction had been found not to constitute a basis for discipline and State Bar had not challenged that conclusion, it was not appropriate to consider such conviction as a factor in aggravation of other misconduct.

[15 a, b] **531 Aggravation—Pattern—Found**
586.11 Aggravation—Harm to Administration of Justice—Found
591 Aggravation—Indifference—Found
691 Aggravation—Other—Found
745.52 Mitigation—Remorse/Restitution—Declined to Find
801.20 Standards—Purpose
801.47 Standards—Deviation From—Necessity to Explain
861.40 Standards—Standard 2.6—Disbarment
1091 Substantive Issues re Discipline—Proportionality
1913.49 Rule 955—Compliance—Generally
Recent Supreme Court decisions reflect the view that disbarment is generally the appropriate sanction for a willful violation of rule 955. One of the primary reasons for the adoption of the Standards for Attorney Sanctions for Professional Misconduct was to achieve greater consistency in disciplinary sanctions for similar offenses. Any reason for deviating from the standards or established case law must be clearly stated. Accordingly, where respondent participated in the rule 955 proceeding, but did not present a convincing case of mitigation, diligence, and rectification of misconduct, and instead demonstrated a pattern of inattention to important duties, an inability to conform to professional norms, and a lack of concern for potential harm to his clients and the public, the public interest and the administration of justice would be served by respondent's disbarment.

[16] **863.30 Standards—Standard 2.6—Suspension**
1913.49 Rule 955—Compliance—Generally

Wilful breach of a Supreme Court order is by definition deserving of strong disciplinary measures, and the sanction generally imposed for wilful violation of rule 955 is disbarment. When disbarment has not been imposed, the attorneys involved had complied with the notification requirement, orally or in writing, to all their clients, participated in the disciplinary process, and presented substantial mitigating evidence regarding the noncompliance and their present good character.

ADDITIONAL ANALYSIS

Aggravation
Found
511 Prior Record
Mitigation
Declined to Find
710.53 No Prior Record
710.55 No Prior Record
740.53 Good Character
Discipline
1921 Disbarment
Other
175 Discipline—Rule 955
1913.13 Rule 955—Wilfulness—Timeliness of Notice
1913.14 Rule 955—Wilfulness—Inability to Comply
1915.10 Rule 955—Violation Found

OPINION

STOVITZ, J.:

Respondent, Bert B. Babero, has requested our review of a decision of the hearing department in this consolidated matter, recommending that he be disbarred from the practice of law in California based on his failure to obey the Supreme Court's order in his prior disciplinary case, which required him to comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court.[1] Respondent concedes his disciplinable failure to comply with rule 955, but contends that disbarment is too harsh in light of mitigating evidence. The Office of Trials disputes the claims of mitigating evidence, and asserts that the recommended discipline is consistent with past Supreme Court decisions in rule 955 cases.

After reviewing the record and considering guiding decisions of the Supreme Court which have imposed disbarment except in rare cases presenting more mitigation than present here, we agree with the hearing judge that disbarment is the appropriate discipline to recommend.

I. CONVICTION REFERRAL MATTER

[1] The rule 955 matter was consolidated in the hearing department with an unrelated proceeding resulting from respondent's criminal conviction for violating Vehicle Code section 23152, subdivision (b) (driving under the influence of alcohol) and Penal Code section 415, subdivision (1) (fighting in public). Because respondent's request for review places the entire matter before us (Trans. Rules Proc. of State Bar, rule 453), we have reviewed the conviction matter even though neither the Office of Trials nor respondent has challenged the findings and conclusions of the hearing judge.

Respondent acknowledged at the disciplinary hearing that he was in possession of a concealed, loaded firearm on the night of May 2, 1987, when he was stopped for a broken taillight and expired license plate tab on his motorcycle and thereafter arrested on alcohol-related charges (Veh. Code, § 23152, subds. (a) & (b)); for carrying a concealed weapon without a license (Pen. Code, § 12025, subd. (b)), and for carrying a loaded weapon on a public street (Pen. Code, § 12031, subd. (a)). Respondent was carrying the registered weapon because earlier in the year, he had been threatened at gunpoint in his office by persons attempting to extort the proceeds of an insurance settlement from him. He reported the threat to the police, and to protect himself, respondent began carrying a gun. At the time of his own arrest, the persons who had threatened him were still at large. One of the principal extortionists was later tried and convicted of charges stemming from the threat to respondent.

After respondent pled no contest to two amended charges, the remaining charges were dismissed, and he was sentenced to three years on summary probation, on terms including fines and assessments totaling $663 and attendance at drunk driver and Alcoholics Anonymous programs. Respondent completed these programs. In October 1990, he was later found in violation of his probation as a result of a May 1990 arrest on charges that were later dismissed. The record contains little about the nature of this probation violation beyond that respondent was fined but the original probation was reinstated.

[2] To determine if the facts and circumstances of respondent's conviction constitute other conduct warranting discipline, we assess them in light of the mandate to protect "the public, the courts and the integrity of the legal profession." (*In re Kelley* (1990) 52 Cal.3d 487, 497.) We note that a conviction which combines concealed firearms and driving offenses has resulted in lawyer discipline in the past. (*In re Titus* (1989) 47 Cal.3d 1105 [public reproval].) However, as we recounted recently in *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, not every conviction such as that suffered by respondent warrants discipline. Here, the hearing judge found understandable reasons for respondent to be carrying a weapon and that his

1. For convenience, we refer to this California Rule of Court hereafter as "rule 955." As pertinent, rule 955 required respondent to notify clients, courts and opposing counsel of his earlier disciplinary suspension by registered or certified letter, to deliver to all clients in pending matters their papers or property and to file an affidavit with the Supreme Court showing he complied with this rule.

conviction was of a "singular instance." Clear and convincing evidence in the record that respondent has an alcohol dependency problem would raise the concern of public protection articulated in *Kelley*, *supra*. No evidence on this issue was introduced. Although respondent pled no contest to the charge of fighting in public, the arresting officer testified that respondent was not combative when arrested and did not have to be restrained by the arresting officers. There was no evidence that respondent resorted to the firearm when arrested. Given the lack of any clear evidence of disrespect for the law or dangerous or violent criminal behavior or other aggravating circumstances, and noting that neither side has challenged the conclusions of the hearing judge, we adopt the judge's ultimate determination that respondent's conviction did not involve either moral turpitude or other conduct warranting discipline, on the minimal evidence contained in the record. (See *In the Matter of Respondent I*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 271 - 272.)

II. RULE 955 MATTER

A. Background Facts

As a result of a prior disciplinary matter, the Supreme Court suspended respondent for three years, stayed that suspension, and placed him on a three-year probationary term. One of the conditions of his probation was a six-month actual suspension. The Supreme Court also ordered respondent to pass the Professional Responsibility Examination within one year, and to fulfill the requirements of subdivisions (a) and (c) of rule 955 within 30 and 40 days, respectively, of the effective date of the order. The order also noted that it was effective upon finality, citing California Rule of Court 24(a), which provides that a Supreme Court order, unless it otherwise specifies, becomes final 30 days after filing. The order was filed on August 22, 1990, and became effective September 21, 1990.

Under the order, respondent was required by October 21, 1990, to advise in writing those involved in pending matters of his suspension, specifically all clients, co-counsel, opposing counsel or, in their absence, parties, and the court or tribunal where the litigation was pending. Notice was to be given by registered or certified mail, return receipt requested, and was to include an address where respondent could thereafter be reached. Clients were to be advised that after the date of his suspension, respondent could not act as their attorney. All client papers were to be returned or arrangements made for their return, all unearned fees were to be returned, and the clients told to seek other counsel. By October 31, 1990, respondent was to have filed with the Supreme Court, pursuant to rule 955(c), an affidavit attesting that he had fully complied with the dictates of subdivision (a) and providing an address to which any further communications could be sent.

Respondent did not receive from the Supreme Court its August 22, 1990 order; the correspondence was returned by the U.S. Postal Service, marked "forwarding order expired." It had been sent to respondent's official State Bar membership address, which was in fact respondent's office at the time of service. The first notice respondent had of the Supreme Court's suspension and rule 955 orders was a September 24, 1990, letter from the State Bar Court's probation department, reminding respondent of the conditions of his probation and enclosing a copy of the Supreme Court's order. It is unknown why respondent received the State Bar Court's letter but not the Supreme Court's service of its order sent to the same address.

On or about December 28, 1990, respondent sent to the State Bar Court clerk's office a document entitled "Declaration Re: Apparent Default." In it, respondent stated that he had not been served with a copy of the Supreme Court's order and had only received notice of the Court's order in the State Bar Court probation department's letter on September 26, 1990. Respondent stated (incorrectly) that as of the receipt of the letter, he was already in default of the rule 955 notice requirements.[2] He averred that prior to September 26, he had substituted other

2. As noted *ante*, respondent had until October 21, 1990, to give the notices required by rule 955.

counsel for the bulk of his client caseload and had given written notice to the opposing counsel in those matters. Declaring that as of September 26 he had only two outstanding cases, with hearing dates scheduled in both matters within a few days, respondent found substitute counsel for the clients, advised them orally of his suspension and secured their consent to the new counsel, met with one of the clients, and waived any fees earned but not yet paid by the clients to compensate them for any inconvenience. Respondent also described additional problems he faced with two former employees who had engaged in the unauthorized practice of law, using respondent's name to secure clients, circumstances which led to respondent's underlying discipline. Respondent declared that there might be persons who dealt with these employees and believed that respondent was their attorney, but respondent did not know their identities and had not been able to discover their files or the whereabouts of his former employees. He outlined his legal efforts to curtail any additional damage from his prior association with these individuals.

Respondent was advised by the State Bar's probation department by letter dated January 22, 1991, that the then recent amendments to the court rules effective December 1, 1990, delegating the power to extend time to comply with rule 955 orders to the State Bar Court, did not apply because his compliance was due to be filed with the Supreme Court on October 31, 1990.

Because respondent did not timely file his affidavit under rule 955(c) with the Supreme Court, that Court referred the matter to the State Bar Court by order dated February 11, 1991, for hearing and, if his violations were found to be wilful, for recommended discipline.

At the hearing below, the parties submitted a lengthy stipulation of facts and held two days of hearings. The Office of Trials established that at the time respondent received a copy of the Supreme Court's order, respondent had six cases involving a total of twelve clients whom he had a duty under rule 955 to notify of his suspension. Although respondent did not receive the Supreme Court's order through no fault of his own and miscalculated the time within which he had to satisfy rule 955, the hearing judge found respondent had sufficient time after receiving his copy of the order to comply. Respondent did not check the court rules to determine the effective date of the order or his required duties under rule 955. Nor did he contact his own counsel from his disciplinary case, the Supreme Court, or the State Bar to seek clarification of his compliance responsibilities. Only two clients were contacted by respondent and verbally advised of his suspension and the need to retain new counsel. As respondent stipulated, none were provided with written notice, nor were opposing counsel or the courts involved in the cases given any notice of respondent's suspension. Respondent concedes before us that his actions did not comply with the requirements of rule 955 and his violation was wilful. The hearing judge so found and we agree.

B. Discussion of Mitigating and Aggravating Evidence

Respondent argues that his efforts at compliance, while far from sterling, were substantial and taken in good faith. **[3a]** Upon review, respondent avers that he relied on advice from his probation monitor and his counsel concerning his efforts to comply with rule 955 to his own detriment. This argument might have been persuasive as evidence of mitigation (see *Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 259) had respondent raised it at the hearing below and produced evidence in support. However, at the hearing, in response to a question from his attorney regarding whether his former counsel had given him any advice regarding compliance with rule 955, respondent answered "No, regretfully not." (R.T. January 15, 1992, p. 85.) As to respondent's contact with his probation monitor, the record shows only that during this time period, respondent attempted to reach him. (*Id.* at pp. 123-124.) It does not, as respondent contends, establish that the probation monitor corroborated respondent's mistaken calculation of the deadline to comply with rule 955 and led respondent to believe that respondent's failure to comply fully with the rule's requirements would be excused.

Respondent's other excuses are questionable as well. In his December 1990 declaration, respondent averred that in the two client matters of which he was

aware (Collins and Johnson), each had hearings within a few days of his receiving notice of the order. While this may have been true in one case (Collins), the family law case cited by respondent (Johnson) had its next hearing date on October 25, 1990, just short of a month from the date respondent received the order. Respondent admitted as much in the disciplinary hearing.

[4] In another matter (Powell), respondent did not think of himself as the attorney of record in the case because he believed he had been retained for limited services. Respondent accepted a retainer fee and filed a civil complaint on the client's behalf in August 1989, listing himself in the complaint and on the summons as the plaintiff's attorney. In his view, he did not think to notify the client of his suspension because respondent was the attorney of record but not the attorney in fact. Respondent has not advanced any legal support for this distinction.

[5] Respondent claimed that two of the cases (Ruiz and Corona), involving a total of eight clients, had been removed from the office by his former employees and to hold him culpable for misconduct regarding these files would be unfair. This was not the explanation offered by respondent in the hearing below. There, he similarly maintained that he was retained in these two cases for limited purposes only, and, in one case, the file lay dormant for more than two years in his file cabinet. Later he claimed that after the problems with the former employees surfaced, he executed substitution of attorney forms, turning the cases over to another attorney. However, he did not take responsibility for filing the forms with the court and serving them on opposing counsel, or at least verifying whether filed copies of the substitution form were returned to him by new counsel. **[6]** The Office of Trials is not precluded from raising these incidents because these two files were not the subject of the prior disciplinary case against respondent.

[7a] The remaining case (Craft) was, in respondent's view, a result of an oversight concerning another substitution of attorney form. This case, along with over 200 other workers' compensation files, was transferred en masse by respondent to new counsel in anticipation of respondent's suspension. To effect the transfer, respondent photocopied hundreds of blank "notice of association of counsel" and "substitution of counsel" forms and signed them, undated and without captions, client names or case numbers on them. He left it to successor counsel to take all remaining steps to effect the transfer of responsibility, including communicating with the clients. Respondent did not keep a copy of the files or even a list of the clients or case names handed over to the new attorney.[3] Respondent was aware that client consent (which he had not obtained) was necessary for a substitution of attorney to be effective. (Code Civ. Proc., § 284, subd. (1).)[4]

[8a] Respondent contends that he submitted his December 1990 declaration in an attempt to comply with his duty under rule 955(c). Initially, respondent's rule 955 affidavit was to be filed with the Supreme Court by October 31, 1990; respondent sent his declaration to the State Bar almost two months later. The hearing judge noted that the declaration contained a number of contradictory statements. In our analysis, the statements are more inaccurate than contradictory: for example, none of the opposing counsel in respondent's cases had been advised, in writing or otherwise, of respondent's suspension, contrary to respondent's declaration that written notice of the substitution of counsel had been sent. He misrepresented in the declaration the hearing date in one case, so that it appeared "extreme time limitations" prevented him from providing written notice and a proper substitution of counsel in compliance with rule 955 prior to the hearing date. Respondent also claims mitigating credit because of "his refusal to file a false declaration re: compliance out of respect for his legal mandate for honesty." (Resp. brief, p. 18.)

[9] We do not find respondent's miscalculation

3. Since the transfer was in anticipation of respondent's suspension, it could be argued that he was required to retain records of the steps he took under his suspension order, in accordance with then rule 955(d).

4. If client consent cannot be obtained, an attorney may, after notice to the client, seek a court order to be relieved as counsel. (Code Civ. Proc., § 284, subd. (2).)

of the time deadlines for compliance or failure to file for other reasons to be reasonable or mitigating given his failure to consult the court rules or contact his former counsel, the Supreme Court's clerk's office, or the State Bar for clarification in a timely fashion. **[7b]** Of particular concern was his careless method of transferring a large number of cases in anticipation of the Supreme Court order with blank substitution of counsel forms in such a manner that he had no idea whether the substitutions were completed or his clients protected.

[10] As further mitigating evidence, respondent argues the lack of harm to his clients, citing to the language in the Supreme Court's decision in *Durbin* v. *State Bar* (1979) 23 Cal.3d 461, 467-468, that the primary purpose of rule 955's reporting requirements is to "insure the protection of concerned parties." However, as the Court noted in a more recent opinion, the concerned parties include not only clients, but co-counsel, opposing counsel or adverse parties, and any tribunal in which litigation is pending. (*Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1187.) In *Lydon*, the Court rejected an attorney's claim that his failure to comply with rule 955 was "insubstantial" because none of his clients were harmed, stating that there is nothing in the rule or prior decisions to distinguish between a substantial or insubstantial violation. (*Id.* at pp. 1186-1187.) Whether or not respondent had any clients, he would have been required to comply with rule 955. (*Powers* v. *State Bar* (1988) 44 Cal.3d 337, 341.)

[11] Respondent criticizes the wording of the rule, implying that his compliance would have been assured had the language been simpler. As the Court has remarked, the mandate of the rule is clear and requires little if any assistance to fulfil its requirements. (*Durbin* v. *State Bar*, *supra*, 23 Cal.3d at p. 468; see also *Dahlman* v. *State Bar* (1990) 50 Cal.3d 1088, 1094.)

The examiner highlights several pieces of evidence which, in his view, constitute aggravating circumstances. We agree with all of his arguments save one. Respondent does have a prior record of discipline, involving misconduct which began just over two years after he had been admitted to practice, an aggravating circumstance under standard 1.2(b)(i), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("standards"). He was found culpable of abandoning clients in two instances, failing to return unearned fees to the abandoned clients, failing to return client documents to one of the abandoned clients, and, in a third matter, failing to promptly return client funds upon request. As respondent has noted, this misconduct arose from respondent's questionable association with two individuals which resulted, in the view of the hearing panel in his disciplinary case, in "fertile ground for mismanagement of cases and abuse of his name and status as an attorney." The hearing panel found that respondent had essentially rented out his name and status to these non-attorneys to increase his income in two areas of the law with which he was unfamiliar. Thereafter, he made no effort to monitor these individuals' activities and showed a lack of concern for any potential harm resulting to the public. The serious nature of the misconduct, the potential for massive fraud, and respondent's irresponsible attitude prompted the hearing panel's recommended discipline of a three-year stayed suspension, a three-year probationary term, an actual suspension for six months and successful passage of the professional responsibility examination within one year. With minor modifications to the culpability findings, which did not alter the underlying findings and conclusions of the hearing panel, this department affirmed the recommended discipline in an unpublished decision, and that decision was adopted by the Supreme Court.

[12] Respondent did not pass the professional responsibility examination within one year as ordered and was suspended from practice from October 7, 1991, until January 10, 1992, during the pendency of this matter. Although the examiner does not characterize this suspension as prior discipline, which it is not, he argues that it indicates that respondent is unable to act responsibly or obey the Supreme Court's order regarding his professional conduct. We deem it relevant to our determination of the appropriate discipline. (See *Barnum* v. *State Bar* (1990) 52 Cal.3d 104, 113.)

[13] The examiner also argues that respondent did not present any evidence of remedial steps to assist the clients in four of the six cases involved in this matter. Respondent remains the attorney of

record in three of these cases and litigation is still pending in them. This inaction indicates an indifference to the consequences of his misconduct and is an aggravating circumstance. (Std. 1.2(b)(v).) We note as well that respondent has yet to file an affidavit with the Supreme Court which conforms to the requirements of rule 955(c).

[14] We disagree with the examiner's use of respondent's criminal conviction as additional, aggravating evidence of respondent's inability to conform his conduct to the requirements of the law. The hearing judge found that the conduct did not constitute a basis for discipline. The Office of Trials has not challenged that conclusion before this court. We have adopted the hearing judge's decision on this point. While a respondent's criminal conduct might well be relevant as an aggravating circumstance in a different case, we deem it inappropriate under these circumstances to consider respondent's criminal conviction as an aggravating factor.

There is other evidence we find aggravating which has been identified earlier in this opinion. **[8b]** We agree with the hearing judge that respondent's inaccurate declaration raises a serious doubt as to his credibility. (Std. 1.2(b)(vi).) **[7c]** Further, his irresponsible acts in executing in blank hundreds of substitution of attorney and association of attorney forms and turning them over to successor counsel, without any safeguards for his clients' interests, posed a significant potential harm to his clients and to the public interest generally. (Std. 1.2(b)(iv).)

C. Degree of Discipline

Respondent seeks review because he contends that the disbarment recommendation is unwarranted under the mitigating facts of the case and the applicable case law. He asserts that the facts here most closely resemble those in *Durbin* v. *State Bar*, *supra*, 23 Cal.3d 461, in which the attorney received a minimum six-month actual suspension, and finds distinguishable or inapposite the cases the hearing judge relied upon in his analysis: *Shapiro* v. *State Bar*, *supra*, 51 Cal.3d 251; *Bercovich* v. *State Bar* (1990) 50 Cal.3d 116; *Lydon* v. *State Bar*, *supra*, 45 Cal.3d 1181, and *Powers* v. *State Bar*, *supra*, 44 Cal.3d 337. The examiner contrasts the diligence and ultimate compliance of the attorney with rule 955 in the *Shapiro* case with respondent's conduct. He argues that the degree of discipline imposed in the *Durbin* case would be inadequate under the facts and that the trend of recent Supreme Court decisions has been to impose disbarment as the discipline for wilful noncompliance with rule 955.

[15a] The Supreme Court announced its current benchmark for considering rule 955 matters in *Bercovich* v. *State Bar*, *supra*, 50 Cal.3d 116. "We believe the more recent decisions by this court reflect the view that disbarment is generally the appropriate sanction for a willful violation of rule 955. [Citations.] The introduction to the Standards states that one of the primary reasons for their adoption was 'to achieve greater consistency in disciplinary sanctions for similar offenses.' We see no reason to depart from what appears to be the most consistently imposed sanction in recent cases under rule 955." (*Id.* at p. 131, citing *Powers* v. *State Bar*, *supra*, 44 Cal.3d at p. 342; *Lydon* v. *State Bar*, *supra*, 45 Cal.3d 1181.) Similarly, when we deviate from the standards or established case law, we must make clear the reasons for such a departure. (*Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) Therefore, it is instructive for us to review the two cases discussed by the parties and the hearing judge that impose a sanction other than disbarment to determine the reasons, if articulated, for not imposing disbarment.

In *Durbin* v. *State Bar*, *supra*, 23 Cal.3d 461, the attorney was actually suspended from practice for two years, but did not learn of the Supreme Court's order of suspension until two weeks after the suspension went into effect. He complied with rule 955(a) within the time period, but did not file the required affidavit with the Supreme Court. The Court rejected as unpersuasive the attorney's proffered excuse that he could not remember the names of all the clients whom he had notified and did not keep records of their names. Finding that the attorney did timely comply with all of the provisions of rule 955 *except* for the filing of the affidavit with the Supreme Court, the Court suspended the attorney for six months or until he filed the required affidavit with the Court, whichever was longer. As noted by the Court in its later opinion in *Bercovich*, the *Durbin* opinion does not discuss any factors which might be considered

aggravating or weighing in favor of disbarment. (*Bercovich*, *supra*, 50 Cal.3d at p. 132.)

Soon after the *Bercovich* opinion was issued, the Court decided *Shapiro* v. *State Bar*, *supra*, 51 Cal.3d 251. In that case, the attorney was actually suspended for one year for abandoning two clients, failing to return their unearned advanced fees, and practicing while suspended for nonpayment of dues. In anticipation of his suspension, the attorney met with his remaining clients and successor counsel to inform them that he could not longer represent them. The successor counsel offered to substitute as counsel or assist the clients in securing other representation. Shortly after respondent received the Supreme Court's order, he sought the advice of his probation monitor concerning the notification requirement in rule 955(a). The monitor provided inadequate guidance and misinformed respondent concerning the format and time limitations for filing his rule 955(c) affidavit. When respondent learned his affidavit was insufficient, he contacted his probation monitor and retained a law firm to assist him in complying with the rule. His affidavit was filed six months late, delayed in part by physical injuries suffered by the attorney. The Court found substantial mitigating factors in that record, including the diligent, if unsuccessful effort of the attorney to comply with the rule timely; the affirmative misdirection by the probation monitor; the attorney's lack of a disciplinary record over 16 years prior to his misconduct, which occurred within a very narrow time frame[5]; the attorney's recovery from debilitating physical and psychological problems, established by his medical records, and the character testimony of practicing attorneys from his community. Shapiro received a two-year stayed suspension and a two-year probationary term on conditions including an actual suspension of one year.

In both *Durbin* and *Shapiro*, the attorneys notified their clients of their suspension in a timely manner, as required by rule 955(a), and their failure to comply was primarily limited to failing to submit proper proof of their compliance. There was substantial mitigating evidence presented in *Shapiro* and the lack of any aggravating circumstances in *Durbin*. Both attorneys participated in the disciplinary proceedings. The actual suspensions ordered in the prior matters (one year actual in *Shapiro* and two years actual in *Durbin*) which triggered the 955 requirement were lengthier than that ordered in the present case (six months).

The hearing judge, in distinguishing this case from the *Durbin* and *Shapiro* cases, noted that respondent failed to notify all his clients, any of his opposing counsel, or any of the tribunals in his cases, and failed to execute proper substitution of counsel forms. Where the attorney in *Shapiro* had withdrawn from all his cases, the hearing judge noted that respondent remained the counsel of record in three cases as of the date of the parties' stipulation. Shapiro showed diligence in attempting to comply with the rule and belatedly provided the requisite notice to all concerned parties and filed the proper affidavit with the Court. Respondent, in the view of the hearing judge, demonstrated little if any interest in ascertaining his responsibilities under the court rules and did not contact the State Bar until the Supreme Court was advised that he had not filed the appropriate affidavit.

While we agree with the hearing judge's analysis of the instant facts in contrast with the *Shapiro* and *Durbin* cases, respondent has not been accorded full credit for what steps he did attempt prior to the imposition of his suspension. When he learned of the filing of the Supreme Court's order, respondent acted quickly in two cases to contact the clients with the news of his suspension, got their permission to substitute counsel of his suggestion, and adjusted any financial obligation in favor of the clients. Prior to the issuance of the order, respondent recognized that he had an obligation to his clients to refer them to new counsel in anticipation of his six-month suspension. However, executing hundreds of substitution of counsel and association of counsel forms in blank and handing the cases over to another attorney

5. The Court found that an additional incident of client abandonment, consolidated with the rule 955 case, occurred in the same short time period as the two incidents in the prior discipline case. (*Shapiro* v. *State Bar*, *supra*, 51 Cal.3d at pp. 258-259, 260.)

without notice to or consent of his clients placed those clients' causes in possible jeopardy. His actions are not comparable to those taken by Shapiro in meeting with his clients together with possible new counsel.

Further, respondent has not come forth with mitigating evidence comparable to that shown in the *Shapiro* case. **[3b]** We reject respondent's attempt to argue any misdirection by his probation monitor and former counsel which is unsupported and even contradicted by the evidence. Respondent does not have a long, unblemished record prior to his misconduct. There has been no character evidence offered and no showing of diligent efforts to comply, however belatedly, with the Supreme Court's order. The one declaration respondent filed, with its inaccuracies, undercuts rather than bolsters his case for good faith compliance.

Admittedly, the remaining recent Supreme Court cases, all of which disbarred the attorneys for wilful 955 violations, showed serious breaches of professional conduct. None of these attorneys in these cases (*Dahlman*, *Bercovich*, *Lydon,* and *Powers*) appeared in the disciplinary proceedings in the 955 matters or presented credible explanations why they did not participate in a timely fashion. Claims of physical and emotional problems in two cases which the attorneys asserted prevented their participation were rejected as belated and unsupported. The Court was concerned in both *Lydon* and *Bercovich* with the absence of any evidence that the attorney's misconduct would not recur in the near future. (*Bercovich* v. *State Bar*, *supra*, 50 Cal.3d at p. 132; *Lydon* v. *State Bar*, *supra*, 45 Cal.3d at p. 1188.) The underlying discipline in the prior misconduct matters in these cases was not any more serious than in *Shapiro* or as represented in the two-year actual suspension in *Durbin*,[6] but the Court found in each instance that, as a result of the 955 proceeding, public protection required disbarment.

[16] Wilful breach of a Supreme Court order is by definition "deserving of strong disciplinary measures." (*Lydon* v. *State Bar*, *supra*, 45 Cal.3d at p. 1187.) The sanction recognized and generally imposed by the Supreme Court in rule 955 wilful violation cases is disbarment. (*Bercovich* v. *State Bar*, *supra*, 50 Cal.3d at p. 131.) When it has not been imposed, the attorneys had complied with the notification requirement, orally or in writing, to all their clients, participated in the disciplinary process, and presented substantial mitigating evidence regarding the noncompliance and their present good character.

[15b] Although respondent has participated in the disciplinary process, he has not presented a convincing case of mitigation, diligence, and rectification of his misconduct. He has demonstrated a pattern of inattention to important duties to his clients, the courts and the public; an inability to conform to professional norms, and a lack of concern for the potential harm to his clients and the public resulting from his misconduct. With the Supreme Court's directive in cases of a wilful violation of rule 955 under circumstances as presented here, the public interest and the administration of justice are appropriately served by the disbarment of respondent.

III. FORMAL RECOMMENDATION

Accordingly, we affirm the findings of the hearing judge in this matter, as modified herein, and recommend that respondent, Bert B. Babero, be disbarred from the practice of law in the state of California. Since, at the time of filing this opinion, respondent is entitled to practice law, we recommend that he be required to comply with rule 955 within the same time limits as customarily imposed by the Supreme Court. We also recommend that eligible costs of this proceeding be awarded the State Bar.

We concur:

PEARLMAN, P.J.
NORIAN, J.

6. The underlying misconduct warranting a two-year actual suspension was not discussed by the Court in *Durbin* v. *State Bar*, *supra*, 23 Cal.3d 461.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT K

A Member of the State Bar

No. 80-O-10164

Filed March 16, 1993

SUMMARY

Respondent represented six named plaintiffs in an antitrust case in the 1970's and achieved enormously positive, unexpected results, including a $9 million settlement for the six plaintiffs. In addition, respondent negotiated a $1 million settlement for hundreds of other clients in connection with the case. Although none of the six named plaintiffs complained about respondent, one of the other clients sued respondent for malpractice. In 1980, when the client who had sued won a substantial verdict against respondent, the State Bar became aware that misconduct may have occurred. In 1987 the State Bar charged respondent with numerous ethical violations regarding the above matters.

After a lengthy State Bar Court trial, a hearing referee of the former State Bar Court concluded that respondent was not culpable of any of the misconduct alleged in the notice to show cause and recommended that the matter be dismissed. The State Bar examiner sought review before the former review department. The former review department concluded that respondent had represented clients with conflicting interests without obtaining their written consent. The former review department then remanded the matter to the same hearing referee for a recommendation as to the degree of discipline. After further hearings, the referee recommended that respondent be privately reproved. (C. Thorne Corse, Hearing Referee.)

Respondent requested review before the current review department, contending that he was not culpable of misconduct, or, in the alternative, that the misconduct did not warrant any discipline. The current review department concluded that the only properly charged conflict of interest which had been found by the referee or former review department was not established by clear and convincing evidence. However, it found respondent culpable of failing to keep the portion of his legal fee which was disputed by the client in a trust account until the resolution of the dispute. Because the sole basis of culpability was this trust account violation and because the mitigating circumstances outweighed the aggravating circumstances, the current review department imposed a private reproval conditioned on respondent taking and passing the professional responsibility examination. (Gee, Acting P.J., concurred in part and dissented in part and filed a separate 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: Jerome Fishkin

For Respondent: James J. Brosnahan, Jr.

HEADNOTES

[1 a, b] 130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
166 Independent Review of Record

The law of the case doctrine does not preclude the current review department from reviewing the former review department's decision de novo. If review is sought in a proceeding which had been previously decided by the former review department, the entire matter is before the review department for independent de novo review, and it may act on an issue regardless of whether the parties have raised it. (Rule 453(a), Trans. Rules Proc. of State Bar.) Accordingly, review department could reopen a charge dismissed by the former review department.

[2 a, b] 102.10 Procedure—Improper Prosecutorial Conduct—Reopening
135 Procedure—Rules of Procedure

Initiation of disciplinary proceeding against respondent was not barred under former rule 511 of the Rules of Procedure of the State Bar by State Bar's decision to monitor appeal in malpractice case against respondent instead of pursuing formal investigation.

[3] 130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
166 Independent Review of Record

Former review department's alleged lack of quorum was moot where all issues in proceeding were before current review department for independent de novo review.

[4] 141 Evidence—Relevance
146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings

Where civil malpractice action against respondent involved essentially identical factual issues to those in discipline proceeding, nontestimonial exhibits consisting of documents relating to judgment in such civil proceeding, including unpublished appellate opinion explaining reasons for decision of civil courts, were admissible evidence in disciplinary proceeding.

[5 a, b] 135 Procedure—Rules of Procedure
159 Evidence—Miscellaneous

Former review department's admission of certain exhibits into evidence without allowing respondent an opportunity to present rebuttal evidence was error. Nevertheless, no error in admitting or excluding evidence invalidates a finding of fact, decision or determination unless the error resulted in a denial of a fair hearing. (Rule 556, Trans. Rules Proc. of State Bar.) Where such exhibits were not relied upon in determining culpability and discipline, respondent failed to show that the admission of the documents deprived him of a fair hearing.

[6] **162.11 Proof—State Bar's Burden—Clear and Convincing**
162.12 Proof—State Bar's Burden—Preponderance of Evidence
191 Effect/Relationship of Other Proceedings
Because the preponderance of the evidence standard of proof in a civil malpractice trial is lower than the clear and convincing evidence standard of proof in a disciplinary proceeding, the conclusions reached by civil courts in a malpractice action against respondent are not dispositive of disciplinary charges.

[7] **204.90 Culpability—General Substantive Issues**
280.00 Rule 4-100(A) [former 8-101(A)]
The amount of client trust funds that an attorney mishandles goes to the issue of discipline, not culpability, and the mishandling of even an insignificant amount can constitute a disciplinable offense. No de minimis exception applies to the determination of culpability for mishandling trust funds.

[8 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
A client's objection to respondent taking any legal fee from a settlement triggered the provision of the rule of professional conduct requiring respondent to retain disputed funds in a trust account pending a resolution of the dispute even though respondent later reduced his legal fee.

[9 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
106.90 Procedure—Pleadings—Other Issues
113 Procedure—Discovery
273.30 Rule 3-310 [former 4-101 & 5-102]
An attorney can be disciplined only for misconduct charged in the notice to show cause or an amendment thereto. Where notice to show cause charged violation of rule against representing clients with conflicting interests, and respondent served interrogatory requesting identification of all such alleged conflicts, charges against respondent were limited to those identified in State Bar's answer to such interrogatory, and respondent could not be found culpable of violating conflict of interest rule based on a conflict not listed therein.

[10 a, b] **273.30 Rule 3-310 [former 4-101 & 5-102]**
The former rule of professional conduct prohibiting an attorney from representing clients with conflicting interests without written client consent was violated where the attorney favored one client at the expense of another client. An attorney has a duty to secure as large a recovery as possible for a client and the attorney violates this duty when the representation of one client might have induced the attorney to negotiate a low settlement for another client. A conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of one is rendered less effective by reason of the lawyer's representation of the other.

[11 a-e] **273.30 Rule 3-310 [former 4-101 & 5-102]**
Representing over 700 clients by majority rule posed risk of conflicting interests among clients, since respondent owed same ethical obligations to each client, not just those in majority. However, respondent's representation of multiple clients did not violate the former rule of professional conduct prohibiting an attorney from representing clients with conflicting interests without written client consent where the clients' interests were compatible, not conflicting; respondent was not put in a position of choosing between conflicting duties or of attempting to reconcile conflicting interests; there was no clear and convincing evidence that respondent's representation of one group of clients rendered his representation of the other group less effective; and there was not clear and convincing evidence that potential conflicts or favoritism ever materialized.

[12 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
273.30 Rule 3-310 [former 4-101 & 5-102]
563.90 Aggravation—Uncharged Violations—Found but Discounted

Respondent violated former rule of professional conduct prohibiting representation of clients with conflicting interests when he accepted more signatories to a settlement than were required, because interests of required signatories conflicted with interests of extra signatories, whose participation in settlement reduced amounts received by required signatories and by previous extra signatories. Where such violation of conflict of interest rule was not charged, it could not be basis of culpability, but could be relied on in aggravation. However, because of novelty of situation, which involved extremely unusual settlement, uncharged violation was given minimal aggravating weight.

[13 a, b] **213.40 State Bar Act—Section 6068(d)**
221.00 State Bar Act—Section 6106

In order for an attorney's misrepresentation to be a violation of the statute prohibiting the commission of any act involving moral turpitude, dishonesty or corruption, the misrepresentation must be made with an intent to mislead. Negligence in making a representation does not constitute a violation of the statute. Where no clear and convincing evidence established any misrepresentation or deception, attorney's statements did not involve moral turpitude and also did not violate statute requiring attorneys only to use means consistent with truth and not to deceive judicial officers.

[14 a-d] **541 Aggravation—Bad Faith, Dishonesty—Found**

Where respondent made, and urged his clients to make, misleading statements to the opposing party in connection with a settlement, wrongfully demanded the return of a partial settlement payment from a client who was entitled to the funds, and delayed sending the same client other partial settlement payments to which the client was entitled, this conduct constituted bad faith and was an aggravating factor.

[15] **106.30 Procedure—Pleadings—Duplicative Charges**
541 Aggravation—Bad Faith, Dishonesty—Found
605 Aggravation—Lack of Candor—Victim—Declined to Find
801.90 Standards—General Issues

Even if respondent's demand that client return settlement check demonstrated lack of candor or cooperation with client, review department would not consider it as separate aggravating circumstance where it had already been found to be a factor establishing bad faith, a different aggravating circumstance.

[16 a, b] **615 Aggravation—Lack of Candor—Bar—Declined to Find**
735.10 Mitigation—Candor—Bar—Found

Where respondent was candid and displayed exemplary conduct during disciplinary proceedings, respondent's vigorous defense of the charges, which was motivated only by his honest belief in his innocence, did not negate the mitigating force of his candor and cooperation with the State Bar.

[17] **740.31 Mitigation—Good Character—Found but Discounted**
740.32 Mitigation—Good Character—Found but Discounted

The weight to be accorded to respondent's character evidence was diminished somewhat where respondent presented a limited range of character witnesses, only one of whom revealed a full understanding of respondent's culpability.

[18] **740.10 Mitigation—Good Character—Found**

Civic service, such as valuable charitable work, can deserve recognition as a mitigating circumstance under the standard providing that evidence of good character is mitigating.

[19] **162.20 Proof—Respondent's Burden**
745.59 Mitigation—Remorse/Restitution—Declined to Find

A respondent has the burden of proving mitigation by clear and convincing evidence. While respondent's honest belief in his innocence was not an aggravating factor, it precluded finding by clear and convincing evidence that respondent's recognition of his wrongdoing was a mitigating factor. Recognition of wrongdoing does not require false penitence, but it does require acceptance of culpability.

[20 a-c] **595.90 Aggravation—Indifference—Declined to Find**
625.10 Aggravation—Lack of Remorse—Declined to Find
750.10 Mitigation—Rehabilitation—Found

Respondent's long period of postmisconduct practice of law without further discipline was a significant mitigating circumstance, because it demonstrated that respondent was able to adhere to acceptable standards of professional behavior and was not likely to commit misconduct in the future. Respondent's good faith defense of his innocence, in which he honestly believed, did not constitute a lack of understanding of his misconduct so as to preclude such finding, especially where respondent offered evidence about his sensitivity to misconduct of which he had been found culpable at an earlier stage in the proceeding.

[21 a-c] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
162.20 Proof—Respondent's Burden
755.52 Mitigation—Prejudicial Delay—Declined to Find

Excessive delay in the conduct of a disciplinary proceeding may be a mitigating circumstance, but the attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense. A delay in a disciplinary proceeding merits consideration only if it has caused specific, legally cognizable prejudice. Where respondent was able to present evidence on all issues as to which respondent claimed prejudicial delay, and did not specify what missing evidence would have shown, respondent failed to show that delay caused specific prejudice.

[22 a-e] **543.90 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
750.10 Mitigation—Rehabilitation—Found
801.41 Standards—Deviation From—Justified
824.59 Standards—Commingling/Trust Account—Declined to Apply
1091 Substantive Issues re Discipline—Proportionality

Where respondent was culpable of failing to set aside $942 of his legal fee in a trust account pending resolution of a dispute with his client; aggravating factor of bad faith arose from respondent's intent to serve his clients rather than from any venal purpose; aggravating factors were outweighed by mitigating factors including long period of unblemished practice since misconduct, indicating unlikelihood of further misconduct; and prior similar cases indicated that it would be appropriate to depart from the 90-day minimum actual suspension for trust account violations, appropriate discipline was private reproval conditioned on passage of professional responsibility examination.

ADDITIONAL ANALYSIS

Culpability
- **Found**
  - 280.01 Rule 4-100(A) [former 8-101(A)]
- **Not Found**
  - 213.15 Section 6068(a)
  - 213.45 Section 6068(d)
  - 221.50 Section 6106
  - 273.35 Rule 3-310 [former 4-101 & 5-102]

Aggravation
- **Declined to Find**
  - 582.50 Harm to Client

Mitigation
- **Found**
  - 715.10 Good Faith
  - 720.10 Lack of Harm
- **Declined to Find**
  - 710.53 No Prior Record

Standards
- 801.30 Effect as Guidelines
- 801.47 Deviation From—Necessity to Explain
- 802.30 Purposes of Sanctions

Discipline
- 1051 Private Reproval—With Conditions
- **Probation Conditions**
  - 1024 Ethics Exam/School

OPINION

NORIAN, J.:

This proceeding resulted from respondent's[1] handling of an antitrust case during the 1970's. Respondent represented six named plaintiffs in the case and achieved enormously positive, unexpected results, including a $9 million settlement for the six plaintiffs. In addition, respondent negotiated a $1 million settlement for hundreds of other clients in connection with the case. Although none of the six named plaintiffs complained about respondent, one of the other clients sued respondent for malpractice. In 1980, when the other client won a substantial verdict against respondent, the State Bar became aware that misconduct may have occurred. In 1987 the State Bar charged respondent with numerous ethical violations regarding the above matters.

After a lengthy State Bar Court trial, a hearing referee of the former, volunteer State Bar Court, concluded that respondent was not culpable of any of the misconduct alleged in the notice to show cause and recommended that the matter be dismissed. The State Bar examiner sought review before the former, volunteer review department. The former review department concluded that respondent had represented clients with conflicting interests without obtaining their written consent in wilful violation of former rule 5-102(B) of the Rules of Professional Conduct of the State Bar of California,[2] and section 6068 (a) of the Business and Professions Code.[3] The former review department then remanded the matter to the same hearing referee for a recommendation as to the degree of discipline. After further hearings, the referee recommended that respondent be privately reproved. Respondent requested review before us, basically arguing that no misconduct should be found, or, in the alternative, that the misconduct does not warrant any discipline.

We have independently reviewed the record in this matter and have concluded that the majority of the referee's findings of fact are supported by the record and we adopt them. Our modifications to the referee's and former review department's conclusions of law, however, are substantially greater and we reject those conclusions of law not specifically adopted below.[4] With these modifications, we conclude that respondent wilfully violated rule 8-101(A)(2) by failing to keep the disputed portion of a legal fee in a trust account until the resolution of the dispute. Respondent received a $50,000 legal fee from the $1 million settlement and the disputed portion of that fee was $942. Because the sole basis of culpability is this trust account violation and because the mitigating circumstances outweigh the aggravating circumstances in this proceeding, we impose a private reproval.

I. FACTS

The hearing referee made detailed findings of fact regarding culpability. The former review department, without explanation, adopted its own factual findings which, for the most part, mirror the referee's findings. We must decide "whether, considering the record as a whole, the referee's findings are supported by the weight of the evidence." (*In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 261.) In so doing, we give great weight to the referee's credibility determinations. (*Id.*) As indicated above, we adopt the referee's factual findings with modifications which we have concluded are supported by clear and convincing evidence in the record. Our modifications mainly involve the addition of facts to the referee's findings.

1. In light of our disposition of this matter as a private reproval, we omit respondent's name from this published opinion, although the proceeding itself was, and remains, public. (Rule 615, Trans. Rules Proc. of State Bar.)

2. All references to rules herein are, unless otherwise stated, to the former Rules of Professional Conduct of the State Bar of California, in effect from January 1, 1975, to May 26, 1989.

3. All further references to statutes are to the Business and Professions Code unless otherwise noted.

4. This matter originally involved two respondents. Consequently, the referee's and former review department's decisions contain findings and conclusions with regard to both respondents. For reasons not relevant to the current proceeding, the charges against the other respondent were dismissed. In this opinion, we only adopt the findings and conclusions that pertain to respondent.

Instead of detailing every addition or change, we simply set forth our findings below. Where we have added facts to the referee's findings or changed facts found by the referee, we so modify his decision. In all other respects, we adopt the referee's factual findings.

In 1967, a number of beef producers, including D, approached attorney B regarding the apparent fixing of beef prices by major supermarket chains ("chains").[5] Attorney B was a rancher as well as an attorney specializing in personal injury matters. Concluding that the beef producers had good prospects for an antitrust case against the chains and lacking antitrust expertise, attorney B approached respondent's father in July 1967. Respondent's father had antitrust expertise and agreed to act as co-counsel for the beef producers.

The beef producers were told that $25,000 would be needed to finance a "test case" by a small number of plaintiffs against the three biggest chains, E, F, and G, and that if the case was successful, other cases would then be brought by other plaintiffs against these three chains and other chains based on the evidence developed in the test case. In the early fall of 1967, this sum was raised by contributions from a group of 199 producers, whom the referee and former review department characterized as the "supporters." The contributions included $1,000 from D, who was one of the four or five largest contributors. The 199 supporters did not sign retainer agreements with B or respondent's father, nor does the record identify all the 199 supporters. The primary objective of the proposed "test case" was to stop anti-competitive practices by the chains rather than to obtain substantial monetary damages, which were not expected.

For reasons not material to this proceeding, respondent's father stopped practicing law after 1967, and the antitrust case was handled by other attorneys in his firm. Six beef producers, consisting of five cattle ranchers and one feedlot operator, were selected by the attorneys to be plaintiffs in the test case. Each plaintiff signed a retainer agreement specifying attorneys' fees as one-third of any recovery *plus* any attorneys' fee awarded by the court. In January 1968, the complaint was filed for the test case against E, F, and G.

Respondent became a member of the State Bar in January 1969 and assumed responsibility for handling the test case in 1970. A motion for summary judgment by the defendants was denied in 1972. This denial, which received wide publicity, substantially increased the prices paid to beef producers.

In February 1973, respondent negotiated a settlement with F for $40,000 and a settlement with E for $45,000. After the settlement, which was widely publicized, the prices paid to beef producers again rose substantially.

In July 1974, a jury returned a verdict in favor of the six plaintiffs and against G for a total amount of $10,904,227. Thereafter, the trial court trebled the plaintiffs' damages and awarded attorneys' fees to the plaintiffs in the amount of $3.2 million. Extensive publicity surrounding the verdict further increased the prices paid to beef producers.

G thereafter appealed. Fearing the reversal of the verdict, respondent negotiated a $9 million settlement for the plaintiffs on July 22, 1975. The settlement included the dismissal of the appeal and the vacation of the judgment, which was done in due course.

Two meetings of the plaintiffs occurred in respondent's office after respondent negotiated the $9 million settlement during which respondent claimed, as the attorneys' share of the settlement, the $3.2 million court award of attorneys' fees, plus one-third of the remaining $5.8 million. At the first meeting, there was discussion of the distribution of the settlement, including the $3.2 million attorneys' fee. The discussion was somewhat heated and no conclusion was reached regarding the distribution. However, the plaintiffs agreed to accept G's offer and signed a settlement agreement.

5. In keeping with the anonymity of this opinion (see fn. 1, *ante*), we have used single-letter abbreviations to identify the persons involved in the facts and circumstances which generated this proceeding.

The second meeting was held on August 11, 1975. Two of the plaintiffs were accompanied by independent counsel. After significant disagreement and negotiation, the plaintiffs decided to agree to respondent's claim to $3.2 million plus one-third of the remaining $5.8 million. Underlying the plaintiffs' decision was a desire to preserve unanimity among themselves and to reward respondent for having represented them well. G paid the $9 million settlement and the balance, after respondent deducted the above fee, was duly distributed to the plaintiffs.

In negotiating with his clients regarding the attorneys' fee, respondent referred to the $3.2 million as "court awarded" fees when, in fact, the settlement included the vacation of the judgment, including the award of attorneys' fees. However, respondent did not assert that the attorneys' fee award survived the vacation of the judgment, nor did he explain that it did not.

Having arranged the $9 million settlement for the plaintiffs, respondent negotiated another $1 million settlement with G on the same day. Respondent told G's counsel that he had been meeting with a number of other beef producers for a long time and threatened to sue G on their behalf unless a settlement could be reached. G first offered $250,000, then increased the offer to $500,000, and eventually agreed to pay $1 million. At this meeting, respondent drafted a settlement agreement by hand which stated, among other things, that respondent represented "600 plus or odd cattlemen." The agreement was reduced to typewritten form shortly after this meeting and signed by respondent. The typewritten agreement stated that respondent had represented to G that he had been instructed by the cattlemen to commence an antitrust action against G, and that he had been authorized to settle the claims of the cattlemen.

As indicated, the $1 million was to go to "600 plus or odd cattlemen" whom respondent claimed to represent. These "600 plus or odd cattlemen" had not signed retainer agreements with respondent. The estimate of "600 plus or odd" was based on membership representations by the officers of the beef producers associations at the time of the E and F settlements. The phrase "plus or odd" indicated uncertainty about the exact number of persons involved. G made no offer to settle with any fewer than approximately 600 people and wanted this number of people to execute covenants not to sue G.

On August 13, 1975, respondent wrote a letter to leading beef producers to inform them of the $1 million settlement. According to the letter, the settlement was intended "to ensure at least some payment" to those who had been "behind the prosecution of" the test case, but would not prevent any producers from suing the other retail chains involved in the conspiracy to fix beef prices. The letter recognized that some producers had made cash donations, some had organized meetings and other events, some had testified at trial, some had furnished documentation, and some had done all of these things. The letter concluded by stating that respondent would meet with the producers in various western states during the next few months to discuss the settlement.

On August 15, 1975, respondent met in Grand Junction, Colorado, with 30 or so beef producers, including D and other supporters, to explain the $1 million settlement and to seek covenants not to sue G. Respondent stated at this meeting that he expected one-third of the $1 million as his attorney's fee and that there would have to be further discussion regarding the distribution of the balance. The record contains no evidence that anyone objected at this meeting to the fee which respondent claimed. During the early morning hours of August 16, 1975, respondent met privately with a leading rancher and D in D's hotel room. D expressed his opinion that the legal fees being collected were extraordinarily high. In response, respondent told D that his (respondent's) fee was his business, not D's.[6]

Another meeting was held on November 17, 1975, in Denver, Colorado, which was attended by about 20 cattlemen, including representatives of the various beef producers organizations whose mem-

6. The referee found that it was not clear whether D was referring to the legal fees from the $9 million settlement or the $1 million settlement or both, but probably D was referring to both fees.

bers were supporters or were potentially to be included as signatories of the covenants not to sue G, and D and his independent counsel. Most of the meeting was devoted to a discussion of how the $1 million should be distributed. Respondent made a full disclosure of his attorney's fee at this meeting. D's attorney was emphatic that the distribution of both the $9 million and the $1 million, particularly the attorneys' fees, should be submitted to arbitration. Respondent acknowledged in his testimony in the subsequent malpractice case that D's attorney had objected to the attorneys receiving any part of the $1 million settlement.

The beef producers attending the November 17, 1975, meeting advised respondent that they had been elected and authorized by their membership to agree to an allocation of the $1 million settlement and to bind all the members. Feeling dissatisfied with the meeting and wanting to reach home before a winter storm hit, D and his attorney left the meeting early. Different proposals about the distribution of the $1 million settlement were discussed at the meeting. After the departure of D and his attorney, the other beef producers approved an attorneys' fee of $333,333 and a formula for distributing the remaining $666,667. There is no evidence in the record that the other beef producers were authorized to act on behalf of D.

The formula divided the $666,667 as follows: 45 percent ($300,000) to those who contributed money to finance the test case, 30 percent ($200,000) to those who submitted documentation about beef production for use in test case, 10 percent ($66,667) to those who testified at the trial, 10 percent ($66,667) to those who set up meetings and provided leadership in support of the test case, and 5 percent ($33,333) to be distributed at respondent's discretion. At respondent's request, the beef producers signed an agreement for themselves and for all their members to specify the distribution of the settlement.

On November 24, 1975, respondent wrote a letter to the leading beef producers who had attended the meeting a week earlier. Enclosed with the letter was a copy of the agreement reached by those who had remained at the meeting. This agreement had been signed by all the producers attending the November 17 meeting except D and another. In the letter, respondent stated that no one "except one or two individuals" had questioned the $333,333 legal fee which he proposed to take. Also in the letter, respondent urged the leading beef producers to exert their very best efforts to obtain the required number of covenants.

Respondent's office distributed standard covenants to the leading beef producers, who were responsible for obtaining the signatures. Among other things, the covenants stated that the endorser had authorized and directed respondent to execute the $1 million settlement and that the attorneys had fully advised the endorser about the covenant and all matters covered by it. As the original deadline for the submission of covenants drew near, D decided to share in the $1 million settlement. However, D submitted a copy of the standard covenant with many corrections which D's attorney had made and which D had initialed. Among other corrections, D's covenant stated that the respondent had *not* been authorized and directed to execute the $1 million settlement agreement and had *not* fully advised D. The covenant contained no provision allowing the attorneys to receive any of the $1 million settlement.

D's covenant was delivered to respondent with a cover letter dated December 30, 1975, by a second attorney whom D had retained to represent him in the matter. The cover letter informed respondent that D had not accepted respondent's "proposal with respect to attorneys' fees."

In a letter dated January 20, 1976, respondent told the ranchers only 350 covenants had been received. To prevent the $1 million settlement from unraveling, respondent reduced his fee from $333,333 to $50,000.[7] He used the resulting $283,333 as a fund to encourage ranchers to provide the remaining covenants required by G.

7. The referee and former review department found that respondent reduced his fee in order to minimize the dilution of the interests of the supporters and other early participants in the $1 million settlement. We find that respondent's January 20, 1976, letter establishes that respondent reduced his fee in order to prevent the collapse of the settlement.

In a letter dated February 19, 1976, respondent expressed concern to D's attorney about D's modified covenant. Respondent stated that he could not be responsible for G's reaction to the covenant and suggested that D submit an unmodified covenant.

On June 4, 1976, respondent met with leading beef producers in Denver. Respondent's law office had received 711 covenants and it was unclear exactly how the $1 million settlement was to be distributed. Two separate formulas were agreed to at this meeting for distributing the $1 million settlement. The first formula involved the distribution of $666,667 of the settlement as agreed at the November 17, 1975, meeting. Under the second formula, everyone who submitted a covenant was to receive an equal share of the $283,333 fund created by the respondent's reduction of his fee. Not everyone who had attended the November 1975 meeting also attended this June 1976 meeting. Those attending this June 1976 meeting did not sign an agreement about the distribution of the $283,333 as those attending the November 1975 meeting had signed an agreement about the distribution of the $666,667.

Although only approximately 600 covenants were required for the $1 million settlement, respondent accepted 711 covenants, which he transmitted to G. The $1 million settlement was paid in four installments spread over three years. The attorneys' fee check was issued for the full $50,000 from the first installment, all of which was deposited in July 1976 into a personal bank account. None of the $50,000 fee was set aside in a trust account.

Respondent's office sent D four settlement checks. The first check, dated July 9, 1976, was for $3,592.35. Approximately three weeks after the filing of the malpractice suit against him by D, respondent demanded that D return the $3,592.35 check. Respondent's explanation was that since D was claiming in his malpractice suit that he should have shared in the $9 million settlement, D could not also share in the $1 million settlement. However, two of the test case plaintiffs shared in both settlements.

Respondent withheld the remainder of D's portion of the settlement from D until August 1978, when D was sent three more checks: a $4,790.20 check dated August 1976; a $4,801 check dated July 1977; and a $4,715.40 check dated July 1978. Thus, D's share of the $1 million amounted to $17,898.95. After the attorneys' fee was deducted, a total of $950,000 was available for distribution to the persons who submitted covenants. Because D's share was $17,898.95, the disputed portion of the attorneys' fee amounted to approximately $942.[8]

Dissatisfied with the respondent's handling of both the $9 million and $1 million settlements, D sued respondent and others for malpractice in July 1976. D alleged fraud, misrepresentation, breach of fiduciary duty, and other claims. D's lawsuit resulted in a judgment for compensatory and punitive damages for D against the defendants in 1980. The judgment was modified in an unpublished appellate opinion in 1984. As modified, the judgment totaled approximately $3 million in compensatory and punitive damages.

II. DISCIPLINARY PROCEEDINGS

Respondent requested review before us, contending that the former review department's finding of misconduct is void because of procedural errors, or, in the alternative, the misconduct does not warrant any discipline. In response, the State Bar examiner disputes each of respondent's contentions, argues that respondent is also culpable of making a material misrepresentation to his clients, and asserts that the recommended discipline should be increased. In reply, respondent argues that he cannot be found culpable of misrepresentation because it was not charged in the notice to show cause and, even if the allegation was properly charged, it was not proven by clear and convincing evidence.

Thereafter, we requested that the parties be prepared at oral argument to discuss whether respondent is culpable of violating rule 8-101(A)(2) or section 6106 by failing to retain the disputed portion of his legal fee in trust pending resolution of an alleged

8. The disputed portion of the $50,000 fee is calculated by dividing D's share ($17,898.95) by the total amount available for distribution to all clients who participated in the settlement ($950,000) and then by multiplying the quotient (0.0188) by the fee ($50,000). The referee found that the amount was $850.

objection by his client to the fee; and whether respondent is culpable of violating sections 6068 (d) or 6106 by claiming the court award of attorneys' fees without explaining that the court award of fees in the test case belonged to the plaintiffs, that the settlement would vacate the award, and that the attorneys would have no legal right to the award after the settlement. The parties subsequently filed briefs addressing the above issues.

Respondent argues that his alleged failure to retain the disputed portion of a fee in trust is a charge that was dismissed by both the hearing referee and the former review department and therefore the charge is not properly before us now, and there is no clear and convincing evidence in the record to support the charge even if it is properly before us. Respondent also argues his alleged failure to explain the legal effect of the $9 million settlement on the court award of attorneys' fees was not charged in the notice to show cause, that he did disclose this information to his clients, and that section 6068 (d) does not apply to the conduct at issue because the alleged misrepresentation or omission was not directed to a court.

The State Bar, in response to our letter, asserts that respondent is culpable of failing to retain the disputed portion of the legal fee in trust, that respondent concealed the effect of the settlement on the award of attorneys' fees as indicated in our letter, that respondent also misrepresented the status of the fees as court awarded after the settlement, that respondent had many conflicts of interest, and that these issues are all properly before the current review department.

III. DISCUSSION OF PROCEDURAL ISSUES

As indicated above, respondent argues that the current review department cannot consider any of the charges that were dismissed by the former review department and that the former review department's finding of misconduct is void because of procedural errors. We address these issues first.

A. Obligation of Independent De Novo Review

Respondent "strenuously objects" to our independent de novo review of the record on the ground that such review "would amount to relitigation of old matters already disposed of. . . ." Respondent argues that the former review department's decisions bind us and that once the former review department dismissed all the charges against respondent other than an alleged violation of rule 5-102(B), such charges "were no longer part of the proceedings before the State Bar Court." Respondent cites no authority in support of this argument, which is inconsistent with his position that the decision of the former review department is void because it lacked a proper quorum.

[1a] Respondent acknowledges that pursuant to *In the Matter of Respondent A*, *supra*, 1 Cal. State Bar Ct. Rptr. 255, the law of the case doctrine does not preclude us from reviewing the former review department's decision de novo. According to respondent, however, *Respondent A* merely indicates our "authority to conduct [an] independent review," but "does not suggest or require that every decided issue be revisited." In *Respondent A*, we stated that if review is sought in a proceeding which had been previously decided by the former review department, "the entire matter is before us for independent de novo review." (*In the Matter of Respondent A*, *supra*, 1 Cal. State Bar. Ct. Rptr. at p. 261.) Rule 453(a) of the Transitional Rules of Procedure of the State Bar requires us to conduct an independent review of the entire record. If we discover errors, rule 453(a) authorizes us to adopt findings, conclusions, and a decision or recommendation to correct such errors. Further, rule 453(a) authorizes us to take action on an issue regardless of whether the request for review or the briefs of the parties have raised the issue. Thus, as the examiner observes, respondent's request for review places all issues before us and obligates us to undertake an independent de novo review.

B. No Violation of Former Procedural Rule 511

[2a] Respondent argues that pursuant to former rule 511 of the Rules of Procedure of the State Bar, the entire disciplinary proceeding against him should be dismissed. We disagree. Former rule 511, which was in effect from September 1, 1980, until September 1, 1984, provided that subject to certain exceptions, "the decision of a staff attorney . . . that a formal proceeding shall not be instituted is a bar to further proceedings against the member upon the same

alleged facts." Citing the declaration and deposition of Francis Bassios, the State Bar attorney who originally handled this matter, respondent asserts that the State Bar decided in the fall of 1980 not to file a formal proceeding against him and that this decision triggered the provisions of rule 511 barring further proceedings.

[2b] The State Bar, however, made no such decision. In the cited paragraph of his declaration, Bassios stated that he began his investigation of respondent in the fall of 1980 after the malpractice case had been appealed and that his office decided to monitor the appeal rather than pursue a formal investigation in the belief that the appellate decision would resolve many issues. On the cited page of his deposition, Bassios stated that the decision to monitor the appeal was a collective decision by his office. Neither statement by Bassios establishes a decision by the State Bar not to prosecute respondent. Both statements made it clear that the State Bar merely decided to monitor developments in the malpractice case.

As the examiner points out, respondent cuts off Bassios's deposition in mid-sentence. The omitted portion of this sentence explained that because the State Bar investigation was not completed in the fall of 1980, the matter was not forwarded for further proceedings. As the examiner observes, the State Bar's decision in favor of continuing the investigation of respondent did not constitute a decision against prosecuting him.

C. Moot Issue of Quorum Requirement

Respondent argues that the former review department's original decision filed in May 1989, and modified decision filed in July 1989, were void because, in reaching these decisions, the department lacked a quorum. Former rule 452 of the Rules of Procedure of the State Bar of California, which was in effect through August 1989, provided that eight members constituted a quorum. **[3]** Even if the former review department lacked a proper quorum under the rule, as discussed above, all issues are now before us pursuant to our obligation of independent de novo review. (See *In re Morales* (1983) 35 Cal.3d 1, 7.) Thus, as the examiner points out, the current review renders the prior quorum issue moot.

D. No Prejudice from Evidentiary Ruling

Certain exhibits, which were excluded by the hearing referee at the disciplinary trial, were admitted by the former review department at the review level. Respondent argues that he was denied due process because the former review department relied on these exhibits in reaching its decision without affording him an opportunity to rebut the evidence in the exhibits.

In its May 1989 decision, the former review department admitted into evidence 16 exhibits which the referee had excluded: exhibits 1 through 10, 42, 89, 109, 140, 141, and 161. Exhibit 1 is the unpublished opinion by the civil appellate court in the malpractice case. Exhibits 2 through 10 are documents from the malpractice case: the appellate judgement nunc pro tunc and several trial documents, including the jury verdict, reduction of judgment, first amended judgment, order denying motion for judgment notwithstanding the verdict, second amended judgment, notice of intended decision regarding prejudgment interest, order and judgment regarding prejudgment interest, and findings and conclusions regarding prejudgment interest. The remaining six exhibits are not at issue in the current proceeding.[9] **[4 - see fn. 9]**

[5a] We agree with respondent that the former review department should not have admitted the above exhibits without allowing him the opportunity to present rebuttal evidence. Nevertheless, no error in admitting or excluding evidence invalidates a finding of fact, decision or determination unless the error

9. Respondent does not argue that the exhibits are inadmissible under the rules of evidence. **[4]** We note that the appellate opinion is relevant to the current disciplinary proceeding because it cites reasons for the decision of the civil courts and we find that there is an essential identity of factual issues in both the civil and discipline proceedings. We therefore conclude that the above nontestimonial evidence from the civil proceedings is admissible. (*Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, 622, fn. 11, 634; Cal. Rules of Court, rule 977.)

resulted in a denial of a fair hearing. (Rule 556, Trans. Rules Proc. of State Bar.) Respondent must show that the admission of the documents deprived him of a fair hearing. (*Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 845.) Respondent has not made such a showing.[10] Instead, he merely asserts, without explanation, that if he had the opportunity, he would have presented rebuttal evidence.

[5b] In its May 1989 decision, the former review department cited exhibit 1, but only to support the finding that the appellate court affirmed the jury verdict in the malpractice case. In determining respondent's culpability, the former review department did not cite any of the exhibits excluded by the referee. In the decision on remand concerning the degree of discipline, the referee considered the previously excluded exhibits in determining whether certain standards of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) applied to respondent. Because the referee determined that those standards did not apply, the admission of the exhibits did not result in the denial of a fair trial. All issues are now before us for independent review. We have not relied on the exhibits in reaching our decisions regarding culpability and discipline.

[6] In addition, we note that the preponderance of the evidence standard of proof in the civil malpractice trial is lower than the clear and convincing evidence standard of proof in the current disciplinary proceeding. (*In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 329; see *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725.) Thus, the conclusions reached by the civil courts and which are contained in the exhibits are not dispositive of any of the disciplinary charges. (*Rosenthal* v. *State Bar*, *supra*, 43 Cal.3d at p. 634.) Most important, in terms of whether respondent is culpable of professional misconduct, is the evidence introduced at the civil trial. A significant part of that evidence was introduced at the discipline trial and respondent had ample opportunity to rebut the evidence. Under the above circumstances, we conclude that the admission of exhibits 1 through 10 did not deprive respondent of a fair hearing.

IV. DISCUSSION OF CULPABILITY

A. Mishandling of a Disputed Fee

The notice to show cause in this matter charged that D had objected "to the amount of the attorney fees" before the distribution of the funds from the G settlement and that respondent had failed to retain "the disputed portion of the attorney fees in trust" in violation of rule 8-101(A).[11] The referee found that D told respondent at the private meeting in D's hotel room that the fees respondent was collecting were inordinately high; however, the referee determined that it was unclear whether D was referring to the fees from the $9 million settlement or the $1 million settlement, but that D was probably referring to both fees. The State Bar contended at trial that D objected to the fee from the $1 million settlement and respondent should have retained that portion of the fee in trust. The referee concluded that since the disputed amount was $850, the State Bar's contention was "de minimis at best."

The former review department found that despite D's dispute as to the determination of the attorneys' fee, respondent did not deposit the disputed amount in a trust account. Without explanation, the former review department did not conclude that respondent thereby violated rule 8-101(A)(2).

Respondent's argument with regard to this issue is twofold. **[1b]** First, he argues that the current review department cannot reopen this charge because it was dismissed by the former review department. We disagree as set forth above in our discussion of the procedural issues. Second, respondent argues that there is no clear and convincing evidence that D ever objected to the proposed one-third fee from the $1 million settlement or the eventual $50,000 fee, and that the referee properly concluded that the matter was de minimis and does not warrant any discipline. Again, we disagree.

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10. Respondent even relies upon exhibit 6.

11. Rule 8-101(A)(2) provided that funds belonging in part to a client and in part, presently or potentially, to the attorney must be deposited into a client trust account and when the right of the attorney to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

[7] We first note that the amount of money mishandled goes to the issue of discipline, not culpability, and the mishandling of even an insignificant amount can constitute a disciplinable offense. (*Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071, 1078; Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 2.2.) The amounts mishandled have sometimes been extremely modest. (*Silva-Vidor* v. *State Bar*, *supra*, 49 Cal.3d at p. 1078 [$760]; *Alberton* v. *State Bar* (1984) 37 Cal.3d 1, 12 [$345]; *Crooks* v. *State Bar* (1970) 3 Cal.3d 346, 350-352, 358 [$790.30].) No de minimis exception applies to the determination of culpability for mishandling trust funds. Thus, respondent may be disciplined for mishandling $942 of a $50,000 fee.

We believe that, contrary to respondent's argument, there is clear and convincing evidence in the record to support the conclusion that D objected to respondent taking any fee from the $1 million settlement. The referee found that at the November 17, 1975, meeting, D's attorney was emphatic that the distribution of both settlements, "particularly the attorneys' fees," be submitted to arbitration. Respondent has not argued that this finding is not supported by the record. In addition, respondent admitted at the malpractice trial that at the November 17 meeting, D's attorney had objected to the attorneys taking any fee from the $1 million settlement. Respondent also acknowledged in his letter of November 24, 1975, that one or two individuals had objected at the November 17 meeting to the legal fee from the $1 million settlement. Furthermore, the cover letter accompanying D's covenant informed respondent that D had not accepted respondent's proposal with respect to the legal fees. Finally, respondent's counsel conceded during oral argument before the current review department that D had objected to the attorneys receiving fees from the $1 million settlement.

[8a] We agree with respondent that the record contains no evidence that D specifically objected to the legal fee after respondent reduced it to $50,000. However, D objected to respondent taking any fee from the $1 million settlement. We are not aware of any authority that interprets rule 8-101(A)(2) as requiring D to have specifically objected to the reduced fee in such circumstances. D's objection was sufficient to inform respondent that D disputed respondent's right to receive any fee from the settlement.

[8b] D's objection to the taking of any attorneys' fee from the $1 million settlement triggered the requirement of former rule 8-101(A)(2) that respondent deposit and retain in a trust account some portion of the $50,000 fee pending the resolution of the dispute with D. As explained above, the sum respondent should have retained was $942. By not setting aside this sum in a trust account pending a resolution of the dispute with D, respondent wilfully violated former rule 8-101(A)(2).

We do not, however, find respondent's conduct in failing to set aside a portion of the fee to have also violated section 6106. Neither the referee nor former review department found a violation of section 6106 and the State Bar does not argue that respondent should be found culpable of violating the section with respect to this issue. No clear and convincing evidence establishes that respondent's failure to segregate the $942 involved moral turpitude, dishonesty or corruption.

B. Representation of Conflicting Interests

The notice to show cause charged that the terms of the settlement which respondent negotiated with G included the dismissal and vacation of the judgment in the test case, the payment of $9 million to the six plaintiffs in that case, and the "[p]ayment of $1,000,000 to other cattle ranchers," including the beef producers who had contributed to the original $25,000 litigation fund and had not been plaintiffs in the test case. The notice charged that by so agreeing to settle the claims against G, respondent had "represented conflicting interests without the written consent of all parties concerned; and specifically without the written consent of [D]." The notice concluded that the respondent had violated rule 5-102(B).[12]

12. Rule 5-102(B) provided that an attorney "shall not represent conflicting interests, except with the written consent of all parties concerned."

[9a] Approximately six months after the issuance of the notice to show cause and more than five months before the beginning of the initial disciplinary hearing, respondent served interrogatories on the examiner. Interrogatory number 31 asked that the examiner "identify every conflicting interest represented by [respondent]." In response, the State Bar identified the following conflicts of interest: (1) the test case plaintiffs versus the supporters; (2) the majority of the supporters versus D and other supporters who had objected to the G settlement; (3) the test case plaintiffs and the donors to the $25,000 litigation fund versus the other persons who had participated in the $1 million settlement; and (4) respondent versus the test case plaintiffs, the donors to the $25,000 litigation fund, the other supporters, and the other participants in the $1 million settlement.

The referee determined that respondent had violated rule 5-102(B) by failing to obtain a written consent from each person who signed a covenant not to sue G. According to the referee, the participation of each of the extra 111 signatories reduced the shares received by the required 600. Yet the referee concluded that because the State Bar did not establish "that any of the 711 in fact suffered any damage," respondent's misconduct did not merit any discipline.

The former review department concluded that respondent failed to deal properly with the following alleged conflicts: (1) the interests of C (who had ceased to be a cattle producer) conflicted with those of the other test case plaintiffs in respect of settlement with any defendant; (2) the interest of the test case plaintiffs similarly was not the same as that of the supporters as a whole, and was conflicting as to the relative value of funds received in settlement or judgment and benefits from a rise in beef prices; (3) the interests of the supporters in a settlement conflicted with that of the other cattle producers, and (4) the interest of the first 600 signatories conflicted with the additional, superfluous, 111 included in the final group sharing the proceeds. Thus, the former review department concluded that respondent violated rule 5-102(B) by failing "to obtain written consents to his representation and continuing representation of the various conflicting groups."

[9b] An attorney can be disciplined only for misconduct charged in the notice to show cause or in an amendment to the notice to show cause. (*Arm* v. *State Bar* (1990) 50 Cal.3d 763, 775.) The use of interrogatories is appropriate in disciplinary proceedings. (Trans. Rules Proc. of State Bar, rules 315, 321; Code Civ. Proc., § 2030; *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 301, 305.) Interrogatories serve as "'an adjunct to the pleadings'" insofar as they "'clarify the contentions of the parties . . . .'" Courts should permit and encourage the "'[l]iberal use of interrogatories for the purpose of clarifying and narrowing the issues made by the pleadings . . . .'" (*Burke* v. *Superior Court* (1969) 71 Cal.2d 276, 281.) Thus, the examiner's answer to respondent's interrogatory number 31 limited the charge against respondent to the four identified conflicts of interest.

The only conflict of interest found by the referee or former review department that was properly charged, as framed by the interrogatory answers, was the alleged conflict between the test case plaintiffs and the supporters. The examiner asserts that a conflict between these two groups existed because the plaintiffs could recover damages from the test case defendants whereas the supporters could not.

Few published California disciplinary opinions deal with violations of rule 5-102(B) and its predecessor, former rule 7. (See, e.g., *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300; *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179; *Gendron* v. *State Bar* (1983) 35 Cal.3d 409; *Codiga* v. *State Bar* (1978) 20 Cal.3d 788; *Black* v. *State Bar* (1972) 7 Cal.3d 676; *Lee* v. *State Bar* (1970) 2 Cal.3d 927; *Arden* v. *State Bar* (1959) 52 Cal.2d 310.) None of these cases has facts analogous to the facts of the current proceeding. **[10a]** However, in *Kapelus* v. *State Bar*, the Supreme Court found a violation of rule 5-102 where the attorney had favored one client at the expense of another client. (*Kapelus* v. *State Bar*, *supra*, 44 Cal.3d at p. 196.)

[10b] In *Anderson* v. *Eaton* (1930) 211 Cal. 113 (cited in *Lee* v. *State Bar*, *supra*, 2 Cal.3d at p. 942), the Supreme Court stated that an attorney had a duty to secure as large a recovery as possible for a client and that the attorney had violated this duty when his representation of one client might have induced him to negotiate a low settlement for another client. (*Anderson* v. *Eaton*, *supra*, 211 Cal. at pp. 117-118.) The Court stated: "It is . . . an attorney's

duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances . . . . The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]" (*Id.* at p. 116.) In *Spindle* v. *Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713, the court stated that a "[c]onflict of interest between jointly represented clients occurs whenever their common lawyer's representation of one is rendered less effective by reason of his representation of the other."

The State Bar must prove disciplinary charges by clear and convincing evidence and all reasonable doubts must be resolved in favor of the respondent. (*Kapelus* v. *State Bar*, *supra*, 44 Cal.3d at p. 184, fn. 1.) In a disciplinary proceeding, a culpability determination must not be debatable. (See *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 289.)

[11a] We do not believe that the State Bar has proven by clear and convincing evidence that the interests of the six test case plaintiffs conflicted with the interests of the supporters. Certainly, the plaintiffs recovered damages from the test case whereas the supporters did not. Nevertheless, the primary objective of both the plaintiffs and supporters was to stop the anti-competitive practices of the chains rather than to obtain damages. To the extent that a rise in prices paid to beef producers was a measure of success in achieving this goal, each "victory" (defeat of the summary judgment motion, E and F settlements, and jury award) the plaintiffs achieved increased the prices and thereby furthered the goal of both the plaintiffs and supporters. The greater the success in the test case, the greater the success in stopping anti-competitive practices.

[11b] Assuming that the plaintiffs were only interested in obtaining a large monetary award and the supporters were only interested in stopping anti-competitive practices, their interests seem to have been compatible, not conflicting, as a large damage award would have advanced both interests. Thus, respondent was not put in a position of choosing between conflicting duties or of attempting to reconcile conflicting interests. Even assuming that both groups were only interested in obtaining a large damage award, no clear and convincing evidence establishes that respondent's representation of either the plaintiffs or supporters induced him to negotiate a lower settlement for the other, or establishes that his representation of one group rendered his representation of the other less effective.

With regard to the other charged conflicts of interests as well as to the other conflicts found by the former review department, the only "interests" of any of respondent's clients that were established by clear and convincing evidence were the interest in stopping anti-competitive practices and the interest in obtaining a large damage award. As explained above, no clear and convincing evidence establishes that these interests were conflicting. In addition, there is no clear and convincing evidence that D or any other supporter objected to the $1 million settlement.

[11c] We can only speculate as to the other interests of respondent's clients as no clear and convincing evidence was introduced to establish those interests. For example, it seems logical that respondent's 700 plus clients had differing interests that may very well have been conflicting. However, other than as stated above, no clear and convincing evidence was introduced to establish what the various interests were and how they were conflicting.

[11d] It also seems logical that representing over 700 clients by majority rule may well have involved the representation of clients with conflicting interests. Respondent owed the same ethical obligations to each client, not just those in the majority. (*Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1149.) Presumably, all 711 clients had legitimate, and individual, claims against G based on the damages to each caused by G's anti-competitive practices. Each of the 711 clients was required to release G from these claims in return for participation in the $1 million settlement. Respondent had an obligation to maximize the recovery for each client or to obtain the client's written consent. Instead, certain leading producers decided on formulas for distributing the $1

million that, for the most part, heavily favored the supporters at the expense of the remaining clients. Thus, respondent's representation of the supporters may have rendered his representation of the other clients less effective. Again, however, no clear and convincing evidence establishes that the $1 million settlement was actually distributed pursuant to the formulas. Without knowing how the money was distributed, we cannot determine whether the potential conflict ever materialized.

[11e] Similarly, respondent's distribution of the $1 million settlement may have involved a conflict of interest in another respect. The distribution formula provided for respondent's distribution of 5 percent of the settlement at respondent's discretion. Thus, respondent was placed in a position of possibly favoring some of his clients over others. (See *Kapelus* v. *State Bar*, *supra*, 44 Cal.3d at p. 196.) Again, however, no clear and convincing evidence establishes that respondent distributed the funds in a manner that favored some of his clients at the expense of others.

[12a] We do agree with the referee and former review department that the interests of the initial 600 signatories conflicted with the interests of the additional 111. The money that resulted from respondent's reduction of his legal fee was to be distributed to all who signed covenants not to sue G. Only 600 covenants were required.[13] Thus, the extra 111 reduced the amount received by the first 600.[14] In this respect, respondent failed to maximize the recovery of the first 600. Regardless of whether the 711 signatories represented two separate identifiable groups, the interests of the first 600 conflicted with the interests of the extra 111 because the amount received by the first 600 was reduced by each of the extra 111.[15] Respondent also diluted the share of each unnecessary late signatory by accepting covenants from the other unnecessary late signatories. Respondent did not obtain written consents from his clients. Thus, he violated rule 5-102(B).

[9c] Respondent's violation of this rule, however, cannot be a basis of culpability in the current proceeding as it was not one of the conflicts identified in the interrogatory responses. Although uncharged misconduct can be used to establish an aggravating circumstance (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35-36), we give minimal weight to the violation, as discussed below.

C. No Misrepresentation

The notice to show cause charged that respondent had an adverse interest in the settlement with G, insofar as he "asserted a right to the $3,200,000 designated as court-awarded attorneys [*sic*] fees, even though said award was to be vacated as a result of the settlement." By this and other actions, respondent was accused of various types of misconduct, including the violation of his oath and duties as an attorney (section 6068) and the commission of acts involving moral turpitude, dishonesty, or corruption (section 6106).

Respondent's interrogatory 44 asked the State Bar to state every act or omission on which it based the allegation that respondent violated his oath and duties as an attorney. The answer to interrogatory 44 included "[t]he assertion [by respondent] of the right to the $3,200,000 designated as court-awarded attorneys [*sic*] fees, even though said award was to be vacated as a result of the settlement [with G]." Interrogatory 45 asked the State Bar to state every act or omission on which it based the allegation that respondent committed acts involving moral turpitude, dishonesty, or corruption. Like the answer to interrogatory 44, the answer to interrogatory 45 included "[t]he assertion of the right to the $3,200,000 desig-

13. Although the $1,000,000 settlement agreement indicates that 600 "plus or odd" covenants were required, respondent stated in a brief on review before us that G "insisted on 600 signatures as a condition of the settlement."

14. We also note that some clients were eligible to receive part of the $666,667 and part of the $283,333, whereas other clients were only eligible to receive part of the $283,333. Thus, as a percentage of the total amount received, the monetary diminution caused by the acceptance of more covenants than necessary was greater for those clients that were only eligible to receive part of the $283,333.

15. Contrary to the referee's conclusion, the reduction in the amount received by the clients, however small, establishes that the clients were damaged.

nated as court-awarded attorneys [*sic*] fees, even though said award was to be vacated as a result of the settlement [with G]."

The referee found that although respondent did refer to the $3.2 million as "court awarded" fees, the reference was for definition only and was not a representation that the award survived the vacation of the judgment. The former review department found that there was no indication that respondent's use of the term was intended to give it a status it did not have. Neither the referee nor the former review department found a violation of section 6068 or 6106. As indicated above, respondent argues before us that neither a misrepresentation nor an omission was properly charged in the notice to show cause, and even if they were, he is not culpable of misconduct.

Section 6068 (d), requires an attorney "[t]o 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." The Supreme Court has stated that section 6068 (d), requires an attorney to refrain from acts which mislead or deceive. (*Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at p. 315.) Pursuant to section 6106, "[t]he commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." Section 6106 applies to the misrepresentation and concealment of material facts. (*In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 154-155; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.) **[13a]** Contrary to the examiner's assertion, a representation in violation of section 6106 requires an intent to mislead. (*Wallis* v. *State Bar* (1943) 21 Cal.2d 322, 328; see also *Gold* v. *State Bar* (1989) 49 Cal.3d 908, 914 ["an attorney who intentionally deceives his client is culpable of an act of moral turpitude"].) Negligence in making a representation does not constitute a violation of section 6106. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 360, 367-369.)

We agree with respondent that even if he was properly charged with this misconduct, his culpability has not been established by clear and convincing evidence. The examiner argues that respondent's references to the $3.2 million as court-awarded attorneys' fees were misrepresentations because the judgment had been vacated pursuant to the settlement agreement. According to the examiner, there is no basis in the record to support the finding that respondent used the term "court awarded" only for definition. The examiner cites to the testimony of two of the test case plaintiffs and asserts that these witnesses "testified to the exact contrary."

Respondent testified at the disciplinary hearing that he did not tell any client during the settlement discussions that he was entitled to the $3.2 million as a legal matter because the court had awarded it to him. The referee's finding that respondent did not represent that the award survived the vacation of the judgment is consistent with respondent's testimony. To the extent that the witnesses' testimony, as cited by the examiner, conflicts with respondent's testimony, the referee resolved the conflict in respondent's favor. We must afford this determination great weight. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 931.) The State Bar has not directed our attention to any evidence in the record that would support our modification of the referee's finding.

[13b] Accordingly, respondent did not misrepresent the status of award of the attorney's fee. We also do not find any evidence in the record that indicates that respondent specifically explained to his clients that the award of the fee did not survive the vacation of the judgment. Nevertheless, given the referee's finding that respondent did not use the phrase "court awarded" other than as a term of reference, we conclude that no clear and convincing evidence establishes that respondent's omission was an act of deception. As no misrepresentation or culpable omission occurred, respondent did not violate either section 6068 (d) or section 6106.[16]

16. In light of our conclusion, we need not address respondent's contention that section 6068 (d) applies only to representations made to a court. (But see *Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1089.)

D. Summary

We conclude that respondent wilfully violated rule 8-101(A)(2) by failing to set aside $942 of his legal fee from the $1 million settlement pending a resolution of the dispute regarding the fee with D, but that this conduct did not also violate section 6106. Contrary to the former review department's conclusion, we do not find that respondent violated rule 5-102(B) as charged in the notice to show cause, nor do we 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.) We also conclude that no misrepresentation or culpable omission occurred with regard to respondent's reference to his legal fee as "court awarded." Finally, we conclude that the referee's and former review department's dismissal of the remaining charges in the notice to show cause are supported by the record and we adopt them.

V. DISCIPLINE

After further hearings on remand from the former review department, the referee recommended that respondent be privately reproved. The recommendation is based on the misconduct found by the former review department and the referee's conclusion that no aggravating circumstances and several mitigating circumstances are present in this matter.

The State Bar argues that respondent is culpable of additional misconduct, as indicated above, and that several aggravating circumstances are also present. In light of the additional grounds for culpability and the aggravating circumstances, the State Bar recommends that respondent be suspended from the practice of law for one year, with the execution of that suspension stayed, and that respondent be placed on probation for a period of two years on conditions, including that he be actually suspended for thirty days. Respondent argues that he is not culpable of additional misconduct, that the aggravating circumstances alleged by the State Bar are not present, and that several mitigating circumstances are present. Respondent concludes that no discipline should be imposed.

We first note that the referee's decision on remand contains very few factual findings with regard to the evidence that was introduced at the discipline phase of the trial. Most of the live evidence on remand consisted of respondent's character evidence. The referee concluded this evidence was credible and not contradicted by the State Bar, without detailing the facts that resulted from the evidence. We accept the referee's credibility determination and set forth our factual findings regarding this testimony below in our discussion of standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) (hereafter "standard(s)"). We also note, however, that cross-examination of these witnesses did reveal matters which bear on the weight to be accorded the testimony, which we also discuss below.

A. Aggravating Circumstances

1. Standard 1.2(b)(iii)

Standard 1.2(b)(iii) provides that it shall be considered an aggravating circumstance where the attorney's misconduct is surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the Rules of Professional Conduct. The examiner requests that we find aggravating circumstances pursuant to this standard on the basis of three of the exhibits excluded by the referee but admitted by the former review department: the appellate court opinion, the jury's answers to special interrogatories, and the trial court's order denying a motion for a judgment notwithstanding the verdict. According to the examiner, these documents from the malpractice action demonstrate that respondent committed fraud, intentional misrepresentation, intentional concealment, and breach of his fiduciary duties. The examiner also requests that we find an aggravating circumstance under this standard because respondent attacked D "for taking a position different from respondent's other clients on the covenant not to sue."

The examiner argued to the referee that the referee was bound by the conclusions reached by the civil courts as evidenced by the above exhibits. The examiner is apparently making the same argument before us. The greater standard of proof in this

disciplinary proceeding disproves this argument. (See *Rosenthal* v. *State Bar*, *supra*, 43 Cal.3d at p. 634.) In addition, the malpractice judgment was against several defendants, including respondent. None of the documents from the malpractice action cited by the examiner makes clear what conduct, if any, was attributed to respondent. Nevertheless, based on our independent review of the record, we conclude that the following establishes that respondent's misconduct was surrounded by bad faith pursuant to standard 1.2(b)(iii).

The referee concluded that while respondent should have treated D differently, no bad faith was involved. We disagree. As the referee found, D had an attorney-client relationship with respondent through at least the $1 million settlement. In light of this, respondent owed D the most conscientious fidelity. (*Doyle* v. *State Bar* (1976) 15 Cal.3d 973, 978.)

[14a] D modified his covenant not to sue to reflect the facts that he had not authorized and directed respondent to execute the $1 million settlement agreement and that respondent had not fully advised him of his rights. In a December 1975 letter to D's attorney, respondent expressed concern about G's reaction to these modifications and urged D to submit a covenant without them.[17] Thus, respondent urged his client to make misleading warranties. In addition, as all the covenants were in the same form, respondent in effect urged all his clients to make misleading warranties because at the time he signed the $1 million settlement agreement, he had not been authorized and directed to do so by 711 clients.

[14b] In July 1976, respondent's office sent D the first of four settlement checks from the $1 million settlement. In early August 1976, three and one-half weeks after the filing of the initial malpractice complaint, respondent requested that D repay the money on the grounds that respondent would not have paid D from the $1 million settlement had respondent known D claimed part of the $9 million settlement. Respondent also stated that if D did not repay the money, he would sue him for the return of the money and would claim that D's acceptance of the check amounted to a waiver or estoppel with regards to the malpractice suit. Yet, participation in the $9 million settlement did not prevent participation in the $1 million settlement. Two of the test case plaintiffs shared in both settlements.

The referee acknowledged that respondent's treatment of D "leaves much to be desired" and that respondent's demand for D to return the first settlement check "creates some doubts" and "seems disingenuous." However, the referee did not "find it to be a serious breach of good faith" because, apparently on the advice of counsel, D had not cashed the check and did not intend to cash it. D's decision not to cash the check is not relevant to respondent's demand for the return of funds to which D was entitled.

[14c] Respondent also withheld two other settlement checks, dated August 1976 and July 1977, from D. These two checks were finally sent to D in early August 1978, along with D's last settlement check, which was dated July 14, 1978. D was entitled to these checks promptly after respondent's receipt of the settlement monies. The record contains no valid reason for the delay in payment.[18]

[14d] In addition to his treatment of D, respondent made misleading statements in negotiating the $1 million settlement. The settlement agreement signed by respondent stated that he represented approximately 600 persons who had instructed him to sue G,

17. The examiner cites to this letter in support of his argument that respondent "attacked" D for taking a position different than respondent's other clients with respect to the covenant. Although we do not consider respondent's letter an "attack" on D, we do view the letter as evidence supporting our conclusion.

18. We do not find that respondent's refusal to provide D with information regarding the attorneys' fees at the August 1975 meeting to have involved bad faith, as the dissent suggests. The referee found that it was not clear whether the conversation concerned the fee from the $9 million settlement, to which D was not a party as he was not a plaintiff, or the $1 million settlement. In addition, respondent made a full disclosure of his fees at the November 1975 meeting. Under these circumstances, we do not find clear and convincing evidence of bad faith or concealment with regard to respondent's refusal.

and who had authorized him to settle their claims. At that point in time, respondent had not been instructed by 600 clients to bring an action on their behalf nor had he been authorized to settle their claims. Based on the foregoing, we conclude that respondent's misconduct was surrounded by bad faith pursuant to standard 1.2(b)(iii).

[12b] Respondent also committed the uncharged violation of rule 5-102(B) as explained above. Although not an independent basis for discipline, such uncharged misconduct does constitute an aggravating circumstance under standard 1.2(b)(iii).

[12c] This uncharged violation of rule 5-102(B) resulted from respondent's negotiation of an extremely unusual settlement and his failure to limit the number of participants in the settlement. Respondent offered money to ranchers throughout several states, urged leading beef producers to scour their areas for persons to sign the covenants, and did not limit the number of covenants in order to maximize the recovery of all his clients. Nevertheless, because of the novelty of the situation confronting respondent, we give minimal weight to the uncharged violation. (Cf. *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 602.)

2. Standard 1.2(b)(iv)

Standard 1.2(b)(iv) provides that an aggravating circumstance be found if an attorney's misconduct significantly harmed a client. Without explanation, the examiner asserts that we should find such an aggravating circumstance because 600 clients suffered harm. The examiner made a similarly unexplained argument to the referee. The referee concluded that no harm occurred as a result of the conflicts of interest found by the former review department to be the basis for respondent's culpability. As we have concluded that respondent is culpable of violating rule 8-101(A)(2), we examine the harm done to D that resulted from this violation. As discussed above, respondent mishandled approximately $942 of trust funds attributable to D's share of the $50,000 attorneys' fee from the $1 million settlement. Even if D was entitled to that $942, we do not find this to be significant harm for purposes of standard 1.2(iv) in light of the amount involved.

The examiner may be contending that respondent harmed 600 clients by accepting 111 unnecessary covenants and thus diluting the interests of the first 600 clients. The extra covenants diluted the share of the first 600 by approximately $74 each. We do not view this as significant harm. In any event, our culpability conclusion is based on respondent's mishandling of a disputed fee, not on representing conflicting interests.

3. Standard 1.2(b)(v)

Standard 1.2(b)(v) provides that an aggravating circumstance be found if an attorney demonstrates indifference towards rectifying, or atoning for, the consequences of his or her misconduct. The examiner asserts that respondent demonstrated indifference by demanding that D return the first settlement check, by refusing to talk to D regarding respondent's legal fee, and by doing what the consensus of his clients wanted him to do "even when in conflict with the interests of his client" D. Similar arguments were made to, and rejected by, the referee.

The record contains no clear and convincing evidence either proving or disproving indifference towards rectification or atonement by respondent to D. As the examiner observes, respondent refused to discuss attorneys' fees with D in August 1975 and improperly demanded the return of D's first settlement check in August 1976. In addition, there may have been many problems representing the clients by consensus, assuming all of the clients had not so agreed. Yet the examiner does not explain how these acts constituted indifference toward rectifying, or atoning for, misconduct. We find no clear and convincing evidence establishing aggravation pursuant to standard 1.2(b)(v).

4. Standard 1.2(b)(vi)

Standard 1.2(b)(vi) provides that an aggravating circumstance be found if an attorney displayed a lack of candor and cooperation with any victims of the attorney's misconduct or with the State Bar during the disciplinary investigation or proceedings. The examiner argues that respondent's lack of candor and cooperation is demonstrated by respondent's

concealment of the actual number of his clients from his clients and opposing counsel, by respondent's failure to notify "anyone" when the distribution formula for the $1 million settlement changed, and by respondent's demand that D return the first settlement check. Again, similar arguments were made to, and rejected by, the referee.

The examiner contends that respondent concealed from his clients and from opposing counsel a discrepancy between the number of clients whom he claimed to represent "and the actual number." We first note that the opposing attorneys were not the "victims" of respondent's misconduct. In addition, when respondent confronted problems in securing the number of covenants required for the $1 million settlement, he obtained an extension of the deadline for obtaining covenants and informed the leading beef producers responsible for obtaining covenants of the need for more covenants. Thus, as the referee found, respondent's clients were made aware of the fluctuations in the total.

The examiner also claims that respondent "failed to notify anyone" when "the distribution formula [for the $1 million settlement] changed." The record does not contain clear and convincing evidence of such failure to notify. Further, it is not accurate to suggest that the original distribution formula changed. What the record shows is that the formula adopted at the Denver meeting in November 1975, for the distribution of the $666,667 was unchanged and that an additional formula was used to distribute the $283,333 fund which respondent created by the reduction of his claimed legal fee. The record also indicates that the leading beef producers were aware of the plan to distribute the $283,333 fund equally among all who signed covenants.

[15] Next, even if respondent's demand for D to return the first settlement check demonstrated a lack of candor or cooperation with D, we would not consider it to be a separate aggravating circumstance pursuant to standard 1.2(b)(vi) because we have already found that it was a factor establishing aggravation under standard 1.2(b)(iii). (Cf. *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11 [misconduct forming a basis of culpability not counted again as a separate aggravating circumstance].)

Finally, the examiner does not argue that respondent lacked candor and cooperation with the State Bar during the investigation of this matter and the referee found that respondent was candid. We conclude no clear and convincing evidence establishes that respondent displayed a lack of candor and cooperation with D or the State Bar.

B. Mitigating Circumstances

1. Standard 1.2(e)(i)

Standard 1.2(e)(i) provides that a mitigating circumstance be found if an attorney has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious. The referee found mitigation pursuant to this standard on the grounds that respondent had been in practice since 1970 without prior discipline and that the misconduct found by the former review department was not serious. The examiner argues that respondent had not practiced law long enough prior to the misconduct to warrant a finding under this standard. Respondent was admitted to the bar in January 1969. His violation of rule 8-101(A)(2) occurred in July 1976, after he had been in practice for seven and one-half years. We conclude that respondent's absence of a prior disciplinary record for this period of time warrants little weight in mitigation. (*Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 658 [attorney's seven and one-half years of practice before misconduct was not especially commendable: "Petitioner had been practicing long enough to know that his misconduct was wrong, but not so long as to make his blemish-free record surprising."]; *Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, 1115 [six years practice before misconduct entitled to little weight in mitigation].)

2. Standard 1.2(e)(ii)

Standard 1.2(e)(ii) provides that a mitigating circumstance be found if the attorney acted in good faith. Relying on expert testimony about the novelty and complexity of the $1 million settlement, the referee found that respondent acted in good faith. Respondent argues that the evidence fully supports this finding. The examiner contends that standard 1.2(e)(ii) cannot apply because of respondent's bad faith pursuant to standard 1.2(b)(iii).

As discussed above, respondent displayed bad faith in his dealings with D and G. Such aggravating circumstances, however, do not prevent a finding that respondent acted in good faith in his dealings with clients other than D. We conclude that the record contains clear and convincing evidence that respondent acted in good faith with regards to the participants in the $1 million settlement other than D.

Respondent arranged meetings with the leading beef producers, explained the settlement, received approval from almost all of the leading beef producers for $333,333 in attorneys' fees, and obtained an agreement about the distribution of the remaining $666,667. To save the settlement, he drastically reduced the attorneys' fees and created a $283,333 fund to induce the necessary number of beef producers to sign covenants. He perceived no conflict of interest among the participants in the $1 million settlement and wanted to provide some recovery for many producers before he filed an action against other supermarket chains. Viewing the entire record, we conclude that respondent believed he was serving these clients' interests and, as urged by respondent, this factor mitigates his misconduct. (*Arm* v. *State Bar*, *supra*, 50 Cal.3d at pp. 779-780.)

3. Standard 1.2(e)(iii)

Standard 1.2(e)(iii) provides that a mitigating circumstance be found if no harm occurred "to the client or person who is the object of the [attorney's] misconduct." The referee found that no harm occurred as a result of the conflicts of interest found by the former review department. Respondent argues that the evidence fully supports these findings. As we have determined, respondent mishandled approximately $942. Nevertheless, he achieved enormous unexpected economic benefits for his clients. In addition, the record indicates that D received a total economic benefit from the rise in beef prices of approximately $1,533,354, and the profits of all ranchers in the United States, including those whom respondent represented, increased by approximately $3.5 billion in 1974. Thus, we do find lack of harm as a mitigating circumstance.

4. Standard 1.2(e)(v)

[16a] Standard 1.2(e)(v) provides that a mitigating circumstance be found if the attorney displayed spontaneous candor and cooperation to the victims of the attorney's misconduct and to the State Bar during disciplinary investigation and proceedings. The examiner argues that this standard does not apply because respondent still believes he has done nothing wrong. We agree with the referee that respondent's vigorous defense of the charges brought against him by the State Bar does not evidence a lack of candor or cooperation. The examiner does not cite to any evidence in the record to suggest that respondent's defense of the charges was motivated by anything other than his honest belief in his innocence. (Cf. *Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at pp. 932-933.)

[16b] The referee found that respondent was candid and his conduct was exemplary during the disciplinary proceedings. As respondent suggests, the evidence fully supports these findings. We also conclude based on our review of the record that respondent was cooperative during the disciplinary proceedings. We thus find mitigation pursuant to standard 1.2(e)(v).

5. Standard 1.2(e)(vi)

An extraordinary demonstration of the attorney's 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 attorney's misconduct is a mitigating circumstance under standard 1.2(e)(vi). The referee found that respondent introduced credible evidence from lawyers and lay persons of his high reputation. The examiner argues that respondent's witnesses were impressive, but few.

Citing no testimony or other evidence, respondent claims that the strongest recommendation of his good character comes from his clients. Two of the test case plaintiffs testified on respondent's behalf during the culpability phase, but not the discipline phase, of this proceeding. Although both praised respondent's handling of the test case, neither ex-

pressed any awareness of the exact disciplinary charges against respondent.

The only other clients who offered evidence were two of the supporters who were deposed in April 1990. According to one, respondent did what he said he would do. This client expressed gratitude for respondent's having handled the test case litigation and stated "We liked him. We trusted him. We trusted him very much. And we thought he was doing us a real service." The other supporter admired respondent's "outstanding job" in the test case and stated that "if there was [*sic*] a chance to go again [*sic*], [respondent] would be the first lawyer [I would] talk to." Yet neither of the supporters expressed any awareness of the exact disciplinary charges against respondent or of the culpability determination by the former review department.

During the discipline phase of this proceeding, four persons provided character evidence on respondent's behalf: an educator, the director of a nonprofit organization, a business executive, and a partner in a large law firm. The educator has known respondent since 1984 and testified respondent has a good reputation in the community. The educator, however, was aware of the disciplinary charges against respondent "only to the extent that [counsel for respondent had informed him] that the charges involve a conflict of interest between clients represented by [respondent] in 1976."

The director of the nonprofit organization has known respondent for seven or eight years and testified that respondent is "very sincere" and "very honest." When asked whether he had an understanding of the basis of the disciplinary proceeding against respondent, he replied, "Very basic, I mean it was very legalese [*sic*]." When asked to explain his understanding, the director stated, "[T]here was somehow an accusation that [respondent] represented more than one party or something like that in a case, but it was very legalese [*sic*]." When asked whether he understood that respondent had been found to have represented conflicting interests, he responded, "Right."

The business executive has known respondent since respondent was a young man and testified that he has been involved in litigation against respondent. The executive asserted that respondent was "very forthright, up front, and honest"; "an honest, decent human being"; and "an honest, forthright individual." Although the executive had read the former review department's decision, he found the "allegations" against respondent "a little confusing" and "couldn't find any guilt on [respondent's] part." When asked whether he knew that respondent had been found to have committed an ethical offense, he replied, "There are allegations that [respondent] appears to have been accused of something." When asked several more times about his understanding of respondent's ethical offense, he was unable to articulate a clear summary of the former review department's decision.

The partner had opposed respondent in litigation and testified that respondent was a "great" lawyer, who was "very creative" and "totally ethical." Having read the former review department's decision, the partner stated that respondent had "an excellent reputation for good character" and "an unimpeachable reputation for honesty." On cross-examination, the partner clearly summarized the former review department's decision.

[17] Thus, the character witnesses expressed high opinions of respondent's honesty and praise of his legal ability and good reputation. Nevertheless, respondent presented a limited range of character witnesses, none of the clients expressed knowledge of the charges against respondent, and only one witness who testified on remand revealed a full understanding of the former review department's culpability decision. For these reasons, the weight to be accorded to this evidence is diminished somewhat. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131; *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 33.)

[18] Civic service can deserve recognition as a mitigating circumstance under this standard. (*Porter* v. *State Bar* (1990) 52 Cal.3d 518, 529.) Undisputed testimony by a character witness and by respondent establishes that respondent has done valuable fund-raising, organizational, educational, and lobbying work since 1981 on behalf of the paralyzed. The referee did not consider whether respondent's civic service con-

stitutes a mitigating circumstance. We, however, agree with respondent that his civic service is a mitigating circumstance. Based on the above, we conclude that respondent has demonstrated mitigation pursuant to standard 1.2(e)(vi).

6. Standard 1.2(e)(vii)

Standard 1.2(e)(vii) provides that a mitigating circumstance be found if the attorney has promptly taken objective steps "spontaneously demonstrating remorse, recognition of the wrongdoing found or acknowledged which steps are designed to timely atone for any consequences of the [attorney's] misconduct." The referee found that it was unrealistic to expect respondent to demonstrate remorse when he was still contesting the charges, and even though the record was not clear whether respondent had paid D any of the malpractice judgment, to the extent he had, he atoned for his misconduct. The examiner argues that this standard does not apply because respondent fails to understand his misconduct and has failed to show that he made restitution of the malpractice judgment to D. Respondent argues that his honest belief in his innocence cannot be used against him.

[19] Respondent has the burden of proving mitigation by clear and convincing evidence. (Std. 1.2(e).) As indicated above, we do not consider respondent's honest belief in his innocence to be factor in aggravation. Nevertheless, we cannot conclude that he has presented clear and convincing evidence of his recognition of his wrongdoing when he does not believe he has committed any wrongdoing. Standard 1.2(e)(vii) does not require false penitence, but it does require acceptance of culpability. (*In re Rivas* (1989) 49 Cal.3d 794, 802; *In the Matter of Katz* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 502, 511.)

In addition, even if we were to consider respondent's payment of the malpractice judgment as a recognition of his disciplinary misconduct, we agree with the referee that the record is not clear as to whether the judgment has in fact been paid. We therefore conclude that respondent has failed to establish mitigation pursuant to standard 1.2(e)(vii) by clear and convincing evidence.

7. Standard 1.2(e)(viii)

Standard 1.2(e)(viii) provides that a mitigating circumstance be found if "considerable time" has passed "since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation." The referee found mitigation pursuant to this standard because it had been 14 years since the wrongdoing and respondent had not been culpable of misconduct since then. The examiner asserts that respondent should not be entitled to this mitigation because he has not demonstrated rehabilitation in that he has not made any attempt to make amends and continues to show a lack of understanding of his misconduct.

The examiner does not articulate what "amends" respondent should have attempted. The record does not contain any evidence that respondent attempted to resolve the fee dispute with D or attempted to address his uncharged violation of rule 5-102(B). Nevertheless, the circumstances of the present case are far different than in *Wood* v. *State Bar* (1936) 6 Cal.2d 533, cited by the examiner. There, the attorney had obtained a $100 loan from the employees of a client in order to secure his own release from jail, repaid the loan with a check drawn on a bank account that had been closed for more than six months, and then failed to make good on the bad check for more than six years. (*Id.* at p. 534.) Respondent's failure to make amends for misconduct which he honestly believes he did not commit pales in comparison.

[20a] We also do not find that respondent's good faith defense of that which he honestly believes is a lack of understanding of his misconduct. Furthermore, respondent offered evidence about his sensitivity to the misconduct found by the former review department. He testified that he has referred clients to other attorneys because of conflicts of interest, or potential conflicts, and that he has obtained written waivers from clients who wanted him to represent them when conflicts of interest were present. Respondent also testified that if confronted today with the situation he faced in the 1975, he would explain the conflicts in writing, obtain written consents, ask another lawyer to review the situation, and consult with the bar. For the above reasons, we do not find the examiner's argument persuasive.

[20b] The review department has held that postmisconduct practice for several years without any further disciplinary offense constitutes a mitigating circumstance under this standard. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 126.) Without reference to standard 1.2(e)(viii), the Supreme Court has found mitigation where there was no specific showing of rehabilitation, other than the practice of law for a period of time without further misconduct. (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 256 [three years unblemished postmisconduct practice]; *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at pp. 316-317 [eight years unblemished postmisconduct practice].) The review department has done the same. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 [12 years unblemished postmisconduct practice].) We conclude that respondent's unblemished 16 years of practice since his mishandling of trust funds and 14 years of practice since his uncharged misconduct is a mitigating circumstance under this standard.

8. Standard 1.2(e)(ix)

Standard 1.2(e)(ix) provides that a mitigating circumstance be found if excessive delay occurred in the conduct of the disciplinary proceedings, if the delay was not attributable to the attorney, and if the delay prejudiced the attorney. The referee found that there was excessive and unconscionable delay by the State Bar after 1980 when the bar became aware of the malpractice judgment. Even though the referee determined that respondent was able to establish most of the matters for which he claimed that the unavailability of witnesses prejudiced him, the referee concluded that respondent was undoubtedly prejudiced to some extent because of the unavailability of witnesses. The examiner argues that respondent was not prejudiced as a result of the delay.

[21a] Whether a delay constitutes a mitigating factor must be determined on a case-by-case basis. (*Sodikoff* v. *State Bar* (1975) 14 Cal.3d 422, 431-432.) Even when a delay in pursuing disciplinary proceedings is excessive, an attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense. (*Amante* v. *State Bar*, *supra*, 50 Cal.3d at p. 257.) A delay in a disciplinary proceeding merits consideration only if it has caused specific, legally cognizable prejudice. (*Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774.)

The publicity surrounding the malpractice action alerted the State Bar to possible ethical violations by respondent. Because the parties stipulated to sealing the record, the State Bar did not become aware of the malpractice matter until the early fall of 1980. From 1980 until 1984, the State Bar monitored the civil appeal instead of actively pursuing its own investigation. The civil appellate court filed its decision in April 1984, and the Supreme Court denied review in July 1984. The State Bar issued a notice to show cause to respondent in June 1987. A delay as short as 22 months can be excessive. (See *Amante* v. *State Bar*, *supra*, 50 Cal.3d at p. 257.) As the referee pointed out, the delay in the current proceeding from 1980 to 1987 was excessive. It was unnecessary to wait four years for the outcome of the civil appeal and then three more years for no reason explained in the record. None of this seven-year delay was attributable to respondent.

Respondent argues that he was not able to preserve testimony favorable to him because of the delay. Specifically, respondent asserts that several witnesses died which made it more costly and difficult for him to prevail on the issue of the enforceability of the E and F settlement agreements, and deprived him of favorable testimony regarding the allocation of attorneys' fees, regarding his cooperation and candor with his clients, and regarding the absence of a conflict of interest among the supporters. Respondent also argues that he was prejudiced by the loss of documents, such as sign-in sheets, tape recordings, and notes of meetings, that would have enabled him to demonstrate his full disclosure to his clients and the absence of conflicts.

[21b] We, like the referee, find that respondent was able to present evidence on all of the issues for which he claims he was prejudiced. In addition, respondent has not specified what information the witnesses would have revealed and what the missing documents would have shown, other than the general assertions noted above. Respondent's assertions are too vague to find he has been specifically prejudiced by the delay.

We also note that the enforceability of the E and F settlement agreements is not an issue in our opinion; we have not found respondent culpable of any misconduct regarding the allocation of attorneys' fees; we found that he was candid and cooperative with the State Bar; and the only conflict involved is the uncharged conflict that resulted from his acceptance of more covenants than was necessary.

The victim of respondent's misconduct was D. Respondent does not argue that any of the evidence that he asserts he was unable to preserve pertains to his candor and cooperation with D. We did not find clear and convincing evidence of a lack of candor and cooperation with D. Finally, the documentary evidence that respondent asserts he was unable to preserve would not establish that respondent obtained written consent from his clients regarding the dilution of their recovery from the $1 million settlement. **[21c]** Based on the foregoing, we conclude that the delay in the disciplinary proceeding did not cause respondent specific prejudice and therefore, we do not find mitigation under standard 1.2(e)(ix).

C. Discipline

The purpose of attorney discipline is to protect the public, the courts, and the legal profession; and the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. (*Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931; std 1.3.) **[22a]** As noted above, we have concluded that respondent is culpable of violating rule 8-101(A)(2) for failing to set aside $942 of his legal fee pending a resolution of the dispute with D. This misconduct is aggravated by respondent's bad faith toward D and G, and the uncharged violation of rule 5-102(B). The misconduct is mitigated by respondent's good faith toward his clients in the $1 million settlement other than D; the lack of harm to D; respondent's candor and cooperation during the disciplinary proceeding; his demonstration of good character; and his unblemished postmisconduct practice.

[22b] Standard 2.2(b) calls for a minimum 90-day actual suspension for violations of rule 8-101 which, as the violation in the present case, do not involve wilful misappropriation of trust funds. Although we look to the standards as guidelines, they do not mandate a particular result. (*In re Young* (1989) 49 Cal.3d 257, 268; see also *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 401.) We must also look to relevant case law for guidance as to the appropriate discipline. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 648.) Prior similar cases indicate that a departure from standard 2.2(b) is appropriate in this case.

In *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, the clients made ambiguous statements as a result of which attorneys Dudugjian and Holliday honestly, but mistakenly, believed that the clients had authorized the application of certain funds to the payment of attorneys' fees. (*Id.* at p. 1095.) The attorneys received a check for $5,356.94 and informed the clients, who owed them more than this sum in attorneys' fees. Pending the resolution of any questions about fees, Dudugjian put the check in a drawer. Two weeks later, believing there to be no such unresolved questions, Dudugjian deposited the check in the firm's general account. Before the check cleared, the clients requested the funds and the attorneys falsely represented that they would comply with the request. Later, without authorization from the clients, the attorneys applied the funds to the payment of the clients' bill and so informed the clients. (*Id.* at p. 1096.)

The Supreme Court concluded that the attorneys' mishandling of client funds violated rules 8-101(A), for depositing the settlement check into their general account instead of a client trust account, and 8-101(B)(4), for refusing to pay the funds over on request. (*Id.* at pp. 1099-1100.) The Supreme Court found no aggravating circumstances and several mitigating circumstances, the most significant of which was the attorneys' honest belief that they had permission from the clients to retain settlement funds. The Court also found that the attorneys were not likely to commit such misconduct in the future, that they generally exhibited good moral character, and that their failings were aberrational. (*Id.* at p. 1100.) The discipline for each attorney was a public reproval conditioned on restitution with interest and passage of the professional responsibility examination. (*Id.* at pp. 1100-1101.)

In *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, a newly hired bookkeeper mistakenly billed a client of the attorney for $1,753.94 as a cost advanced in litigation. The client paid the bill, and the client's check was deposited in the attorney's general operating account. Nearly three years later, the attorney discovered the mistake, indicated to the client's new attorneys that he would take care of the matter, and requested a meeting to settle disputed fees and costs. When no settlement was reached, arbitration followed. During arbitration, the attorney offered to credit the client for the erroneously paid $1,753.94 as an offset against other unpaid costs in almost the same amount. The client's new attorneys did not object, and the arbitration award concluded that the client had paid all actual costs. (*Id.* at pp. 722-723.)

The review department held that the attorney violated former rule 8-101(A)(2) by failing to put $1,753.94 in a trust account when he discovered the mistake, pending the resolution of the dispute with the client. (*Id.* at p. 728.) The review department found no aggravating circumstances and several mitigating circumstances, including no prior record of discipline during long years of practice, extensive pro bono activities and community involvement, and testimony from a great number of character witnesses about the attorney's impeccable honesty and reliability. The discipline was a private reproval conditioned on the passage of the California Professional Responsibility Examination.

[22c] Although respondent's culpability is similar to the culpability in the above cases, his misconduct is surrounded by several aggravating circumstances not found in the above cases. We have not characterized the aggravating circumstances as grave, as does the dissent, but we do not minimize their seriousness. Respondent's bad faith toward D and G cannot be condoned. Nevertheless, while the covenants were misleading, there is no evidence that respondent intended to deceive D or G for his own personal gain or for any other venal purpose. Rather, his intent was to serve his clients in a unique set of circumstances involving a $1 million offer to settle the claims of a large, ill-defined group of claimants/clients. The lack of evil intent serves to partially lessen the seriousness of the aggravating circumstances regarding the covenants. (See *Ames* v. *State Bar* (1973) 8 Cal.3d 910, 921 [seriousness of attorney's misconduct lessened because attorney thought he was acting in his clients' best interests]; *In re Higbie* (1972) 6 Cal.3d 562, 573 [attorney's misconduct lessened because attorney's misconduct not motivated by personal enrichment].)

[22d] On balance, we conclude that the mitigating circumstances significantly outweigh the aggravating circumstances and indicate that discipline similar to that imposed in the above cases is appropriate here. **[20c]** The most significant mitigation is respondent's unblemished postmisconduct practice of law. He has practiced for 14 years since the uncharged misconduct and 16 years since the charged misconduct. We are not aware of any other discipline case that involved such a lengthy period of practice following the misconduct. The unblemished postmisconduct practice demonstrates that respondent is able "to adhere to acceptable standards of professional behavior." (*Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at pp. 316-317.) Thus, respondent is not likely to commit such misconduct in the future.

[22e] Respondent's many years of postmisconduct practice are similar to the many years of premisconduct blemish-free practice in *Respondent E*. Such lengthy periods of practice without misconduct are a significant indicator of the lack of potential for future misconduct. Respondent's postmisconduct practice is especially significant because it is an affirmative demonstration of his ability to maintain high professional standards. Coupled with the other mitigating circumstances, respondent's mitigation is thus greater than Dudugjian's, Holliday's and Respondent E's. We recognize that, unlike in *Respondent E*, several aggravating circumstances exist in the present matter. Nevertheless, "the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." (*In re Kreamer* (1975) 14 Cal.3d 524, 532.) We are convinced, after careful review and consideration of the record as a whole, including aggravating and mitigating circumstances, that the discipline imposed in *Respondent E* will suffice to ensure that respondent is fit to continue as an attorney without threat to the public, courts, and legal profession. In light of the

prophylactic nature of attorney discipline (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245) we conclude that a private reproval conditioned on passage of a professional responsibility examination will best achieve the goals of attorney discipline in this case.

Based on the foregoing, we hereby order that respondent be privately reproved. We also order that, as a condition of this private reproval, respondent take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners of the State of California within one year of the effective date of the reproval and provide satisfactory proof of such passage to the Probation Unit, Office of Trials, Los Angeles.

I Concur:

VELARDE, J.*
GEE, Acting P.J.**, concurring in part and dissenting in part:

I concur in part and respectfully dissent in part. Although I agree with the majority's discussion of procedural issues and culpability, I disagree with their assessment of the mitigating and aggravating evidence and the discipline ordered. Despite significant mitigating circumstances, the aggravating circumstances are so egregious that the maintenance of high professional standards and the preservation of public confidence in the profession require acknowledgement of the seriousness of the conduct and imposition of public discipline.

In the discussion of aggravating circumstances under standard 1.2(b)(iii) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V), the majority acknowledges the existence of the aggravating factors. Respondent knowingly misrepresented to G that he had authority to enter into the $1 million settlement when he negotiated it in July 1975. In August 1975, when D first questioned respondent's fee demand, respondent characterized the attorneys' fees as his business and not D's and refused to provide D with any information. Since respondent had claimed to represent D in negotiating the $1 million settlement, D had every right to information about the fees respondent was seeking from the $1 million settlement.[1]

Several months later, respondent urged D to make the false warranty to G that respondent had been authorized to sign the $1 million settlement agreement at the time he signed it. Respondent knew the warranty was false but submitted to G the standard covenants containing the false warranty from over 700 clients. Although D was unquestionably entitled to a share of the $1 million settlement, respondent demanded that D repay D's initial distribution from the settlement when D initiated a legal malpractice action against respondent, and respondent threatened to sue D if D did not repay the money. Respondent then improperly withheld D's second and third settlement distributions for two years and one year, respectively.

The majority characterizes these serious aggravating factors as merely bad faith. Certainly, respondent's treatment of D constitutes bad faith. However, his misrepresentation to G about his settlement authority and his involvement of over 700 clients in submitting covenants with warranties which he knew to be false were serious acts of dishonesty, and not simply acts of bad faith. Moreover, contrary to the majority's conclusion, respondent's deception of G to obtain the settlement was motivated, at least in part, by a desire for personal gain. Undisputed evidence

* By appointment of the Acting Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

** By appointment of Acting Presiding Judge Stovitz pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

1. The majority implies that respondent might have been confused about which fees D was challenging. The majority states that the referee found it was unclear whether D was challenging respondent on the fee from the $9 million settlement or the $1 million settlement, but probably both. The referee's original decision, in fact, found that, at the least, D was challenging respondent's claim to the fees in the $1 million settlement. The referee says, in pertinent part, that it was not clear whether D referred "*only* to the one-third of the $1,000,000 or to *both that and* the fees from the $9,000,000 - . . . probably the *latter*." (Referee's original decision, finding 65, p. 30, emphasis added.)

shows respondent claimed one-third of the $1 million settlement as legal fees as soon as the settlement was finalized. Additionally, though I agree with the majority's conclusion that respondent demonstrated good faith towards almost all his clients, I disagree that his good faith towards his other clients constitutes a mitigating circumstance under standard 1.2(e)(ii). Standard 1.2(e)(ii) applies to the "good faith" in the context of the particular act of misconduct. Lack of harm to other clients, or even to the individual who was the victim of the misconduct, is not the same as "good faith."

In *Arm* v. *State Bar* (1990) 50 Cal.3d 763, which is cited by the majority, the attorney's "good faith" was considered a mitigating factor because he believed that his conduct was necessary to protect his client's interests. There was no evidence of any good faith on respondent's part when he refused to respond to D's initial inquiries about the fees or when he threatened to sue D if D did not return his share of the settlement funds. More importantly, there is no evidence that respondent had any good faith belief that D at any time gave up his challenge to respondent's entitlement to the attorney fees.

The majority correctly asserts that the protection of the public, the courts, and the legal profession is a primary purpose of a sanction for professional misconduct. Disciplinary proceedings, however, serve two other very important purposes which the majority fails to mention: the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. (Std. 1.3; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 666; *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 132; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 126.)

A private reproval is appropriate where an attorney is culpable of a minor trust fund violation and where there are no aggravating circumstances and substantial mitigating circumstances. (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716; *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17.) In this proceeding, culpability rests solely on such a minor violation, namely, respondent's failure to comply with the requirements of former rule 8-101(A)(2).

However, unlike *Respondent E* and *Respondent F*, this proceeding presents the grave aggravating circumstances discussed above. These aggravating circumstances significantly outweigh the mitigating circumstances and make a private reproval inappropriate. (*In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 205.) Respondent engaged in exactly the type of conduct which undermines professional standards and public confidence in attorneys. He made misrepresentations to an opposing party in order to generate a settlement and mistreated an unhappy client. He even threatened to sue the client and withheld substantial funds to which the client was unquestionably entitled. Specifically, he improperly withheld D's second ($4,790.20) settlement check for two years and D's third ($4,801) settlement check for one year. He also forced D to go through the time and expense of seeking, conferring with, and retaining new independent counsel in an attempt to secure the fair treatment owed him by respondent in the first place.

Although the mitigating circumstances are significant, they do not offset the egregious aggravating circumstances and do not justify imposition of a private reproval. The maintenance of high professional standards and the preservation of public confidence in the legal profession require at least a public reproval.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HERBERT F. LAYTON

A Member of the State Bar

No. 88-O-12561

Filed March 17, 1993; reconsideration denied, April 23, 1993

SUMMARY

Respondent was found culpable of recklessly failing to perform legal services competently by failing to close a relatively simple probate case for over five years. Based on this misconduct and on respondent's prior misconduct, which also resulted from his failure to perform legal services competently in a single probate matter, the hearing judge recommended that respondent receive a two-year stayed suspension, three years probation, and actual suspension for six months. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent sought review, claiming numerous procedural errors and contending that he was not culpable of misconduct, and that if he was culpable, the discipline recommended was too severe. The review department rejected the claims of procedural error and concluded that the hearing judge's findings of fact and conclusions of law were supported by the record and adopted them with minor modifications. The review department also concluded that the discipline recommended was appropriate in light of the facts and circumstances of respondent's present misconduct and his past similar misconduct.

COUNSEL FOR PARTIES

For Office of Trials: Mary Schroeter

For Respondent: Herbert F. Layton, in pro. per.

HEADNOTES

[1] **101 Procedure—Jurisdiction**
204.90 Culpability—General Substantive Issues
Where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by a lay person, the services the attorney renders in the dual capacity all involve the practice of law, and the attorney must conform to the Rules of Professional Conduct in the provision of all of them. This rule applies to an attorney who is appointed both attorney and executor of a probate estate.

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] **106.20 Procedure—Pleadings—Notice of Charges**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where a notice to show cause alleged that respondent failed to perform services competently, and set forth in separate paragraphs specific facts which in the aggregate charged a lack of diligence upon which that violation was based, the alleged misconduct in the notice was pled with sufficient particularity and was adequately correlated with the rule violation charged to have provided respondent with reasonable notice of the specific charges at issue. There is no requirement that each paragraph of a single count in a notice to show cause must allege a violation of a rule or statute.

[3] **120 Procedure—Conduct of Trial**
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden
A showing of specific prejudice is required to invalidate a hearing judge's decision based on procedural errors. Where respondent did not allege and/or demonstrate that he suffered any specific prejudice as a result of numerous alleged procedural errors, he was not entitled to relief.

[4] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
162.20 Proof—Respondent's Burden
No delay in bringing disciplinary charges occurred where complaint against respondent was sent to State Bar in July 1988, respondent's last act of misconduct was in June 1989, and notice to show cause was filed in May 1990. In addition, where none of evidence allegedly lost due to delay was material to issue of respondent's misconduct, no specific prejudice was demonstrated from alleged delay in bringing charges.

[5] **113 Procedure—Discovery**
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden
Where discovery period was extended, giving respondent ample time to conduct discovery, and where respondent engaged in discovery, did not seek additional time for further discovery, and did not move to compel further responses or to compel attendance of witnesses at depositions, respondent's contentions that errors occurred during discovery lacked merit.

[6] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
119 Procedure—Other Pretrial Matters
162.20 Proof—Respondent's Burden
State Bar's pretrial dismissal of three out of four original counts in notice to show cause did not entitle respondent to any relief, where respondent did not demonstrate how such dismissal caused specific prejudice.

[7] **120 Procedure—Conduct of Trial**
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous
162.20 Proof—Respondent's Burden
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Hearing judge's refusal to permit respondent to present evidence that value of one estate asset increased during respondent's delay in completing probate did not entitle respondent to relief, where such increase in value did not justify respondent's misconduct in delaying distribution of other estate assets.

[8] **115 Procedure—Continuances**
159 Evidence—Miscellaneous
162.20 Proof—Respondent's Burden
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Hearing judge's denial of respondent's request for continuance to research probate practices in respondent's county was not error, where respondent had had ample time prior to trial to prepare his defense, and evidence sought would have had very little probative value as custom and practice in respondent's county would not explain or excuse respondent's prolonged delay in closing estate at issue.

[9] **119 Procedure—Other Pretrial Matters**
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous

Hearing judge's request that respondent discuss mitigation evidence with examiner and try to "work something out," in order to promote stipulations for the introduction of character letters, did not constitute an improper requirement that respondent obtain the State Bar's prior approval to present mitigation evidence.

[10] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings

Transcript of superior court trial regarding probate matter which was subject of disciplinary proceeding was admissible pursuant to Bus. & Prof. Code, § 6049.2, and hearing judge did not err in admitting entire transcript, even though much of testimony was not relevant to disciplinary proceeding, where transcript was admitted subject to respondent's motion to strike parts that were not material or relevant, and respondent failed to make such motion.

[11] **162.20 Proof—Respondent's Burden**
194 Statutes Outside State Bar Act
204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Compliance with the time limitations set forth in the Probate Code is not a defense to a charge that the attorney failed to act competently, nor does noncompliance with such time limitations establish per se a failure to act competently. The focus of the inquiry on a charge of failure to act competently is whether the attorney intentionally, recklessly, or repeatedly failed to apply the learning, skill, and diligence necessary to discharge the duties arising from the attorney's employment or representation. Compliance with the time limitations of the Probate Code is but one factor to be considered in making this determination.

[12 a, b] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

An attorney has an obligation to perform services diligently and if the attorney knows he or she does not have or will not acquire sufficient time to do so, the attorney must not continue representation in the matter. Reckless or repeated inattention to client needs need not involve deliberate wrongdoing or purposeful failure to attend to duties in order to constitute wilful violation of duty to perform competently. Fact that respondent performed some services for a probate estate did not

excuse his misconduct in delaying closure of the estate, especially where respondent's asserted justification for delay was that he was busy on other matters. Respondent's repeated failure to perform acts needed to distribute assets and close estate for five years, knowing that beneficiaries desired earliest possible distribution, constituted wilful violation of the duty to perform services competently.

[13] **710.55 Mitigation—No Prior Record—Declined to Find**
710.59 Mitigation—No Prior Record—Declined to Find
Because respondent's first and second episodes of misconduct did not occur during same time period or within narrow time frame, his many years of practice before his first misconduct were not an important mitigating factor in his second discipline matter, especially where other facts in case indicated risk that misconduct would be repeated.

[14] **725.59 Mitigation—Disability/Illness—Declined to Find**
760.52 Mitigation—Personal/Financial Problems—Declined to Find
795 Mitigation—Other—Declined to Find
Office workload does not generally serve to substantially mitigate misconduct. Stressful personal problems may mitigate misconduct, but where respondent's asserted workload or personal problems occurred during first year of administration of probate estate, such problems did not adequately explain five-year delay in administration of estate, and did not constitute mitigation.

[15] **191 Effect/Relationship of Other Proceedings**
193 Constitutional Issues
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
582.50 Aggravation—Harm to Client—Declined to Find
While respondent's motive in appealing superior court's reduction of his fees as attorney and executor of estate might have been suspect, where there was no clear and convincing evidence that such appeal was in bad faith or was otherwise improper, review department declined to consider respondent's appeal as an aggravating factor in light of the important policies favoring unfettered access to the courts.

[16 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
591 Aggravation—Indifference—Found
621 Aggravation—Lack of Remorse—Found
An attorney's failure to accept responsibility for, or to understand the wrongfulness of, his or her actions may be an aggravating factor unless it is based on an honest belief in innocence. Where respondent's assertions in defense of failure to perform services did not reflect an honest belief in innocence, but rather reinforced the conclusion that respondent simply did not understand or appreciate the requirement to devote diligence necessary to discharge duties arising from employment, respondent's assertions exhibited a disturbing lack of insight into misconduct which in turn caused concern that he would repeat his misdeeds.

[17 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
591 Aggravation—Indifference—Found
621 Aggravation—Lack of Remorse—Found
805.10 Standards—Effect of Prior Discipline
844.14 Standards—Failure to Communicate/Perform—No Pattern—Suspension
Where respondent's misconduct in both first and second disciplinary matters involved similar lack of diligence causing delay in closing a simple probate estate, discipline in second matter ordinarily

would warrant only slightly greater discipline than in first matter. However, where respondent had failed to understand or appreciate misconduct, causing concern about handling future cases, and in light of absence of mitigating factors and presence of several aggravating factors, significantly greater discipline than in first matter was appropriate in second matter, and review department recommended two-year stayed suspension, three years probation, and six months actual suspension.

[18 a-c] 173 Discipline—Ethics Exam/Ethics School
196 ABA Model Code/Rules

Normally, a respondent who has recently been ordered to take a professional responsibility examination is not required to do so in connection with subsequent discipline. Where respondent had not been ordered to take any professional responsibility examination in connection with prior discipline, review department recommended that respondent be ordered to take the California Professional Responsibility Examination, focusing on the California Rules of Professional Conduct, which is now routinely ordered in discipline cases involving suspension in lieu of the national Professional Responsibility Examination, which focuses on the ABA rules.

ADDITIONAL ANALYSIS

Culpability
Found
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Aggravation
Found
511 Prior Record
582.10 Harm to Client
Discipline
1013.08 Stayed Suspension—2 Years
1015.04 Actual Suspension—6 Months
1017.09 Probation—3 Years
Probation Conditions
1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review this matter at the request of respondent, Herbert F. Layton, a member of the State Bar since 1959 who has a record of one prior discipline. A hearing judge of the State Bar Court found in the present matter that respondent was culpable of recklessly failing to perform legal services competently in a single probate case. Based on this current misconduct and on respondent's prior misconduct, which also resulted from his failure to perform legal services competently in a single probate matter, the hearing judge recommended that respondent be suspended from the practice of law for a period of two years, with the execution of the suspension stayed, and that he be placed on three years probation on conditions including actual suspension for six months. Respondent asserts on review that he is not culpable of misconduct for a variety of reasons, and that if he is culpable, the discipline recommended is too severe.

We have independently reviewed the record and conclude that the hearing judge's findings of fact and conclusions of law are supported by the record and with the minor modifications discussed below we adopt them as our own. Further, we conclude the discipline recommended is appropriate in light of the facts and circumstances of respondent's present misconduct and his past similar misconduct.

FACTS

We briefly summarize the hearing judge's findings of fact as they are for the most part undisputed.[1] In January 1984, respondent prepared a will for Virgie Rae Dixon. The will named respondent as executor and attorney and authorized him to receive fees both as executor and as attorney. The will left Dixon's personal property to Dixon's nieces, Floy Munk and Lexie Pollick, and the residue of the estate, consisting primarily of Dixon's residence, was left to Dixon's twelve nieces and nephews, which also included Munk and Pollick.

Dixon died February 5, 1984. Munk and Pollick were the only beneficiaries that attended Dixon's funeral. None of the beneficiaries lived in California and most lived in Utah. At the time of the funeral respondent was made aware of the desire of Munk and Pollick to have Dixon's personal property distributed immediately and the real property sold and the proceeds distributed as soon as possible. Pollick and Munk were concerned about the security of the personal and real property. Pollick made respondent aware that certain articles of Dixon's personal property were considered heirlooms and irreplaceable by the beneficiaries.

The petition for probate was filed in early February 1984 and letters testamentary were issued to respondent as executor in early March 1984. The letters authorized respondent to administer the estate under the Independent Administration of Estates Act. The time for filing creditor's claims expired in early July 1984. Creditor's claims of approximately $3,060 were filed and approved.

Pollick continued to press her desire for a quick resolution of the Dixon estate and distribution of the real and personal property when she spoke to respondent which was approximately at monthly intervals. Pollick became dissatisfied with respondent's responses which were that he continued to be busy with other more urgent matters. At the request of Munk and Pollick, Jan Stewart, who was Pollick's brother and also a beneficiary of the real property, phoned respondent early in October 1984 to urge the immediate distribution of the personal property and distribution or sale of the real property. Respondent indicated that the real property could not be listed for sale until the personal property was removed, but did not indicate when any distribution of the personal property would take place.

By early October 1984, the beneficiaries, particularly Pollick, Munk, and Stewart, were dissatisfied with respondent due to his inattentiveness to the Dixon estate and lack of responsiveness to the requests of Pollick, Munk and Stewart to move the

1. Respondent does argue that a few of the factual findings are not supported by the record. However, as we discuss below, the challenged findings are of minor importance.

estate forward. On October 10, 1984, Pollick and Munk filed a petition for the preliminary distribution of the personal property of the estate. The petition was not pursued.

Respondent filed an inventory and appraisement of the estate in early November 1984, showing an estate of approximately $121,700. The household furniture and furnishings were valued at $1,000 and the car was valued at $500.[2]

In March 1985, Munk and Pollick filed a petition to revoke respondent's authority as executor because of respondent's alleged failure to file the inventory and appraisement within three months after his appointment, to transfer title to the decedent's automobile, to make a preliminary distribution of the personal property, and to rent, lease or sell the decedent's real property. The hearing on the petition was scheduled for April 1985 and was continued to May 1985 so that respondent and Stewart, on behalf of the beneficiaries, could reach some agreement. Respondent wished to have until after April 15, 1985, to prepare the final accounting because he was busy until then with income tax filing obligations. Stewart continued to be dissatisfied because he could not get a commitment from respondent as to distribution of the personal effects or sale of the real property. Respondent wanted authority from Stewart for respondent personally to sell the property rather than going through a real estate broker and although Stewart reiterated that the beneficiaries wanted the property sold, he refused to commit on behalf of the beneficiaries to respondent personally selling the property. No appearance was made at the May 1985 hearing and the petition to revoke respondent's authority as executor was dropped.

On May 1, 1985, respondent filed the first and final accounting. A hearing was scheduled on the accounting for May 29, 1985. Attorney Clifford Egan appeared for the beneficiaries on May 29. The hearing on respondent's accounting was continued to July 3, 1985, to permit Egan to file a new petition to remove respondent as personal representative of the estate. On June 25, 1985, Egan filed the petition to remove respondent and to reduce respondent's fees as executor and/or attorney because of his delay in the handling of the estate. On July 3, 1985, counsel stipulated to immediate preliminary distribution of the personal property and an order to that effect was filed on July 15, 1985.

The petition to remove respondent was scheduled for trial on September 20, 1985. At that time, both the petition to remove respondent and the hearing on respondent's first and final accounting were heard. Following the hearing, the superior court denied the petition to remove respondent and reserved the issue of respondent's fees, finding "unnecessary wait in the sale of the property." The court further ordered: an immediate distribution of the real property in kind to the beneficiaries, and, after payment of fees and taxes, a distribution of the remaining property on the basis of one-twelfth to each beneficiary without need for further court order; that respondent not proceed against Bank of America as to two old bank accounts; and that respondent prepare the order of distribution. On September 23, 1985, the superior court signed an order that essentially cut respondent's requested fees and commissions in half.[3]

An order to correct the order settling the first and final accounting had to be requested by Egan because the final judgment prepared by respondent had failed to state the real property was in the name of Rae S. Dixon who was the same person as Virgie Rae Dixon, the decedent. The order to correct was signed on January 2, 1986.

In November 1985, respondent appealed the order reducing his commissions and fees. In November 1986, the Court of Appeal affirmed the trial court's order; denied sanctions; and awarded costs to

2. Dixon's house was valued at $97,000 and the balance consisted of cash, certificates of deposit and savings bonds.

3. Respondent requested approximately $3,600 for executor's commissions, approximately $3,600 for attorney's fees, and $350 for extraordinary services. The court awarded approximately $1,800 each for the commissions and fees and the $350 for extraordinary services.

Pollick, who had opposed the appeal. The Court of Appeal found the time taken for the administration of the estate exceeded the time permitted under former Probate Code section 1025.5 and that respondent "failed to sell or rent the real property, did not keep [Pollick] apprised of the status of the estate, and did not timely file the final distribution."

A supplemental accounting distributing the balance in the estate was not filed until June 2, 1989. The accounting stated that respondent waited to file the accounting "in the event [the Internal Revenue Service] decided to audit" the Dixon estate before making a final distribution. The order settling the supplemental accounting was filed on June 2, 1989.

DISCUSSION

A. Introduction

The amended notice to show cause in this matter charged that respondent failed to perform services competently in the Dixon probate matter in violation of former rule 6-101(A)(2) of the Rules of Professional Conduct.[4] The hearing judge concluded that respondent wilfully violated rule 6-101(A)(2) in that he recklessly exceeded the time allowed for the administration of the estate; recklessly failed to sell or distribute the real property for an unreasonable period of time; recklessly failed to timely settle the supplemental accounting; and recklessly failed to notify the beneficiaries or communicate with them regarding his intentions not to sell or lease the real property.

As indicated above, respondent seeks review of the hearing judge's culpability conclusions and discipline recommendation. On review, we must independently review the record. (Rule 453(a), Trans. Rules Proc. of State Bar.) We may adopt findings and conclusions which differ from the hearing judge's, but we must accord great weight to the hearing judge's findings of fact which resolve credibility issues. (*Ibid.*)

[1] We note at the outset that respondent was appointed both the executor and attorney for the Dixon estate. As such, much of the work he performed was done in his capacity as executor. Executors are not required to be attorneys and are not subject to the Rules of Professional Conduct of the State Bar. (*Layton* v. *State Bar* (1990) 50 Cal.3d 889, 904.) Nevertheless, part of the services respondent rendered to the estate were performed in his capacity as an attorney and, in addition, "where an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them. [Citations.]" (*Ibid.*)

B. Procedural Contentions

Respondent raises a number of procedural contentions which we address first. Respondent attacks the sufficiency of the amended notice to show cause, claiming the notice did not adequately apprise him of the charges and, therefore, the State Bar Court lacked jurisdiction in this matter. The hearing judge found that the misconduct alleged in the notice was pled with sufficient particularity and adequately correlated with the rule of professional conduct allegedly violated.

Respondent is entitled to reasonable notice of the specific charges that the State Bar intends to prove. (Bus. & Prof. Code, § 6085; *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928, 929; *In the Matter of Glasser* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 163, 171.) The amended notice to show cause charged that respondent became the executor and administrator of the Dixon estate and thereafter failed to perform services competently (paragraph 1); that he exceeded the time allowed by former Probate Code section 1025.5 and the superior court reduced his fees on account of the delay (paragraph 2); that he failed to sell, rent, or lease the real property until ordered by the superior court (paragraph 3); that

4. All further references to rule 6-101(A)(2) are to the former rule in effect from October 23, 1983, until May 26, 1989, which provided: "A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently."

he failed to petition for settlement of the supplemental accounting for over five years from the issuance of the letters (paragraph 4); that he failed to communicate with the beneficiaries (paragraph 5); and that the above specific acts were committed in wilful violation of rule 6-101(A)(2).

[2] Respondent contends that each of the paragraphs of the notice to show cause did not allege a rule or code section that was violated or that required the action that the paragraph alleged was not done. Respondent's assertions are without merit. The notice alleged that respondent violated rule 6-101(A)(2) in that he failed to perform the services competently and alleged specific facts charging a lack of diligence upon which that violation was based. There is no requirement that each paragraph of a single count in a notice allege a violation of a rule or statute. Indeed, such a pleading in this case would have been misleading because this notice alleges a single violation of rule 6-101 based on the aggregate of the acts set forth in the five paragraphs, not five separate violations of the rule. As did the hearing judge, we conclude that the alleged misconduct in the notice was pled with sufficient particularity and was adequately correlated with the rule violation charged to have provided respondent with reasonable notice of the specific charges at issue in this matter.

We also note that respondent's prior discipline involved very similar misconduct. The notice to show cause in that prior matter charged that respondent failed to perform services competently in that he failed to timely file estate tax returns, failed to preserve estate assets, and failed to timely distribute estate property, in violation of rule 6-101(A)(2). The Supreme Court adopted the State Bar's conclusion that respondent recklessly and repeatedly failed to perform services competently in violation of rule 6-101(A)(2). (*Layton* v. *State Bar*, *supra*, 50 Cal.3d at p. 898 ["Over five years elapsed from the time letters of administration were issued to Layton in this simple estate to the time he was removed by the court as executor, having failed to bring the Estate to closure. This delay in accomplishing the purposes for which he was retained was accompanied by numerous instances of lack of diligence in performing his duties as an attorney as well as his duties as an executor."].) It is rather disingenuous for respondent to argue that the present notice to show cause failed to adequately apprise him that unwarranted delay in the administration of an estate could be grounds for discipline under rule 6-101(A)(2) when he had already been disciplined based on similar charges and findings.

Finally, we note that there was an extensive pretrial conference in this matter at which the hearing judge discussed in great detail with respondent the charges and the anticipated evidence in support of those charges.

[3] Respondent next complains that the hearing was not fair. In support of this assertion, respondent alleges some 17 procedural errors. A showing of specific prejudice is required to invalidate a hearing judge's decision based on procedural errors. (*Calvert* v. *State Bar* (1991) 54 Cal.3d 765, 778 ["The rules of criminal procedure do not apply in attorney discipline proceedings, and reversible error will be found only when the errors complained of resulted in a deprivation of a fair hearing"]; *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 845.) Even assuming for the sake of argument that each of the 17 errors occurred as asserted by respondent, he has not alleged and/or demonstrated that he suffered any specific prejudice as a result. In any event, we have examined each of the 17 alleged errors and have concluded that each lacks merit and that respondent received a fair hearing.

We have previously discussed and rejected respondent's first alleged error that the notice to show cause failed to notify him of the charges. **[4]** Respondent next complains that there was prejudicial delay in bringing the charges. The complaint against respondent was sent to the State Bar in July 1988, the last act of misconduct was in June 1989 when respondent settled the supplemental accounting, and the notice to show cause was filed in May 1990. We do not find delay under these circumstances. In addition, neither the documentary evidence respondent claims was destroyed nor the events respondent claims certain witnesses could not remember is material to respondent's delay in the administration of the estate. Respondent has never claimed that any of these people said or did anything that caused delay or that what these witnesses could not remember was material to the issue of delay. In short, even if there

was delay, respondent has not demonstrated specific prejudice.

[5] Respondent also alleges that several errors occurred during discovery. We note that discovery, which usually must be completed within 90 days after service of the notice to show cause (rule 316, Trans. Rules Proc. of State Bar), was extended until early June 1991. Thus, respondent had ample opportunity to conduct discovery. Respondent propounded interrogatories and deposed witnesses. He did not seek additional time for further discovery beyond the June 1991 cut-off. He also did not move to compel further responses to any discovery he deemed inadequately answered, nor did he seek to compel the attendance at depositions of out-of-state witnesses. We find no merit to respondent's contentions that errors occurred during discovery in this matter.

[6] Respondent next complains that he was prejudiced because the State Bar successfully moved to dismiss three of the four counts of the original notice to show cause. Respondent does not support this rather novel argument with authority. He does not allege, nor is there any evidence to suggest, that the State Bar did not have good cause to file the three counts. Respondent has not demonstrated how the dismissal of three counts against him in 1990 caused specific prejudice.

[7] Respondent next argues that the hearing judge did not allow him to present evidence that the market value of the house increased during the pendency of the estate which would have established that his decision not to sell the house was reasonable. Even if we accepted respondent's contention, it would not provide justification for his inaction. The heirs repeatedly requested the earliest possible distribution and respondent did not consult with them regarding his decision to hold the property, nor did he seek probate court approval to hold the property beyond the one year. In addition, increasing market value of the house did not justify respondent's failure to seek a partial distribution of the personal property, or failure to file the inventory within three months, or failure to distribute the remaining assets of the estate for over five years.

Respondent next contends that several evidentiary rulings by the hearing judge were in error. He first alleges that certain credibility determinations of the hearing judge are not supported by the evidence. Respondent has not directed our attention to any evidence in the record that would support our modification of the allegedly erroneous credibility determinations. Respondent also complains that the hearing judge permitted a State Bar witness to give expert testimony even though not qualified. We agree with the examiner that the witness was a percipient witness, not an expert. [8] Respondent further asserts that the hearing judge refused to allow testimony regarding respondent's research on probate practices in the county where he practiced, which respondent claimed would show that probate cases routinely take longer than one year in the county. Respondent's specific request was for a continuance to gather and present the evidence. The hearing judge denied this request on the grounds that respondent's research would be self-serving and the evidence would not be material to whether respondent improperly delayed the administration of the estate. As indicated above, respondent had more than ample time prior to trial to prepare his defense. Thus, we do not find the denial of the continuance was error. However, even if it was error, we agree with the hearing judge that the evidence would have very little probative value to the issues in this case. The custom and practice in his county would not explain or excuse respondent's failure to close the estate for over five years.

[9] Respondent's next complaint that he was not allowed to present mitigating evidence without the prior approval of the State Bar is simply not true. The hearing judge requested that respondent discuss his evidence in mitigation with the examiner to see if they could "work something out" with regard to the evidence. Essentially, the hearing judge was seeking to promote stipulations for the introduction of character letters. Respondent was not required to obtain prior approval of the State Bar to present mitigating evidence.

[10] Respondent next argues that he was not able to present an adequate defense because the hearing judge permitted the introduction into evidence

of the transcript of the superior court trial even though much of the testimony was not relevant to the State Bar trial. Respondent also contends that the hearing judge failed to inform him of the transcript testimony that would influence the hearing judge. The transcript in question is of the September 1985 hearing on the heirs' petition to remove respondent. The transcript was admissible pursuant to Business and Professions Code section 6049.2. The hearing judge admitted the transcript subject to respondent's motion to strike those parts that were not material or relevant. Respondent never moved to strike particular parts of the transcript.

Respondent apparently believes that the hearing judge should have "prejudged" the evidence so respondent could be informed of those parts of the transcript to which the judge would give weight. He does not cite authority in support of this contention and we are aware of none. The examiner notified respondent in her pretrial statement that she would seek to introduce the 106-page transcript. The hearing judge indicated to respondent at the pretrial hearing in January 1991 that he would probably allow the transcript to be introduced. Respondent had ample opportunity to prepare a defense to the matters in the transcript. Respondent also claims that the hearing judge allowed the State Bar to indicate the parts of the transcript that it was relying on after the close of trial when it was too late for respondent to give testimony regarding those matters. Again, respondent had ample notice and opportunity to prepare his defense to any matter contained in the transcript.

Respondent asserts that he was prejudiced because the State Bar was allowed to change the order of witnesses which deprived him of the opportunity to prepare to cross-examine those witnesses. The examiner indicated in a pretrial conference in response to respondent's inquiry regarding the length of time she needed for her case in chief that she would be calling four witnesses, including respondent. The examiner specifically stated that she was not representing the "sequence of events now, I'm just talking in terms of bulk time." Respondent objected at trial when the examiner called Stewart as her first witness and not respondent. Respondent indicated that he thought he was going to be first and therefore had not prepared to cross-examine Stewart. Stewart was an out-of-state witness and rescheduling his testimony would have created problems. Respondent was aware of the identity of all of the State Bar's witnesses at least from the January 1991 pretrial statement and conference and therefore had ample opportunity to prepare his cross-examination of any or all of them on any given day. Furthermore, the examiner did not make any representations as to the order of the witnesses she would be calling.

Finally, respondent complains that the hearing judge did not review the depositions of Stewart or Pollick. Both Stewart and Pollick testified at trial and respondent had ample opportunity to cross-examine them. In addition, after trial the hearing judge permitted respondent to submit those portions of the deposition transcripts that respondent wanted the hearing judge to review, which respondent did in September 1991. There is no indication in the record that the hearing judge did not review and consider the portions of the depositions submitted.

C. Culpability

Respondent argues that it was not unethical for him to refuse to distribute the personal property of the estate without first obtaining a court order for the distribution. Respondent asserts that the hearing judge found that he should have allowed the beneficiaries to remove the personal property at once. The hearing judge did not make such a finding. Rather, the hearing judge concluded that it was not below the standard of care nor wrong for respondent to have refused distribution of the personal property until there was an order for distribution. As respondent indicates in his brief on review, the earliest time for filing a petition for preliminary distribution was early May 1984. Despite the requests of the beneficiaries for early distribution, an order for preliminary distribution was not obtained until early July 1985 when respondent and Egan stipulated to the distribution. Our reading of the hearing judge's decision in this matter indicates that the unwarranted delay in seeking an order for preliminary distribution is the basis for the judge's decision with regard to this issue.

Respondent next argues that it was not unethical for him to take a full year from the date of the issuance of the letters testamentary to complete the adminis-

tration of the estate, as authorized by former Probate Code section 1025.5. Respondent asserts that the legislature set the one-year time standard and the State Bar Court cannot change that standard.

[11] The hearing judge concluded that respondent's obligation to perform services competently under rule 6-101(A)(2) applied regardless of whether the estate was distributed in over or under one year. We agree. Respondent does not cite any authority, nor are we aware of any, that indicates that compliance with the time limitations set forth in the Probate Code is a defense to a rule 6-101(A)(2) charge, or that indicates that noncompliance with the time limitations establishes a per se violation of the rule. The focus of the inquiry for a rule 6-101(A)(2) charge is whether the attorney intentionally, recklessly, or repeatedly failed to apply the learning, skill, and diligence necessary to discharge the attorney's duties arising from his or her employment or representation. Compliance with the time limitations of the Probate Code is but one factor to be considered in making this determination. (Cf. *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 57 [an attorney's failure to bring a client's lawsuit to trial within the statutory time period was not a violation of rule 6-101(A)(2) because there was no evidence that such failure resulted from anything other than the attorney's simple error in miscalculating the date].)

In any event, respondent failed to comply with the time limitations of former Probate Code section 1025.5 in that he did not file the petition for final distribution until May 1985, which was 14 months after the issuance of the letters. Moreover, respondent did not distribute the balance of the estate until 1989, approximately five years after the letters were issued and approximately two and one-half years after his appeal was decided. The record shows no reason justifying these delays. Again, it is these time frames that we find to be the basis for the hearing judge's decision.

Respondent next contends that the hearing judge's decision is not supported by the record. In support of this argument, he attacks two minor factual findings and argues that he had a good faith belief that the superior court consented to the filing of the accounting after the one-year deadline, that he performed services for the estate during the first year, and that his time was limited during the first year because of other pressing personal and professional matters. Respondent concludes that his actions were not wilful or intentional and that he "did not have any 'reckless disregard' for the estate."

Respondent asserts that he first met Floy Munk before Dixon's death, not the day before the funeral as found by the hearing judge; and that the beneficiaries had indicated that the personal property included "jewelry," "valuables," and items that were "precious and important" to them, not "heirlooms" as the hearing judge found. Both findings are inconsequential to the hearing judge's conclusion that respondent recklessly failed to perform services competently. Thus, even if respondent's assertions are correct and we were to change these two factual findings, no modification of the hearing judge's conclusion would be warranted.[5]

Respondent argues that the superior court consented to the late filing of the petition for distribution of the estate because the court continued the hearing on the beneficiaries' petition to remove respondent from April 1985 to May 1985. The hearing judge rejected respondent's testimony at the State Bar trial that the April hearing was continued to allow him to file the final accounting by May 1, 1985, and that the petition to have him removed was dropped because he filed the accounting. On review, we must give great weight to the hearing judge's credibility rulings. (*Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at p. 931; *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 42.) Respondent has not directed our attention to any evidence in the record, nor are we aware of any, that would cause us to modify this credibility determination. In any event, we

5. Respondent and Munk apparently did converse during Dixon's hospitalization just prior to her death. (Exh. 2, pp. 42-43.) "Heirloom" is not a term of art and is defined as "something of special value handed on from one generation to another." (Webster's Ninth New Collegiate Dictionary (1990) p. 562.)

agree with the hearing judge that the few weeks between April and May 1985 are of no consequence. The significant part of this case is respondent's failure to bring this estate to closure for over five years.

Respondent's arguments regarding the services he did perform and the limitations on his time during the first year of the estate seem to be in support of his conclusion that his actions were not wilful or intentional and were not with reckless disregard. Respondent argues that during the first year of the estate, he marshalled most of the assets of the estate, sent the inventory to the referee, and was willing to distribute the estate property pending a ruling on the beneficiaries' petition to remove him, and that the estate was not harmed by his actions. Furthermore, during that first year of the estate, his time was limited because of the illness of his granddaughter, funerals for two relatives, the hospitalization and death of his mother-in-law, and the manslaughter trial of an indigent friend.

Respondent refuses to focus on the fact that he failed to close this relatively simple estate for over five years. During that period of time, he failed to file the inventory within three months after his appointment as administrator (former Prob. Code, § 600); failed to petition for a partial distribution despite the beneficiaries' repeated requests; failed to file the final accounting within the one-year time frame (former Prob. Code, § 1025.5); and failed to file for settlement of the supplemental accounting and distribute the remaining assets of the estate for over five years from the issuance of the letters and two and one-half years after his appeal was decided. **[12a]** The fact that respondent performed some services for the estate does not excuse his failure to distribute the assets and close the estate for over five years, especially where, as here, respondent asserts that he was busy on other matters. An attorney has an obligation to perform services diligently (rule 6-101(A)) and if the attorney knows he does not have or will not acquire sufficient time to do so, he must not continue representation in the matter (rule 6-101(B)).

[12b] A wilful violation of the Rules of Professional Conduct is established where it is demonstrated that the attorney "acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it." (*Zitny* v. *State Bar* (1966) 64 Cal.2d 787, 792.) As we recently noted in *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179, "An attorney's failure to communicate with and reckless or repeated inattention to the needs of a client have long been grounds for discipline. [Citations.] Such misconduct need not involve deliberate wrongdoing [citation] or a purposeful failure to attend to the duties due to a client. [Citation.] . . . [A]n attorney's acts need not be shown to be wilful where there is a repeated failure of the attorney to attend to the needs of the client. [Citations.]" Respondent's actions were wilful. He repeatedly failed to perform the acts necessary to close the estate for over five years despite knowing that the beneficiaries desired the earliest possible distribution. As a result, we conclude that respondent wilfully violated rule 6-101(A)(2) by recklessly and repeatedly failing to perform services diligently.

DISCIPLINE

Respondent contends that even if culpability is found, the discipline recommended is too severe. He asserts that two years stayed suspension and six months actual suspension is tantamount to disbarment at his age. Furthermore, he argues that he was attempting to serve and increase the estate for the benefit of the beneficiaries and the petition for distribution was "only 56 days" late. Finally, he contends that the misconduct in his prior discipline was more egregious than the present misconduct and the discipline in the prior matter was significantly less. Respondent does not argue that the hearing judge's factual findings with regard to the aggravating and mitigating circumstances are not supported by the record.

[13] The only mitigating factor found by the hearing judge was respondent's years of practice since his admission to practice law in 1959 with only one prior discipline. (Std. 1.2(e)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Trans. Rules Proc. of State Bar, div. V ("standard[s]").) The absence of a prior disciplinary record over many years of practice is considered an important mitigating factor.

(*Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 798-799.) Even where the attorney has a record of prior discipline, many years of blemish-free practice prior to the first act of misconduct has been considered a mitigating circumstance where the prior and present misconduct occurred during the same time period and within a narrow time frame. (*Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 259; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) Respondent's prior and present misconduct did not occur during the same time period or within a narrow time frame. His past misconduct occurred from roughly 1979 to 1984 and his present misconduct occurred from roughly 1984 to 1989. Thus, we do not view respondent's years of practice as an important mitigating factor. In addition, we note that the absence of a prior disciplinary record over many years of practice is considered a mitigating circumstance because it indicates that the misconduct under consideration is aberrational and therefore less likely to recur. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.) As discussed below, there are facts present in this case which increase the risk that respondent will repeat his misdeeds.

[14] Respondent testified at trial that he had other pressing personal and professional obligations during the first year of the administration of the estate. The hearing judge did not find these obligations mitigated the misconduct. We agree. Office workload does not generally serve to substantially mitigate misconduct. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101.) Stressful personal problems may mitigate misconduct in the appropriate case. (See std. 1.2(e)(iv).) However, respondent's workload or personal problems, which he asserts occurred during the first year, do not adequately explain his five-year delay in completing the administration of the estate. (*Carter* v. *State Bar*, *supra*, 44 Cal.3d at p. 1101.)

In aggravation, the hearing judge found that respondent has a record of prior discipline (std. 1.2(b)(i)), the misconduct significantly harmed the beneficiaries (std. 1.2(b)(iv)), and respondent manifested indifference toward rectification of or atonement for his misconduct (std. 1.2(b)(v)). In May 1990, the Supreme Court suspended respondent from practice for three years, stayed that suspension and placed him on three years probation on conditions, including thirty days actual suspension from practice. (*Layton* v. *State Bar*, *supra*, 50 Cal.3d at p. 906.)[6] As indicated above, the prior matter also involved a single probate matter in which respondent was found to have failed to perform services competently as both executor and attorney to the estate. Respondent failed to timely file estate tax returns, failed to preserve estate assets, and failed to timely distribute estate property. The misconduct in the present matter occurred before the Supreme Court disciplined respondent in the prior matter in May 1990. Nevertheless, the notice to show cause, hearing department decision and review department decision in the prior matter all predated the last acts of misconduct in the present matter. In addition, respondent was removed as executor in the prior matter in August 1984, which was before the expiration of the one-year time period of former Probate Code section 1025.5 in the present matter. None of these events apparently served to heighten respondent's awareness and understanding of his ethical duties.

The hearing judge found that respondent significantly harmed the beneficiaries in that they had to hire another attorney in order to have respondent removed as executor and had to pay more in attorney fees to defend against respondent's appeal than the amount of fees involved in the appeal. In the hearing judge's view, "Although respondent's appeal was not frivolous in the sense that he was legally entitled to appeal the reduction of his fees, his doing so because he was unwilling to consider himself wrong when he was egregiously wrong was not an ethical or moral thing to do." (Decision, p. 27.)

[15] While respondent's motive in appealing the reduction of his fees may be suspect in light of the amount involved, there is no clear and convincing evidence in the record that the appeal was in bad faith or was otherwise improper. In light of the "important policies favoring unfettered access to the courts"

6. The State Bar record of the prior discipline was filed with the court on August 5, 1991, but was not introduced into evidence. We correct this oversight by admitting the record into evidence.

(*Lubetzky* v. *State Bar* (1991) 54 Cal.3d 308, 317), we decline to consider respondent's appeal of the reduction of his commissions and fees an aggravating factor. Nevertheless, we agree with the hearing judge that respondent's failure to act competently did cause harm to the beneficiaries in that they incurred attorney's fees and expenses in seeking to remove respondent. In addition, the beneficiaries were harmed in that they were deprived for an unwarranted period of time of the use of the money and/or property that was eventually distributed to them.[7]

[16a] The hearing judge further found that respondent manifested indifference toward rectification of or atonement for his misconduct in that he showed no insight or recognition of his misconduct. We agree. Respondent was removed as executor in the prior matter; he was disciplined in that prior matter based on conduct that closely parallels his conduct in the present matter; and he was found responsible for the unwarranted delays in the administration of the estate in the present matter by the superior court, the Court of Appeal and the State Bar Court. Despite these events, respondent asserts on review before us that his inaction should be excused because he performed some services for the estate, he was busy with other personal and professional matters, and the original petition to distribute the estate was only 56 days late.

[16b] We also agree with the hearing judge that respondent's indifference toward his misconduct is a substantial factor in the discipline recommendation. "An attorney's failure to accept responsibility for, or to understand the wrongfulness of, her actions may be an aggravating factor unless it is based on an honest belief in innocence." (*Harris* v. *State Bar* (1990) 51 Cal.3d 1082, 1088.) As in *Harris*, respondent merely repeats his version of the events. Respondent's assertion before us that he is not culpable because he performed some services, was busy with other matters, and was only 56 days late in filing the original petition is not in our view an honest belief in innocence. Rather, this argument reinforces the hearing judge's conclusion that respondent simply does not understand or appreciate the requirement that he devote the diligence necessary to discharge his duties arising from his employment. We find respondent's assertions exhibit a disturbing lack of insight into the misconduct which in turn causes concern that he will repeat his misdeeds.

We agree with respondent that the misconduct in his prior discipline was more egregious in terms of the financial harm suffered by the estate than the present misconduct. Respondent failed to file a federal tax return on behalf of the estate in that prior case, which resulted in penalties and interest against the estate of approximately $4,000, and he allowed estate funds to accumulate in a non-interest-bearing account for considerable periods of time. (*Layton* v. *State Bar*, *supra*, 50 Cal.3d at p. 896.)

[17a] Nevertheless, in both the prior and current matters, respondent's lack of diligence delayed distribution of the assets in these two relatively uncomplicated estates for over five years. In both matters, respondent simply failed to apply the diligence necessary to bring the estates to closure for exceedingly lengthy periods of time without justification. Because of the similarity between the past and present misconduct, we would ordinarily view the present misconduct as warranting only slightly greater discipline than imposed in the prior matter. (See std. 1.7(a) [discipline imposed in a second or subsequent disciplinary matter against an attorney should be greater than the discipline imposed in the first or preceding disciplinary matter].) However, respondent's failure to understand or appreciate his present misconduct causes concern regarding his handling of future cases, and, in our view, is the primary justification for imposing significantly greater discipline than imposed in the prior matter. Based on our independent review of the record, we conclude that the hearing judge's recommended discipline is appropriate in light of respondent's present and past misconduct, the lack of mitigating factors in the present matter and the presence of several aggravat-

7. The hearing judge also believed that respondent deliberately failed to distribute the remaining assets of the estate promptly after the court order in September 1985 in order to "annoy" the beneficiaries. The hearing judge did not find this to be a factor in aggravation and there is no indication in the record as to the extent to which, if any, the belief affected the hearing judge's discipline recommendation. We do not find clear and convincing evidence in the record to support the hearing judge's belief.

ing factors, including respondent's failure to accept responsibility for, or understand the wrongfulness of, his misconduct.

[18a] Finally, we note that the hearing judge recommended that respondent be ordered to take and pass the California Professional Responsibility Examination ("CPRE") recently developed by the State Bar for use in disciplinary proceedings. Although we do not adopt the hearing judge's reasoning for recommending the California examination,[8] **[18b - see fn. 8]** we adopt the recommendation as it does not appear that respondent was ordered to take the CPRE or PRE in his prior discipline matter. (*Layton* v. *State Bar*, *supra*, 50 Cal.3d at p. 906.) We therefore recommend in this proceeding that respondent be ordered to take and pass the California examination. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)[9] **[18c - see fn. 9]**

FORMAL RECOMMENDATION

[17b] For the reasons stated above, we recommend that respondent be suspended from the practice of law for a period of two years, with the execution of the suspension stayed, and that he be placed on three years probation on the conditions specified in the hearing judge's decision filed November 6, 1991, including actual suspension for six months.[10] We further recommend that respondent be ordered to take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners of the State of California within one year from the effective date of the Supreme Court order in this matter and furnish satisfactory proof of such passage to the Probation Unit, Office of Trials, Los Angeles. We also recommend, as did the hearing judge, that respondent be ordered to comply with rule 955 of the California Rules of Court. Finally, we recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

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8. **[18b]** The hearing judge was under the impression that the respondent had previously been ordered by the Supreme Court to take the national Professional Responsibility Examination ("PRE") and that the hearing judge was ordering a second examination. Normally, if a respondent has recently been ordered to take a professional responsibility examination, he is not required to do so in connection with subsequent discipline. (See, e.g., *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490.)

9. **[18c]** In *Segretti*, *supra*, the Supreme Court imposed the PRE developed to test attorneys' knowledge of the ABA Model Code of Professional Responsibility (since replaced by the ABA Model Rules of Professional Conduct) and indicated that it should be routinely ordered in cases serious enough to require suspension of the attorney. The new CPRE which focuses on the California Rules of Professional Conduct is now routinely ordered by the State Bar Court and Supreme Court in cases where the national PRE was previously ordered. (See, e.g., *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 715.)

10. We modify the conditions of probation where appropriate to refer to the newly created Probation Unit in the Office of Trials instead of the former Probation Department of the State Bar Court.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KAREN GOODSON PIERCE

A Member of the State Bar

No. 92-N-10143

Filed April 6, 1993

SUMMARY

Respondent defaulted in a disciplinary proceeding involving abandonment of a single personal injury client, and received a six-month stayed suspension and probation. She violated her probation, defaulted again in the ensuing proceeding, and received six months actual suspension, resulting in a requirement that she comply with rule 955 of the California Rules of Court. She did not file the declaration required by rule 955 until 21 days after it was due, and then defaulted again in the proceeding arising out of her noncompliance with the rule. In the rule 955 proceeding, because respondent had no clients and the lateness of her declaration was due to illness, the hearing judge recommended a one-year extension of probation in lieu of disbarment. (Hon. Alan K. Goldhammer, Hearing Judge.)

The State Bar requested review, seeking respondent's disbarment. By the time the review department filed its opinion, respondent had defaulted in a fourth disciplinary proceeding arising out of further probation violations. Because of respondent's extended practice of inattention to State Bar discipline proceedings and failure to comply with successive orders of the Supreme Court, the review department recommended that she be disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: No appearance

HEADNOTES

[1 a, b] 107 Procedure—Default/Relief from Default
130 Procedure—Procedure on Review
1911.20 Rule 955—Failure to Appear

Because there was no procedure for entering a default in a referral proceeding for alleged wilful violation of rule 955, the respondent was not precluded by lack of participation in the hearing department from filing an opposition brief on review. However, when respondent failed to file such a brief, the review department issued an order precluding respondent from appearing at oral argument.

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] **107 Procedure—Default/Relief from Default**
511 Aggravation—Prior Record—Found
611 Aggravation—Lack of Candor—Bar—Found
1911.20 Rule 955—Failure to Appear
1913.24 Rule 955—Delay—Filing Affidavit

A short delay in compliance with rule 955, by itself, would not necessitate disbarment. However, where respondent also had failed to appear in the rule 955 violation proceeding, had failed to appear in two prior disciplinary proceedings, and had continued to ignore her obligations thereafter, showing a clear pattern of failure to participate in the disciplinary process and to comply with requirements of Supreme Court, disbarment was clearly appropriate.

[3] **175 Discipline—Rule 955**
1913.60 Rule 955—Not in Active Practice

An attorney who is ordered to comply with rule 955 is required to file an affidavit under the rule whether or not the attorney has clients.

[4] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
1913.11 Rule 955—Wilfulness—Definition

Bad faith is not a prerequisite to a finding of wilful failure to comply with rule 955.

[5] **130 Procedure—Procedure on Review**
146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings
1911.30 Rule 955—Record

It was appropriate for both the hearing judge and the review department to take judicial notice of the status, at the time of their respective decisions, of a separate pending disciplinary matter involving the same respondent.

[6] **139 Procedure—Miscellaneous**
165 Adequacy of Hearing Decision
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings

Where a hearing judge's decision in one matter indicated that if the respondent filed a post-decision declaration in that matter, this would be taken into account in assessing discipline in a second pending matter, the examiner's objections on review to this aspect of the decision were rendered moot by the respondent's failure to file any such declaration, by the State Bar's apparent satisfaction with the result in the second matter, and by the review department's recommendation of disbarment in the first matter based on other grounds.

[7] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous

Declarations can be admitted into evidence in lieu of live testimony when no objection is raised. Where a declaration by the respondent was introduced into evidence by the State Bar without limiting the purpose for which the declaration was admitted, the declaration was admissible for all purposes, including the truth of the respondent's hearsay statements contained therein.

[8 a, b] **175 Discipline—Rule 955**
591 Aggravation—Indifference—Found
621 Aggravation—Lack of Remorse—Found
1913.19 Rule 955—Wilfulness—Other Issues
Disbarment is generally ordered for wilful breach of rule 955, and is particularly appropriate when a respondent repeatedly demonstrates indifference to successive disciplinary orders of the Supreme Court.

[9] **511 Aggravation—Prior Record—Found**
802.21 Standards—Definitions—Prior Record
Prior discipline includes discipline imposed for violation of probation.

[10] **204.90 Culpability—General Substantive Issues**
582.50 Aggravation—Harm to Client—Declined to Find
720.30 Mitigation—Lack of Harm—Found but Discounted
1911.20 Rule 955—Failure to Appear
Attorneys who engage in an extended practice of inattention to official actions should not be allowed to create the risk that it will extend to clients resulting in inevitable and grievous harm to them.

[11] **204.90 Culpability—General Substantive Issues**
220.00 State Bar Act—Section 6103, clause 1
511 Aggravation—Prior Record—Found
611 Aggravation—Lack of Candor—Bar—Found
An attorney's failure to comply with successive orders of the Supreme Court is of concern to the State Bar Court because it repeatedly burdens the resources of the State Bar Court and the disciplinary system.

ADDITIONAL ANALYSIS

Culpability
Found
1915.10 Rule 955
Aggravation
Declined to Find
545 Bad Faith, Dishonesty
588.50 Harm—Generally
Mitigation
Found
791 Other
Standards
806.10 Disbarment After Two Priors
Discipline
1921 Disbarment

OPINION

PEARLMAN, P.J.:

This case illustrates the extreme risk involved in repeatedly ignoring disciplinary proceedings and related Supreme Court orders. Respondent Karen Goodson Pierce first became involved with the disciplinary system because of her abandonment of a single personal injury client. She defaulted in that proceeding and received a Supreme Court order of six months stayed suspension conditioned on compliance with certain conditions of probation. Had she complied with those conditions she would not have had any actual suspension and would not be facing disbarment today. Instead, she violated the conditions of her probation, and in a second proceeding based on those probation violations, she again defaulted. She received six months actual suspension and was ordered to comply with rule 955 of the California Rules of Court (hereafter "rule 955"). After two reminders from the probation department, she filed the required declaration 21 days late stating that she had had no clients for over 3 years. She then failed to show up at the hearing below. The hearing judge warned her in his ensuing decision that despite the minor nature of the current violation she was risking disbarment by continued inattention to State Bar proceedings. He found wilful violation of rule 955 and recommended extending probation for another year.

The Office of Trials requested review, seeking disbarment of respondent. **[1a]** Respondent did not file any opposition thereto[1] **[1b - see fn. 1]** and was thereby precluded by order of this court from appearing at oral argument. In the interim, respondent failed to move to set aside her default in a second proceeding for violation of probation. We take judicial notice that the hearing judge has recommended in that second matter (State Bar Court case number 92-O-13816) that she be actually suspended for one year in that proceeding, the full amount of stayed suspension that could be imposed therein.

[2] Had respondent's short delay in compliance with rule 955 been the only issue before us we would agree with the hearing judge that disbarment is unnecessary. But this was respondent's third disciplinary proceeding in which she failed to appear and respondent continued to ignore her obligations thereafter. We have here a clear pattern of failure to participate in the disciplinary process and to comply with the requirements of the Supreme Court in order to maintain respondent's license to practice law. Respondent has now been found culpable in a fourth disciplinary proceeding in which she again defaulted and has exhibited extreme indifference to the outcome of the current proceeding by her failure to participate despite a request for disbarment. We agree with the Office of Trials that disbarment is clearly appropriate under the circumstances and we so recommend to the Supreme Court.

I. PROCEDURAL BACKGROUND

On October 16, 1991, the Supreme Court filed an order suspending respondent for one year for violation of probation conditions, staying that suspension on conditions including six months actual suspension and directing respondent, inter alia, to comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court. (*In the Matter of Pierce* (S022260), order filed Oct. 16, 1991 [State Bar Court case number 90-O-17816].) Pursuant thereto, respondent should have filed with the clerk of the State Bar Court an affidavit showing that she had fully complied with the provisions of the Supreme Court order on or before December 25, 1991. The order was duly served on respondent by the Supreme Court clerk's office.

On January 9, 1992, the State Bar Court Probation Department notified the Presiding Judge by letter with a copy to respondent of the fact that the probation department had itself notified respondent on November 6, 1991, at her membership records address of the provisions of the Supreme Court order of October 16, 1991, and that she had failed to file any affidavit in compliance with rule 955. On January 14, 1992, this court issued an order referring the matter for a hearing as to whether respondent wilfully failed

1. **[1b]** Although respondent did not participate at the hearing, there is no current procedure for entering a default in a referral proceeding for alleged wilful violation of rule 955. Respondent was therefore not precluded by her lack of participation below from filing a brief in opposition to the Office of Trials' opening brief on review.

to comply with the October 16, 1991, order and if so, for a recommendation as to the discipline to be imposed.

On January 15, 1992, respondent filed the required declaration with the State Bar Court executed on January 13, 1992, under penalty of perjury, stating, among other things, that she did not have any clients and had not actively practiced law for three years; that she had been informed by her probation monitor on December 20, 1991, that she should be sure to make the rule 955 declaration in a timely fashion and that he gave her the dates by which it should be made and that she was ill at the time and forgot in her letter dated December 20, 1991, to make the declaration in compliance with rule 955.

On January 28, 1992, the clerk's office of the State Bar Court served respondent with a copy of the review department referral order and a notice of hearing re compliance with rule 955 and related documents. Respondent thereafter failed to appear at a duly noticed status conference held on May 14, 1992, or at the trial held on August 6, 1992, which was also preceded by written notice served on May 15, 1992. The hearing judge found that respondent had due notice of the Supreme Court order of October 16, 1991, and wilfully failed to timely comply with rule 955, but that her affidavit filed January 15, 1992, did provide the required information 21 days late. The hearing judge further found that respondent had due notice of the referral order and failed to cooperate with or participate in the instant disciplinary proceeding.

II. MITIGATING AND AGGRAVATING CIRCUMSTANCES

In aggravation, the hearing judge noted that respondent, who was admitted to the State Bar in June of 1978, had two prior disciplinary cases, both stemming from one client matter, which constituted an aggravating circumstance under standard 1.2(b)(i) of the Standards for Attorney Sanctions for Professional Misconduct ("standard(s)"). (Trans. Rules Proc. of State Bar, div. V.)

In the first proceeding (State Bar Court case number 88-O-15352) respondent defaulted and was found to have abandoned a client by failing to communicate with the client, failing to perform the legal services for which she was employed and failing to turn over the client's file upon termination of respondent's employment in violation of Business and Professions Code section 6068 (m) and former Rules of Professional Conduct 2-111(A)(2) and 6-101(A)(2).[2] She was also found culpable in a second count of failing to cooperate with the State Bar in the investigation of the matter in violation of Business and Professions Code section 6068 (i) based on her failure to reply to two letters and multiple telephone calls from the State Bar investigator. In his findings in that case, the hearing judge specifically found respondent did not respond to discovery demands in the personal injury case she agreed to take over on behalf of Gayle Thorne in November of 1985; that she did not respond to numerous telephone messages and letters from her client or successor counsel in 1987 and 1988; and that in a conversation with her client in November of 1989 she stated that she was no longer practicing law and admitted she had not been opening any mail "that looked official" for a long time.

The second proceeding was an original proceeding (State Bar Court case number 90-O-17816) alleging respondent's failure to file a written report within the first 60 days of probation indicating respondent's intention to comply with all the provisions of the State Bar Act and Rules of Professional Conduct over the period of her probation and to verify that she had instituted a law office management plan. Respondent again defaulted, was found culpable and was ordered suspended for one year with execution of suspension stayed on conditions including two years probation and a six-month actual suspension. It was this order that required compliance with rule 955, respondent's violation of which resulted in the instant proceeding.

2. The hearing judge also found a violation of Business and Professions Code section 6068 (a) under both counts, but observed that it was superfluous and also found that the charge of violating Business and Professions Code section 6103 was not appropriate on the ground that section 6103 was not a charging provision, but authorization to sanction an attorney for violation of the attorney's oath. (See *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815-816.)

Finally, in aggravation the hearing judge noted respondent's lack of cooperation in the instant case. (Std. 1.2(b)(vi).)

In mitigation, the hearing judge noted that the declaration was only 21 days late and was accompanied by an explanation of illness, and that respondent had no pending cases and thus did not harm any client or person by the delay.[3] (Std. 1.2(e)(iii).)

[3] The hearing judge correctly noted that respondent was required to file the rule 955 affidavit whether or not she had clients (*Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131) and that the late filing was not in bad faith, but that [4] bad faith was not a prerequisite to a finding of wilful failure to comply with rule 955(c). In light of her attempt to comply with the rule 955 requirement and the fact that all of the proceedings stemmed from minor misconduct involving one client, the hearing judge declined to recommend disbarment and instead recommended that the probationary period in case number 90-O-17816 be extended for one year on the same terms and conditions except that if respondent provided a declaration under penalty of perjury that she continued not to have any clients, he would not appoint a monitor and would excuse her from the requirement that she develop a law office management plan. If she resumed the practice of law, a monitor would be appointed and she would be required to submit a written report regarding a law office plan within 60 days. Costs were recommended to be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

III. DISCUSSION

On review, the Office of Trials seeks disbarment and also objects to language in the decision below by which the hearing judge took judicial notice of respondent's default in case number 92-P-13816 also pending before him and stated that "if Respondent either has the default set aside or writes me in this matter (92-N-10143) prior to a decision being reached in 92-P-13816 and assures me that she intends to cooperate with a further period of probation I would take notice of such assurance and would, in all likelihood, afford respondent an opportunity to be on probation rather than to be suspended from law practice."

The examiner did not seek reconsideration by the hearing judge of the challenged language, but argues on review that by inviting respondent to write to the court, the hearing judge solicited the submission of post-trial evidence in this matter by respondent in violation of the California Evidence Code and Transitional Rules of Procedure of the State Bar. The examiner points out that rule 555.1, which provides the procedure for a member whose default has been entered pursuant to rule 555, would require a motion to be filed in case number 92-P-13816 in order for respondent to seek to participate therein. The examiner also argues that a declaration of intent to cooperate would be self-serving and "virtually impossible to evaluate in the absence of cross-examination," citing *Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1187. The examiner does not argue that the language objected to has any bearing on the decision reached *in this case*. Respondent did not in fact file any declaration or other writing.

[5] To the extent that the hearing judge took judicial notice of the status of case number 92-P-13816, we note that the examiner also invites us, pursuant to Evidence Code section 451, et seq., to take judicial notice of the hearing judge's subsequent decision in case number 92-P-13816, in which respondent again defaulted; findings of noncompliance were made;[4] six months actual suspension was recommended; and on reconsideration was changed to a

3. The examiner stated on the record at the hearing that respondent had been suspended for almost three years for failure to pay dues, and that the examiner had received no evidence that respondent was currently practicing law or that she posed any kind of danger to the public. We take judicial notice that the membership records of the State Bar reflect that respondent has been suspended since July 24, 1989, for failure to pay dues.

4. The hearing judge found that respondent's probation monitor wrote to her on December 12, 1991, and notified her that she was to contact him. On December 20, 1991, respondent showed that she had actual knowledge of the conditions of probation in a letter to the probation department reflecting a meeting with the monitor in which the terms of probation and suspension were discussed. The letter could not be filed as a quarterly report because it failed to include any statement that she had complied with the State Bar Act and Rules of Professional Conduct. Respondent never filed any quarterly reports, nor did she communicate thereafter with her probation monitor.

one-year actual suspension—the full amount of stayed suspension originally ordered by the Supreme Court. We deem judicial notice to be appropriate. (Cf. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646.) No request for review was filed in that case, which appears to signal the Office of Trials' satisfaction with the result therein.

[6] To the extent that the examiner objects to the hearing judge indicating that he would take into account in assessing discipline in case number 92-P-13816 the subsequent filing of a declaration in this matter, that appears to be an issue which potentially could have affected the result in case number 92-P-13816, but not the current proceeding. We deem the issue moot in light of subsequent events and the recommendation we make herein.[5] **[7 - see fn. 5]**

[8a] As we discussed in our very recent decision in *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, disbarment is generally ordered for wilful breach of rule 955. (See, e.g., *Bercovich* v. *State Bar*, *supra*, 50 Cal.3d at p. 131.) Disbarment is also the presumptively appropriate discipline if a member found culpable of professional misconduct has a record of two prior impositions of discipline. (Std. 1.7(b).) **[9]** Prior discipline includes discipline imposed for violation of probation. (Std. 1.2(f); see *Barnum* v. *State Bar* (1990) 52 Cal.3d 104, 113; *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 539.) **[8b]** Disbarment is particularly appropriate when a respondent repeatedly demonstrates indifference to successive disciplinary orders of the Supreme Court. (Cf. *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 607 [ordering disbarment].)

A finding was made in the first of the disciplinary proceedings in which this respondent has been found culpable that as of 1989 she had already for some time been ignoring any mail that looked official. Apparently she continued that extremely dangerous practice for the next four years as well. Respondent, by her ostrich-like behavior, may well not even be aware of the disbarment recommendation of the Office of Trials in this proceeding, the warning contained in the hearing judge's decision or the recommendation of this review department until long after it is acted upon by the Supreme Court.

[10] Attorneys who engage in this extended practice of inattention to official actions, as respondent did, should not be allowed to create the risk that it will extend to clients resulting in inevitable and grievous harm to them. (Compare *In re Kelley* (1990) 52 Cal.3d 487 [alcohol-related problems of an attorney need not wait until harm results to clients before discipline is imposed to protect the public]). **[11]** Moreover, respondent's failure to comply with successive orders of the Supreme Court has repeatedly burdened the resources of this court and the State Bar disciplinary system, also a matter of great concern to us. (Cf. *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 507-508 [contemptuous attitude toward disciplinary proceedings is relevant to determination of appropriate sanction].)

We recommend that respondent Karen Goodson Pierce be disbarred from the practice of law in this state and that costs of this proceeding be awarded the State Bar pursuant to Business and Professions Code section 6086.10. Our recommendation is independent of the recommended discipline in case number 92-P-13816 becoming final.

We concur:

NORIAN, J.
STOVITZ, J.

5. [7] We do note, however, that declarations can be admitted into evidence in lieu of live testimony when no objection is raised. In this proceeding, respondent's declaration filed on January 15, 1992, was introduced into evidence by the Office of Trials as an attachment to one of its trial exhibits. This included respondent's hearsay explanation of the delay in filing the declaration of compliance with rule 955. Since the examiner did not offer the declaration for the limited purpose of acknowledging its receipt, it was admissible for all purposes, including the truth of the hearsay contained therein. (Evid. Code, §§ 353, 355.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GILBERT WENTWORTH BOYNE

A Member of the State Bar

Nos. 89-O-12142, 91-O-00376

Filed April 13, 1993

SUMMARY

In two separate proceedings before the same hearing judge, respondent was found culpable of multiple acts of misconduct, including obtaining a large loan from a client without proper disclosure and advice, abandoning several clients' causes of action, failing to communicate with clients, retaining unearned fees, and failing to cooperate with the State Bar's investigation of his misconduct. The hearing judge dismissed charges that respondent had demonstrated disrespect for the court and wilfully disobeyed court orders when he failed to pay court-ordered sanctions. The judge also declined to find culpability of additional charges of client abandonment, finding that respondent's admissions in discovery were insufficient to constitute clear and convincing evidence that he had agreed to represent the clients in the matters involved. In the first of the two proceedings, the hearing judge excluded evidence offered by the Office of Trials regarding the misconduct which subsequently formed the basis for the charges in the second proceeding. In the first proceeding, the hearing judge recommended a one-year stayed suspension, five years of probation, and a 30-day actual suspension. In the second proceeding, the hearing judge recommended a one-year stayed suspension, two years of probation, and 90 days actual suspension, to run concurrently with the discipline recommended in the first proceeding. (Hon. Alan K. Goldhammer, Hearing Judge.)

The Office of Trials sought review in both proceedings. Among other issues, it argued that the degree of discipline was inadequate, and challenged the hearing judge's decision in the first proceeding to exclude evidence of uncharged misconduct which was offered as evidence in aggravation and to impeach respondent's testimony regarding his rehabilitation. The two matters were consolidated before the review department.

The Review Department determined, on independent review, that respondent's discovery admissions and supporting testimony from the client were sufficient to constitute clear and convincing evidence of culpability based on respondent's abandonment of two lawsuits which he had agreed to prosecute. It also concluded that the loan transaction between respondent and a client was unfair to the client because, among other reasons, the terms were not in writing and the interest rate was usurious. Respondent's failure to pay court-ordered sanctions was found to violate sections 6068 (b) and 6103, despite respondent's impecunious state, where he had knowledge of the court order and made no attempt either to comply or to seek relief from its dictates. The hearing judge's determination that evidence of uncharged misconduct should not be admitted as evidence in aggravation or for impeachment in the first proceeding was sustained as properly within the discretion of the

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.

hearing judge, in light of the marginal relevance of the evidence, the delay that would have resulted from its introduction, and the ability of the Office of Trials to pursue the misconduct in a separate proceeding.

Based on its additional findings of culpability, the evidence in mitigation and aggravation, and respondent's intermittent participation in the discipline proceedings, the review department determined that additional discipline was warranted to protect the public and to underscore to respondent the seriousness of his misconduct and the need to conform his conduct to professional standards. The review department recommended five years stayed suspension, five years probation, and actual suspension for two years and until respondent completed certain restitution and established his rehabilitation, fitness to practice law, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For Office of Trials: Jill A. Sperber

For Respondent: No appearance

HEADNOTES

[1] **113 Procedure—Discovery**
162.19 Proof—State Bar's Burden—Other/General
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where both respondent's admission in discovery and client's testimony supported finding that respondent accepted responsibility for proceeding with lawsuit on client's behalf, and there was no evidence that contradicted or undercut respondent's admission, no additional corroboration was necessary to find that respondent agreed to prosecute case, and respondent could therefore be found culpable of misconduct based on failure to perform legal services requested by client.

[2 a, b] **106.10 Procedure—Pleadings—Sufficiency**
162.19 Proof—State Bar's Burden—Other/General
204.90 Culpability—General Substantive Issues
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Where record established that respondent agreed to handle litigation and thereafter abandoned case; former and current Rules of Professional Conduct were virtually identical regarding duties imposed on an attorney who wishes to withdraw from employment; both rules were charged in notice to show cause, and violation clearly occurred during period when either one rule or the other was in effect, review department found respondent culpable of improper withdrawal despite lack of evidence regarding exactly when relevant events occurred.

[3] **273.00 Rule 3-300 [former 5-101]**
In a loan transaction between an attorney and a client, the facts that the loan is unsecured and its terms are not in writing are sufficient to place the fairness of the transaction in doubt.

[4] **273.00 Rule 3-300 [former 5-101]**
Where an attorney offered to pay a usurious interest rate in order to induce a reluctant client to make the attorney a loan, without advising the client that the high interest rate could render the interest on the loan uncollectible, and the attorney's financial condition was not disclosed to the client, the resulting unsecured transaction was not fair and reasonable to the client.

[5] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
110 Procedure—Consolidation/Severance
111 Procedure—Abatement
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
146 Evidence—Judicial Notice

It is not improper for the Office of Trials to pursue on review a challenge to the exclusion of evidence of uncharged misconduct in one proceeding while simultaneously prosecuting a second proceeding based on the same misconduct, so long as both courts are made aware of the pendency of the other proceeding. The second proceeding could be abated until resolution of the first case. Where this did not occur, it was proper for the hearing judge to adjudicate the second case promptly and then request that the review department take judicial notice of the decision in the second case, thus permitting the review department to consolidate the cases on review.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
563.10 Aggravation—Uncharged Violations—Found but Discounted
750.52 Mitigation—Rehabilitation—Declined to Find

Evidence of uncharged misconduct may not be used as an independent basis for discipline, but may be used in a contested proceeding for purposes such as impeaching the credibility of the respondent's testimony regarding rehabilitation, or establishing evidence of aggravating circumstances.

[7] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
561 Aggravation—Uncharged Violations—Found
1099 Substantive Issues re Discipline—Miscellaneous

Uncharged misconduct relied upon to enhance discipline in one proceeding cannot later constitute grounds for additional discipline in an independent disciplinary proceeding.

[8 a, b] **159 Evidence—Miscellaneous**
166 Independent Review of Record
167 Abuse of Discretion

The standard of review on the issue of exclusion of evidence depends on the basis for the hearing judge's action. If the proffered evidence was inadmissible as a matter of law, then the standard is independent de novo review. If not, the review department must consider whether the hearing judge had discretion to exclude the evidence, and if so, whether that discretion was properly exercised.

[9] **135 Procedure—Rules of Procedure**
141 Evidence—Relevance
159 Evidence—Miscellaneous

Underlying evidence of uncharged misconduct was not made inadmissible by rule prohibiting admission in evidence, except in rebuttal, of records of complaints or charges, where such evidence was offered in aggravation and impeachment in a contested proceeding after respondent testified regarding rehabilitation. (Rule 573, Trans. Rules Proc. of State Bar.)

[10 a-c] **115 Procedure—Continuances**
120 Procedure—Conduct of Trial
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act

Under California civil evidence rules, which apply generally in State Bar proceedings, a hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice. Undue consumption of time alone is not in itself grounds for exclusion. Nor is unfair surprise, where the fairness if the trial may otherwise be ensured, if necessary by a continuance. Where evidence is cumulative or remote, however, there is discretion to exclude it.

[11 a, b] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
167 Abuse of Discretion
565 Aggravation—Uncharged Violations—Declined to Find

Where hearing judge determined that proffered evidence of additional uncharged misconduct was of marginal relevance; that it could be fully examined and made the basis of separate discipline, if appropriate, in a separate proceeding, and that its admission would involve a delay to permit respondent time to address the issues it raised, the exclusion of the evidence was not an abuse of discretion.

[12 a-c] **213.20 State Bar Act—Section 6068(b)**
220.00 State Bar Act—Section 6103, clause 1

When payment of sanctions is ordered by a court, an attorney is expected to follow the order or proffer a formal explanation by motion or appeal as to why the order cannot be obeyed; the attorney cannot sit back and await contempt proceedings before either complying or explaining his or her noncompliance. Where respondent had personal knowledge of the entry of two orders awarding sanctions against him, but ignored opposing counsel's efforts to secure compliance and failed to take any action to seek relief from the orders, respondent's failure to comply was not excused by his impecunious status, and constituted a violation of the statutes requiring attorneys to maintain respect for the courts and to obey court orders.

[13 a, b] **162.90 Quantum of Proof—Miscellaneous**
204.90 Culpability—General Substantive Issues
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation

Evidence that respondent paid court-ordered sanctions with a trust account check, and that the client had not provided the funds, established respondent's improper use of the trust account, either by commingling trust and personal funds or by misappropriating funds belonging to other clients. Weighing all reasonable doubts in respondent's favor, a finding of commingling, the less serious offense, was appropriate.

[14] **213.20 State Bar Act—Section 6068(b)**
220.00 State Bar Act—Section 6103, clause 1

Because respondent made a good faith effort to pay court-awarded sanctions so that his client would not be adversely affected by his neglect of the case, and respondent did ultimately pay the sanctions, albeit after a complaint to the State Bar, respondent's initial attempt to pay the sanctions with a trust account check which was valid when written, but which failed to clear due to subsequent closure of the trust account by the bank, did not constitute a violation of statutes requiring attorneys to maintain respect for the courts and to obey court orders.

[15] **611 Aggravation—Lack of Candor—Bar—Found**
750.52 Mitigation—Rehabilitation—Declined to Find
Additional misconduct which occurred after respondent's claimed rehabilitation, and respondent's subsequent failure to participate fully in disciplinary proceedings, were cogent evidence that respondent had not yet dealt effectively with the problems underlying his misconduct.

[16] **760.39 Mitigation—Personal/Financial Problems—Found but Discounted**
While financial stress may be a factor in mitigation, neither an attorney's lack of management skills necessary to succeed in private practice nor the difficulties inherent in solo practice are ordinarily considered mitigating.

[17] **591 Aggravation—Indifference—Found**
611 Aggravation—Lack of Candor—Bar—Found
621 Aggravation—Lack of Remorse—Found
750.52 Mitigation—Rehabilitation—Declined to Find
Respondent's sporadic participation in disciplinary proceedings, despite warning from hearing judge regarding consequences of continuing to be derelict in duty to State Bar, demonstrated both respondent's indifference to his professional obligations and a substantial risk to the public.

[18] **110 Procedure—Consolidation/Severance**
515 Aggravation—Prior Record—Declined to Find
621 Aggravation—Lack of Remorse—Found
750.52 Mitigation—Rehabilitation—Declined to Find
802.21 Standards—Definitions—Prior Record
Where two separate disciplinary proceedings were consolidated on review, the first proceeding did not constitute prior discipline for the purpose of enhanced discipline in the consolidated matter. Nonetheless, where the misconduct involved in the second proceeding had continued during the period that the first proceeding was pending in hearing department, the fact that respondent engaged in additional misconduct while he was aware that his conduct was being scrutinized in a pending disciplinary proceeding was significant.

[19 a, b] **521 Aggravation—Multiple Acts—Found**
710.10 Mitigation—No Prior Record—Found
807 Standards—Prior Record Not Required
822.31 Standards—Misappropriation—One Year Minimum
844.11 Standards—Failure to Communicate/Perform—No Pattern—Suspension
844.14 Standards—Failure to Communicate/Perform—No Pattern—Suspension
Where respondent's misconduct involved eight instances of abandonment or failure to provide services, three instances of failure to return unearned fees, lack of communication with three clients, failure to pay court-ordered sanctions in two cases, misappropriation of a small amount of advanced costs, improper securing of a large loan from a client, and failure to cooperate with the State Bar investigation, and respondent did not fully participate in the disciplinary proceedings, then despite respondent's lengthy unblemished record and public sector service, the appropriate discipline included a lengthy period of actual suspension and probation, and a requirement that respondent prove rehabilitation, fitness to practice, and learning and ability in the law prior to returning to active practice.

[20] **174 Discipline—Office Management/Trust Account Auditing**
176 Discipline—Standard 1.4(c)(ii)
177 Discipline—Limitations on Practice

Where review department recommended actual suspension for two years and until respondent proved his rehabilitation, fitness to practice law, and learning and ability in the general law, probation conditions requiring respondent to submit list of open files to probation monitor, draw up law office plan, and take law office management courses were unnecessary.

ADDITIONAL ANALYSIS

Culpability

Found

213.21 Section 6068(b)
213.91 Section 6068(i)
214.31 Section 6068(m)
220.01 Section 6103, clause 1
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
273.01 Rule 3-300 [former 5-101]
275.01 Rule 3-500 [no former rule]
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)]
420.19 Misappropriation—Other Fact Patterns

Not Found

213.15 Section 6068(a)
213.25 Section 6068(b)
214.35 Section 6068(m)
220.05 Section 6103, clause 1
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)]
420.59 Misappropriation—Other

Aggravation

Found

582.10 Harm to Client

Mitigation

Found

791 Other

Found but Discounted

725.32 Disability/Illness
725.36 Disability/Illness
760.32 Personal/Financial Problems
760.34 Personal/Financial Problems

Standards

801.30 Effect as Guidelines
824.10 Commingling/Trust Account Violations
844.12 Failure to Communicate/Perform
844.13 Failure to Communicate/Perform
863.90 Standard 2.6—Suspension
901.10 Miscellaneous Violations—Suspension
901.20 Miscellaneous Violations—Suspension
901.30 Miscellaneous Violations—Suspension
901.40 Miscellaneous Violations—Suspension

Discipline

1013.11 Stayed Suspension—5 Years
1015.08 Actual Suspension—2 Years
1017.11 Probation—5 Years

Probation Conditions

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

Other

1091 Substantive Issues re Discipline—Proportionality
1093 Substantive Issues re Discipline—Inadequacy

OPINION

PEARLMAN, P.J.:

In these consolidated cases, the Office of Trials requests review of two hearing department decisions finding that the respondent obtained a loan from a client without proper disclosure and advice, abandoned his clients' causes of action, failed to communicate with clients and retained unearned fees. The examiner argues that the record supports additional findings of misconduct and aggravating circumstances which undermine respondent's showing of rehabilitation, and warrant a much lengthier period of actual discipline and supervised probation than the one-year stayed suspension, two years of probation and ninety days actual suspension recommended.[1] Respondent failed to file a responsive brief before us and defaulted in the second case in the hearing department.[2] We find upon our independent review of the record convincing support for the contentions of the Office of Trials, modify the findings below accordingly and, in light of the record and respondent's failure to participate in these proceedings, conclude that the degree of discipline sought by the Office of Trials is necessary both to protect the public and to underscore to respondent the seriousness of his misconduct and the need to conform his actions to the strictures of professional ethics. We will therefore recommend that respondent be suspended from the practice of law for five years, that execution of the order be stayed, and that respondent be placed on probation for five years and, among other conditions, serve an actual suspension of two years and until he completes restitution and shows his rehabilitation, fitness to practice, and learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct ("standards"). (Trans. Rules Proc. of State Bar, div. V.)

I. MISCONDUCT ALLEGED IN NOTICES TO SHOW CAUSE

The charges set forth in the initial case heard were a consolidation of case numbers 89-O-12142 (five counts) and 90-O-12228 (one count). Additional misconduct, raised by the examiner in aggravation, but excluded at trial by the hearing judge, was incorporated with an additional charge of failure to cooperate under section 6068 (i)[3] in a three-count notice to show cause, case number 91-O-00376. The consolidated charges, the hearing judge's culpability findings, and our modifications to those findings will be briefly summarized under the names of the clients or litigants involved.

A. Cain Matter

Thomas Cain employed respondent on April 8, 1988, to represent him in seeking protection for his trucking business, Thomas Cain and Sons, by filing a chapter 11 bankruptcy petition within 10 days. Cain paid respondent $3,500 by April 22, 1988. Thereafter, Cain advised representatives of the two companies who had leased him trucks and trailers to discuss any plans to repossess their equipment with respondent. By July 1988, when no bankruptcy petition had yet been filed, Cain met with respondent to discharge him and get a refund. Respondent convinced Cain that he would file the bankruptcy petition within one week and Cain then agreed to continue his employment.

During the first week in August, one of the two trucks Cain was purchasing was repossessed by its seller for Cain's failure to make the payments. Cain informed respondent, who told him the bankruptcy petition would be filed immediately. By the end of August, the other truck Cain was purchasing and all but one of the leased trucks and trailers were repossessed. Respondent assured Cain that a motion could

1. The hearing judge urged that this recommended discipline from the second case run concurrent with the discipline he recommended in the first case, which was one year stayed suspension and five years of probation on conditions including thirty days actual suspension and restitution.

2. In the first case, respondent filed an answer to the notice to show cause but did not participate in any pre-hearing proceedings. Neither he nor his then counsel appeared at the hearing on January 18, 1991, and respondent's default was entered. Respondent's counsel moved for relief from the default and the motion was partially granted, permitting respondent to present evidence as to mitigation and argument as to the appropriate level of discipline. That hearing was held on June 18, 1991.

3. Unless otherwise indicated, all references to sections are to the provisions of the California Business and Professions Code.

be filed in bankruptcy court for the return of the repossessed equipment. A chapter 11 bankruptcy petition on Cain's behalf was filed by respondent on September 2, 1988. No further action was taken by respondent on the bankruptcy petition. From September 1988 until January 1989, Cain and the equipment lessors were unable to communicate with respondent. Since respondent did not answer any of their invitations to discuss the possible sale of the repossessed trucks, the lessors moved for relief from the bankruptcy automatic stay. Respondent did not file an answer to the motion or advise his client of it. Cain discharged respondent in January 1989, asked for an accounting of respondent's time, and requested a refund of unearned fees so that Cain could afford to retain another attorney. Cain reiterated his requests for an accounting and refund in May 1989, neither of which were ever supplied by respondent. Because he could not re-establish his business due to the passage of time from the repossession, Cain's business was liquidated under a chapter 7 bankruptcy. Respondent filed his own bankruptcy petition in May 1990 and listed Cain as a creditor.

The hearing judge found respondent failed to complete the performance of legal services in the bankruptcy case in violation of former rule 6-101(A)(2),[4] by taking no action between the time he filed the bankruptcy petition and the time he was discharged. Respondent was also found to have acted in violation of section 6068 (m) by failing to notify his client of the petition for relief from the automatic stay and of the efforts of the lessors to arrange a sale to minimize the mounting storage costs for the trucks. The judge dismissed the charge of improper withdrawal as inconsistent with the finding that he had provided incompetent legal services, but found improper retention of unearned advanced fees. Since the misconduct predated the effective date of the current Rules of Professional Conduct, charges under those rules were dismissed.[5]

B. Sanchez Matter

On May 16, 1989, Julie Sanchez retained respondent to file and pursue a dissolution of her marriage, including a restraining order against her estranged spouse and child and spousal support orders, and paid him $600 in advanced payment against a total agreed fee of $663. Respondent promised to secure a court date for Sanchez within two weeks. After being unable to contact respondent for over two weeks, she visited his office in June 1989 and found it closed and locked under the authority of the Internal Revenue Service. Several months thereafter, Sanchez met respondent in their community and refused his offer to continue with her case. She demanded return of her money, to which he acquiesced. However, Sanchez never received any refund nor was she able to contact respondent thereafter.

Respondent was found culpable of failing to respond to client inquiries, in violation of section 6068 (m) and rule 3-500; recklessly failing to perform legal services promised, in violation of rule 3-110(A), and not refunding unearned advanced fees, as required by rule 3-700(D)(2). The judge rejected the charge that respondent had abandoned his client, finding that Sanchez had dismissed respondent after he indicated his willingness to continue to work on her case.

C. McKechnie Matter

Jean McKechnie employed respondent on December 13, 1989, to assist her in obtaining custody of her granddaughter and paid him $453, $153 of which was to cover the filing fees and the remainder constituted advanced legal fees. McKechnie had her granddaughter's mother execute a consent form provided by respondent and returned it to him on December 16, 1989.

By January 31, 1990, respondent had not done

4. References to rules are to the current Rules of Professional Conduct effective May 26, 1989. Where, as here, the former rules are invoked, the reference is to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

5. The judge also dismissed all charges of violations of section 6068 (a), citing *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617-618, as well as our decision in *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1. He also dismissed the charges of violation of section 6103 in the first case, based on the Supreme Court's ruling in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815. However, the alleged violations of court orders in the second case were not encompassed in the dismissed charges.

any work on McKechnie's case, nor had he advanced any costs in connection with it. However, he had already deposited her check, which included funds for costs, in his operating account. On February 1, 1990, McKechnie left a message with respondent's secretary in which she discharged respondent and asked for a full refund. This request was reiterated in telephone messages left with respondent's answering service. McKechnie visited respondent's office in early March and found he had moved with no forwarding address. She has not received a refund and has been unable to afford another attorney to seek custody of her granddaughter.

The hearing judge concluded that there was a failure to perform services for McKechnie, but not an abandonment due to McKechnie's discharge of respondent. The judge also found adequate communications between respondent and McKechnie until the point she discharged him, thereby concluding that no section 6068 (m) violation occurred. Regarding the advanced fees and costs, the judge found a failure to refund unearned fees and, because no funds for costs had been advanced by respondent, a commingling of entrusted funds in respondent's personal account and a misappropriation of those funds after those funds were not returned upon demand, in violation of rule 4-100(A).

D. Niemeyer Matters

Beginning in May 1984, Jack Niemeyer employed respondent on a continuing basis to represent Niemeyer individually and his family-owned corporation, Niemeyer Farms. Respondent submitted his bills monthly, and was paid on an hourly basis. Niemeyer paid respondent's billings regularly until he stopped payments in September 1985. At that time, respondent had $1,500 in outstanding billings, and respondent also had not repaid a large loan Niemeyer had made to him. This loan became the subject of additional disciplinary charges, to be discussed *post*. Niemeyer contended that respondent agreed to initiate or continue litigation in five matters.

i. Niemeyer v. White

In January 1985, respondent filed an action for damages on behalf of Niemeyer in Stanislaus County Superior Court. Respondent stipulated with opposing counsel to transfer the case to superior court in Alameda County in October 1985. Thereafter, respondent appeared and successfully opposed the defendant's demurrer in April 1986, filed an at-issue memorandum with the court in February 1988, and appeared at a trial setting conference in June 1988. The case was ordered to arbitration and an arbitrator was appointed in December 1988. No further action was taken to prosecute the case and, as a result, the matter was removed from the civil active list. Respondent did not withdraw from the case, advise Niemeyer that an arbitrator had been assigned or notify him that the case had been removed for failure to prosecute the case.

The hearing judge found that respondent had failed to communicate important developments to his client in violation of section 6068 (m), and had abandoned the case and failed to return the case file, in violation of former rule 2-111(A)(2). He dismissed the charge of incompetent legal representation pursuant to former rule 6-101(A)(2) as inconsistent with the abandonment finding.

ii. Niemeyer v. City of Modesto

Respondent filed suit on May 1987 against the City of Modesto for damages which occurred to Niemeyer's airplane at the Modesto airport. The case went to arbitration and the arbitrator awarded Niemeyer $7,000. After unsuccessfully attempting to locate respondent, Niemeyer learned of the arbitrator's decision in October 1989, after the deadline had passed to demand a trial de novo, by calling the city attorney's office, the opposing counsel in the case.

The hearing judge concluded that in failing to advise Niemeyer of the arbitrator's decision, respondent acted contrary to the requirements of section 6068 (m) and rule 3-500. The judge also found respondent withdrew from this matter improperly (rule 3-700(A)(2)), but did not engage in a reckless failure to perform legal services (rule 3-110(A)).

iii. Niemeyer Farms, Inc. v. Thayer

This lawsuit was originally filed by another attorney on behalf of Niemeyer Farms in May 1986 in

Stanislaus County Superior Court. The complaint was never served and counsel moved to withdraw from the case in November 1987, citing his inability to garner Niemeyer's cooperation in the prosecution of the matter. Niemeyer contended that he turned the case over to respondent shortly before the three-year statute mandating service was due to run in May 1989, and instructed him to serve the complaint.

The examiner argues that respondent, through his admission[6] in discovery, acknowledged accepting the case. When no efforts had been made by respondent to serve the complaint and Niemeyer was unable to contact respondent as the statute of limitations approached, Niemeyer retrieved the original summons and complaint from respondent's secretary and arranged for service of the complaint.

[1] In this instance, the hearing judge found the evidence that respondent had agreed to proceed on the *Thayer* case was inadequate, concluding that Niemeyer's testimony and respondent's admission were insufficient without additional corroboration. The judge cited to the Supreme Court's footnote in *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 502, fn. 5, holding that where evidence undercuts or negates facts which are deemed admitted through default, the evidence would control over the deemed admitted allegations. However, the judge did not specifically identify what evidence contradicted or undercut respondent's admission that he accepted responsibility for proceeding with the *Thayer* case and, upon our independent review of the record, we have not found any. Niemeyer's testimony, even if the hearing judge found it to be somewhat vague, confirmed rather than undercut respondent's admission. Therefore, we find that respondent agreed to prosecute the *Thayer* case, and failed to perform the legal services requested by his client, in violation of former rule 6-101(A)(2), return the file to the client, in violation of former rule 2-111(A)(2), or communicate with his client, contrary to section 6068 (m).

iv. Niemeyer Farms, Inc. v. Hans Olson

Respondent filed the complaint in this breach of contract suit against Hans Olson in municipal court in Stanislaus County on May 26, 1986. Niemeyer testified that he initially did not want the complaint served on Hans Olson, but, as the three-year statute approached, Niemeyer asked respondent to serve the complaint. As with the *Thayer* matter, when no action was taken, Niemeyer requested return of the original complaint and summons, but he did not receive them from respondent. Thereafter, the statute ran before service could be made and the cause of action was lost.

As in the *Thayer* case, we find that respondent's admission and Niemeyer's testimony establish that respondent agreed to serve the Olson complaint, but did not do so. We also find that respondent failed to answer his client's inquiries concerning the case and the client's request to return the file.

v. General Motors lawsuit

Niemeyer testified that he had asked respondent to pursue a civil case against General Motors and Thompson Chevrolet for damages resulting from an allegedly defective truck transmission manufactured by the automaker. By his failure to respond to requests for admissions, respondent admitted that he agreed to handle the lawsuit, but took no action to advance the cause of action, including filing a complaint. Niemeyer also testified that to his knowledge, respondent did no work on this case.

[2a] We disagree with the hearing judge's conclusions of no culpability on this count and find sufficient evidence in the record that respondent abandoned the case he agreed to prosecute, in violation of either former rule 2-111(A)(2) or rule 3-700(A)(2),[7] **[2b - see fn. 7]** and failed to advise Niemeyer that he had stopped work, in violation of section 6068 (m).

6. The examiner served requests for admissions on respondent in July 1990. After respondent failed to respond within the time period prescribed by law, the hearing judge ordered that the matters in the requests for admissions be deemed admitted. (Order filed September 28, 1990.)

7. **[2b]** The record does not establish when respondent agreed to handle the possible litigation against General Motors and Thompson Chevrolet. However, former rule 2-111(A)(2) and current rule 3-700(A)(2) are virtually identical in the duties imposed on an attorney who wished to withdraw from em ployment; both rules were charged in the notice to show cause; and clear and convincing evidence establishes that the violation occurred during the period of time when either the former or current rule was in effect.

vi. Niemeyer loan to respondent

In March 1985, respondent solicited a loan from Niemeyer. Niemeyer was reluctant to put at risk his personal savings, but was persuaded to loan $17,000 of his personal savings to respondent, upon a promise to be repaid $18,500 in 90 days with interest and points. The loan was unsecured. Prior to the delivery of the funds on March 15, 1985, none of the loan terms were in writing, nor did respondent apprise Niemeyer of his financial condition or the purpose of the loan, or advise Niemeyer to seek the advice of independent counsel. Respondent did not explain the significance of the loan terms, such as the difference between a secured and unsecured loan, the possible effect of bankruptcy, or the enforceability of the agreed-upon points and interest rate in light of California usury laws. Sometime after the loan proceeds were given to respondent, he gave Niemeyer a promissory note dated March 15, 1985, for $18,500, at 11 percent interest per annum, payable in 6 months, not the 90 days agreed upon orally. Respondent made one payment of $2,057 on March 15, 1986, and has made no further payments to Niemeyer. In his bankruptcy petition filed in May 1989, respondent listed Niemeyer as an unsecured creditor with a $25,000 claim.

The hearing judge concluded that respondent failed in his duty under former rule 5-101 to advise Niemeyer to seek the advice of independent counsel regarding the loan and to obtain Niemeyer's consent to the transaction in writing. As to the third requirement of the rule, mandating fair and reasonable terms fully disclosed in writing to the client in a manner and in terms designed to be understood by the client, the requisite writing was not produced and the promissory note thereafter prepared by respondent varied significantly from the agreement of the parties concerning the time period of the loan. However, the hearing judge found the terms to be fair to Niemeyer.

[3] On this last point, we must disagree. The facts that the loan was unsecured and the terms were not in writing already place the fairness of the transaction in doubt. (*Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 314.) **[4]** As noted in the decision, Niemeyer was reluctant to loan the funds to respondent and put such a large portion of personal savings at risk. Respondent persisted, offering financial repayment at a very high rate of return, to induce Niemeyer to change his mind and make the loan. The usurious interest rate could have rendered any interest on the loan uncollectible, as well as having other adverse legal consequences to Niemeyer. (See *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 469 [attorney who failed to advise client of adverse legal consequences of loan to attorney at a usurious interest rate violated duties under former rule 5-101]; Cal. Const., art. XV, § 1; Usury Law, §§ 2, 3 [West's Ann. Civ. Code (1985 ed.) foll. § 1916.12 at pp. 173, 178].) The fact that the high interest rate was void and uncollectible was neither disclosed nor discussed with Niemeyer. Nor did respondent disclose his financial condition. We cannot conclude under these circumstances that the resulting unsecured transaction was fair and reasonable to Niemeyer. Indeed, Niemeyer would have been far better off not to have made the usurious loan upon which respondent immediately defaulted leaving Niemeyer to this date with a loss of nearly $15,000 excluding any interest—exactly the risk that Niemeyer sought to avoid taking.

E. Review of Exclusion of Evidence of Uncharged Misconduct Offered in Impeachment

The C. & S. Enterprises matters, plus the following matter, *Keller* v. *Van Buren*, were initially raised by the examiner in the first proceeding during the mitigation/aggravation phase, to attack the credibility of respondent's claim of rehabilitation. The hearing judge at first admitted some of the evidence for the limited purpose of rebuttal of rehabilitation evidence offered by the respondent, but later reconsidered his prior ruling and excluded the evidence. In his decision, he stated that the offer of proof involved evidence which was unrelated to any of the charged acts of misconduct and would be improperly prejudicial, citing *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921. Thereafter, as noted above, the examiner filed an original disciplinary case incorporating these same

matters, plus a charge of failure to cooperate. In that proceeding respondent's default was entered and a default hearing was held.[8] **[5 - see fn. 8]**

The examiner argues on review that the hearing judge erred in excluding the proffered evidence from the first proceeding. **[6]** While uncharged conduct may not be used as an independent basis for discipline (*Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at pp. 928-929), it is established that in a contested proceeding, uncharged evidence may be used by the examiner for purposes such as impeaching the credibility of respondent's testimony regarding his rehabilitation if it is an issue in the proceeding, or in establishing evidence of aggravating circumstances. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 34; *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 775; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.)

The Office of Trials seeks the same total discipline regardless of whether the second matter is considered separately as it was in fact ultimately presented below or considered as proper aggravation evidence in the first matter. **[7]** As the Office of Trials recognizes, uncharged misconduct relied upon to enhance discipline in one proceeding cannot later constitute grounds for additional discipline in an independent disciplinary proceeding.

At oral argument, we requested the examiner to brief the issue of the standard of review with respect to the challenged exclusion of evidence offered for impeachment of the respondent. In its subsequently filed brief, the Office of Trials asserted that the standard of review should be independent de novo review, but acknowledged the general principle that the hearing judge has broad discretion in determining the admissibility and relevance of evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.)

[8a] The standard of review on this issue depends on the basis for the hearing judge's action. If the proffered evidence was inadmissible as a matter of law, we apply independent de novo review. As the examiner notes, in *In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606, we applied de novo review in affirming the hearing judge's rejection of evidence of uncharged misconduct in a default proceeding because such evidence was inadmissible as a matter of law either to prove culpability of such charges (*Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at p. 929) or in aggravation. (*In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 213.)

[9] Rule 573 of the Transitional Rules of Procedure of the State Bar provides in pertinent part that: "records of complaints or formal charges against the member are inadmissible on behalf of the State Bar, provided, if the member introduces evidence that no complaints or charges have been made, then the records are admissible in rebuttal." Here the examiner did not seek to introduce the State Bar records of complaints or formal charges, but sought to introduce underlying evidence of uncharged misconduct. Such evidence was not inadmissible under rule 573 or the case law because it was offered in aggravation and impeachment in a contested proceeding after respon-

8. **[5]** An issue has been raised as to the propriety of the Office of Trials pursuing its challenge to the exclusion of the proffered evidence on review in the first proceeding while simultaneously prosecuting the second proceeding based on the same alleged misconduct. So long as both courts are made aware of the pendency of the other proceeding, the Office of Trials may, under the current rules, simultaneously seek relief in alternative forums. If respondent had participated in the second proceeding, he could have sought abatement thereof if the hearing judge deemed it appropriate or the hearing judge could have done so on his own motion. Instead, the hearing judge took another equally viable approach. He promptly adjudicated the second proceeding and asked the review department to take judicial notice of his decision therein. As a result, the review department was provided the opportunity of consolidating both cases on review. In the future, evidentiary rulings of the type made by the hearing judge would appear ideally suited to certification for interlocutory review by the review department prior to termination of the first proceeding in the hearing department. Federal procedure provides for such certification of discrete issues. (28 U.S.C. § 1292, subdivision (b).) We commend to the advisory committee which is now considering proposed revisions to the State Bar Rules of Procedure consideration of a similar rule in State Bar proceedings both to expedite review of discrete issues and to avoid the risk of duplication of effort in the hearing department and the review department which could have occurred here.

dent testified that he was "back on the road to recovery" following the charged misconduct in this proceeding. (Cf. *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 36.)

[8b] Thus, the proffered evidence was not inadmissible as a matter of law. We must therefore consider whether the hearing judge had discretion to exclude it, and if so, whether that discretion was properly exercised. **[10a]** The same rules of evidence apply generally in State Bar proceedings as in civil cases in California. (See rule 556, Trans. Rules Proc. of State Bar.) Evidence Code section 352 provides, inter alia, that a judge may exercise discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice . . . ."

In *DePalma* v. *Westland Software House* (1990) 225 Cal.App.3d 1534, 1538, a Court of Appeal restated the applicable standard of review as follows: "In determining the admissibility of evidence, a trial court starts with the proposition 'all relevant evidence is admissible.' (Evid. Code, § 351.) Relevant evidence is all evidence 'including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) In applying this standard, the court is given wide discretion to determine relevance under the code. [Citation.] The appellate court should reverse only when a prejudicial abuse of discretion has occurred. [Citation.]"

[10b] In analyzing what constitutes abuse of discretion, Witkin notes that undue consumption of time is not in itself ground for exclusion. (1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 305, p. 276, and citations therein.) However, where the evidence is cumulative or remote, discretion to exclude it has long been recognized. (*Id.*, §§ 305, 306, pp. 276-277.) Witkin notes also that unfair surprise is not a good reason for excluding evidence as long as a fair trial may be otherwise ensured.[9] **[10c - see fn. 9]** Similarly, in the State Bar Court, "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 a denial of a fair hearing." (Rule 556, Trans. Rules Proc. of State Bar.)

[11a] Here, the hearing judge determined that the proffered evidence was of marginal relevance and could be fully examined in a separate proceeding. Since the hearing judge was aware that he would have the opportunity to assess separate discipline therefor if culpability were subsequently determined and would be able to decide at that time whether to make any disciplinary recommendation therein consecutive or concurrent to the discipline recommended in the first proceeding, the State Bar was able to achieve the same discipline regardless of which way the court ruled. In fact, by excluding it, the hearing judge avoided delaying the first proceeding and thereby sought to make public protection more timely than would otherwise have been the case. His decision to exclude evidence of uncharged matters in aggravation balanced the efficiency of a single proceeding against the delay that would have been required in implementing the discipline to be imposed in the first proceeding to allow the respondent to address the collateral issues raised by the proffered evidence in aggravation. Where, as here, such evidence involves multiple documents and other evidence, the hearing judge is essentially in a position to treat the prosecution's evidentiary offer as a variation on a belated motion to consolidate two disciplinary proceedings at different stages of development.

[11b] We find no abuse of discretion in the hearing judge's exclusion of the proffered evidence. In any event, since the two proceedings are now consolidated before us, we consider all of the evi-

9. **[10c]** Discovery and pretrial conferences are designed to prevent such surprises, but if despite such procedures, "evidence is sought to be introduced at trial which is so important and so wholly outside reasonable anticipation that the other party is harmed by its sudden introduction, the appropriate statutory remedy is a continuance." (*Id.*, § 307, pp. 277-278.) As Witkin notes, for this reason, unfair surprise was eliminated as a separate ground for exclusion under Evidence Code section 352.

dence adduced in the second proceeding and reach the same result in recommended discipline for the consolidated cases as we would have reached if all of the evidence had been admitted in the first proceeding.

F. C. & S. Enterprises Matters

Respondent represented the defendants in two cases in the Orange County Superior Court, *C. & S. Enterprises* v. *Mac Ferguson and James A. Bishop* and *C. & S. Enterprises* v. *James A. Bishop, et al.* Default judgments were entered in each case, awarding plaintiffs $550,000 in general damages in *C. & S. Enterprises* v. *Mac Ferguson and James A. Bishop* on March 23, 1990, and $195,000 in general and punitive damages on April 25, 1990, in *C. & S. Enterprises* v. *James A. Bishop, et al.* Respondent moved under Code of Civil Procedure section 473 to set aside the defaults based on his own mistake, inadvertence, and excusable neglect. The motions were granted and, as provided in the statute,[10] respondent was ordered to pay attorney's fees of $1,500 and $500, respectively. Despite numerous letters sent by opposing counsel requesting payment of the awarded attorney's fees, respondent had not complied with the court orders as of the date of the default hearing below.

The hearing judge concluded that respondent's notice of the sanctions and failure to pay them as ordered did not, apart from other factors, constitute a failure to maintain the respect due to judges and courts under section 6068 (b). At a minimum, in order to establish such a violation, the hearing judge required the examiner to meet the criteria necessary to enforce the order in an indirect contempt proceeding: notice of the order, noncompliance, and ability to comply with or satisfy the order. (See, e.g., *Coursey* v. *Superior Court* (1987) 194 Cal.App.3d 147, 157.) The hearing judge indicated that an attorney who repeatedly failed to pay sanctions before different judges might demonstrate sufficient disrespect to warrant discipline, but that was not the state of the evidence before him. Also, since the examiner did not plead or otherwise present evidence concerning respondent's assets, liabilities, income, or expenses during the default hearing, the hearing judge concluded that there was no clear and convincing evidence in the record of respondent's ability to pay the ordered sanctions. He therefore dismissed the section 6068 (b) charge. On the same grounds, he dismissed the charge that respondent willfully violated court orders which is a disciplinable offense under section 6103. (See, e.g., *Read* v. *State Bar* (1991) 53 Cal.3d 394, 407, fn. 2; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 575.)

[12a] Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system. As officers of the court, attorneys have duties to the judicial system which may override those owed to their clients. (See, e.g., *Arm* v. *State Bar*, *supra*, 50 Cal.3d at p. 776 [protection of client interest no justification for misleading court regarding upcoming suspension]; *In re Young* (1989) 49 Cal.3d 257, 265 [duty to maintain client confidences does not protect attorney's affirmative acts to conceal client's identity from court bail bondsman].) In the case of court-ordered sanctions, the attorney is expected to follow the order or proffer a formal explanation by motion or appeal as to why the order cannot be obeyed.

[12b] The question raised here is whether respondent's failure to obey the court orders constitutes a violation of section 6068 (b) or section 6103 or both. We have ruled in a past proceeding that an attorney who had no personal knowledge of the imposition of court-ordered sanctions or of the failure to pay them could not be held to have violated section 6068 (b). (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 367.) Here, ignorance is not a defense, since respondent was present when the orders were issued and the record discloses that written requests by opposing counsel thereafter seeking respondent's compliance were sent to his then current address. Disregarding

10. Code of Civil Procedure section 473 provides in pertinent part as follows: "The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."

the orders, ignoring opposing counsel's efforts to secure compliance, and failing to take any action to seek relief from the order, as is the case here, is not excused by respondent's impecunious financial status. Sanctions for attorney's fees and costs have been ordered against an attorney who, at the time of the order, was in bankruptcy. (*Papdakis* v. *Zelis* (1991) 230 Cal.App.3d 1385, 1389.) An attorney with an affirmative duty to the courts and his clients whose interests were affected cannot sit back and await contempt proceedings before complying with or explaining why he or she cannot obey a court order. The Supreme Court, in *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 951-952, rejected a similar argument of an attorney that he was relieved of the duty to comply with court orders because he believed them to be technically invalid. The Court found, "Such technical arguments are waived to the extent the orders became final without appropriate challenge. There can be no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid."

[12c] Therefore we find that given respondent's personal knowledge of the orders, his wilful, unexcused failure to comply with them constituted violations of both section 6068 (b) and section 6103.

G. Keller v. Van Buren Litigation

Respondent was hired by Barbara Van Buren in September 1990 to defend her in an unlawful detainer action. Neither respondent nor his client appeared at trial on January 28, 1991, and a default judgment was entered against Van Buren for $4,236 in rent, damages and costs. The court also ordered restitution of the premises to the Kellers. Respondent moved on February 7, 1991, to set aside the judgment pursuant to Code of Civil Procedure section 473. By minute order dated February 13, 1991, the motion was granted and the judgment set aside, conditioned upon payment to the plaintiffs of $350 in sanctions by March 13, 1991.

A check written on respondent's trust account dated March 13, 1991, and made payable to Joseph Keller and his attorney was sent to Keller's attorney and thereafter forwarded to Keller on March 23, 1991. When he deposited the check in his account, it was dishonored and returned by respondent's bank with the notation, "account closed." Keller filed a complaint with the State Bar because of the dishonored check on May 27, 1991, and, a few weeks later, received payment of $350 from respondent. After written notice to respondent, the Pacific Valley Bank closed respondent's trust account on March 26, 1991, because of his unsatisfactory banking practices, which included numerous overdrafts in his operating account. At the time respondent wrote the check, there were sufficient funds in the account to cover the check. His client had not provided the money to cover these costs, nor had she been asked to do so by respondent.

As in the *C. & S. Enterprises* matters, the hearing judge found there was no clear and convincing evidence that respondent's failure to pay court-ordered attorney's fees violated his duty to maintain the respect due to courts under section 6068 (b), nor that the failure constituted a wilful disobedience of a court order in violation of section 6103. **[13a]** However, respondent's payment of the sanction with a trust account check, with evidence that the client did not provide those funds, established an improper use of the trust account and commingling of trust and personal funds, in violation of rule 4-100(A).[11] **[13b - see fn. 11]**

[14] We find that respondent did make a good faith effort to comply with the court order so that his client would not be adversely affected by his neglect of the case. When the check was written, the account was active and there were sufficient funds in it to cover the check. The fact that he used a trust account check is misconduct already charged as a rule 4-100 violation. The sanction has been paid, albeit after a complaint to the State Bar. Therefore, we do not, under these facts, find clear and convincing evidence of violations of sections 6068 (b) and 6103.

11. **[13b]** The trust account check was written either on personal funds commingled in the account, or on trust funds of other clients, which use would constitute misappropriation. Weighing all reasonable doubts in respondent's favor (see, e.g., *Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1216), a finding of commingling, the less serious offense of the two, is appropriate.

H. Failure to Cooperate with State Bar Investigation

We affirm the hearing judge's finding that respondent failed to cooperate as charged due to his failure to answer correspondence from State Bar investigators sent to his membership records address regarding the Cain, Sanchez, Niemeyer, and Van Buren matters. None of the letters were returned as undeliverable. Respondent was called by one investigator after receiving the initial letter dated September 21, 1989, regarding the Sanchez complaint. He did not respond to investigator's correspondence sent to him thereafter.

II. DEGREE OF DISCIPLINE

A. Mitigation and Aggravation

Prior to these matters, respondent had an unblemished legal record since his admission to practice in California in 1962. His career included his service as director of the Stanislaus County Legal Assistance Program in 1968 for two years, five years with a partner in private practice, and his appointment as county counsel for Stanislaus County, serving from 1976 until 1984. He then entered solo private practice. During this time, he also served as the city attorney for Waterford, California, from 1988 until early 1989. Long practice without discipline is considered mitigating. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.)

Respondent testified at the hearing concerning his community activities, including his service as a reader with his local Christian Science Church, and his involvement with the local chamber of commerce and Lions Club. He also taught legally-related courses to real estate students at the community college.

The hearing judge found that respondent suffered from depression and other psychological and financial problems at the time of the misconduct which had since been overcome by respondent. The examiner challenges the weight to be accorded this evidence. The death of respondent's father in July 1989 was not argued by respondent as adversely affecting his law practice, but was found to be a factor independently by the hearing judge. While respondent identified the closure of his office by the IRS in May 1989 as a devastating psychological and financial blow, that event does not account for misconduct which took place before that time. (*Barnum* v. *State Bar* (1990) 52 Cal.3d 104, 113; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 702 [emotional crisis which resulted in attorney abandoning law practice did not mitigate misconduct which occurred prior to crisis].)

The examiner notes that respondent offered no corroborating or expert testimony concerning his depression and its effect, if any, on his misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 197.) While respondent testified concerning his remorse, the scaling-back of his practice with the intent to leave private practice altogether, his consultation with a Christian Science practitioner regarding his emotional problems, and the alleged beneficial effect of his marriage in December 1990, he has not shown clear and convincing evidence of recovery such that the situation would not recur in the future. (*Porter* v. *State Bar* (1990) 52 Cal.3d 518, 527-528.) **[15]** In fact, the *Keller* v. *Van Buren* charges in the second disciplinary case here occurred after respondent's alleged "turning point" and his default in the second disciplinary proceeding and failure to participate on review are cogent evidence that respondent does not yet have a handle on his problems.

[16] Financial stress can be a factor in mitigation as well. (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 254; see *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 672.) However, the lack of management skills necessary to succeed in private practice and the difficulties inherent in a solo practice are not ordinarily considered mitigating factors. (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667.) The closing of respondent's office by the IRS did have a crippling effect on respondent's practice. Even so, it cannot be considered unforeseeable or beyond respondent's control since he admittedly had not filed his federal income tax returns for several years prior to the IRS action. (*In re Naney*, *supra*, 51 Cal.3d at pp. 196-197 [financial difficulties resulting in part from an attorney's failure to pay income taxes were not an unforeseeable financial problem].)

[17] Respondent's participation in these State Bar proceedings has been sporadic at best. (See fn. 2, *ante*.) At the hearing in the first proceeding below, respondent blamed his humiliation at being the subject of disciplinary charges for his inability to participate. The hearing judge accepted this excuse for respondent's initial inaction, but warned respondent of the consequences of continuing to be derelict in his duty to the State Bar. Respondent subsequently failed to participate on review of that decision before this department and defaulted in the second proceeding below. Under these circumstances, respondent's failure to participate demonstrates both his indifference to his professional obligations and a substantial risk to the public.

There are multiple acts of wrongdoing here, involving six different clients, over a period from May 1985 to March 1991. (Std. 1.2(b)(ii).)

There has been significant harm shown to a number of respondent's clients. Because of respondent's inaction, Cain lost the opportunity to continue his business through the protection of the bankruptcy laws. Once Cain's equipment had been repossessed, the likelihood of a successful operating plan in chapter 11 was considerably lessened. When no action was taken thereafter either to seek an order in the bankruptcy court for return of the equipment or to negotiate a deal with the supplier for equipment in which Cain held some equity interest, there was virtually no chance to save Cain's business. Cain testified to the financial and emotional cost he experienced as a result, attributable largely to respondent's misconduct.

McKechnie has been unable to afford another attorney to help her secure custody of her granddaughter since respondent has not refunded her advanced fees and costs of $453, $153 of which was misappropriated by him.

Niemeyer has recovered only a small portion of the $17,000 of personal savings he loaned to respondent. These were funds which he was reluctant to lend and which he might not have loaned, or done so under different terms, had respondent advised him to seek independent counsel or presented fair terms which Niemeyer could have enforced.

Respondent placed his clients' causes of action at risk in three instances, first by failing to take action which resulted in default judgments, and then, after having the judgments set aside, failing in two cases to pay the court sanctions ordered as a condition of reopening the matters and paying them late in a third. His inaction foreclosed any pursuit of the cause of action for Niemeyer in the *Olson* matter and prevented Niemeyer from seeking an appeal of the arbitration decision in the *City of Modesto* case.

[18] Respondent's misconduct continued up through the period that the first disciplinary matter was pending in the hearing department. There is no enhanced discipline in this instance as a result of a prior discipline since the first case has been consolidated in our court with the second matter. However, it is significant that respondent was engaged in additional misconduct while he was aware that his conduct was being scrutinized as part of a then pending disciplinary proceeding.

B. Appropriate Discipline

[19a] In reweighing the appropriate discipline, the examiner urges us to recommend to the Supreme Court a lengthy period of actual suspension and supervised probation, with a standard 1.4(c)(ii) provision, requiring respondent to show his rehabilitation, fitness to practice and learning and ability in the law prior to his return to active practice. Given the record of misconduct, the comparable case law and respondent's current lack of participation, this discipline appears clearly appropriate, despite respondent's lengthy prior unblemished record and public sector service.

[19b] This case involves eight instances of abandonment or failure to provide legal services to four clients, failure to return unearned fees to three clients, lack of communication with three of the clients, failure to pay court-ordered sanctions in two cases, one case of misappropriation of a small amount of client advanced costs, the improper securing of a large loan from a client, and the failure to cooperate with the State Bar. The standards provide for suspension or disbarment, depending upon the gravity of the offenses and the harm to the victims, respondent's clients. (Stds. 2.4(b), 2.6, 2.10.) The trust fund viola-

tions, because of the small amount involved, would require between a three-month and one-year actual suspension. (Std. 2.2.)

The standards are guidelines for us to follow in determining discipline, but we also look to the case law to recommend discipline to suit the respondent and misconduct at issue. (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221-222.) There are comparable cases of misconduct involving attorneys without prior discipline records in which the Court imposed discipline of between one and two years actual suspension.

The examiner cites to *Rose* v. *State Bar*, *supra*, 49 Cal.3d 646, in support of her suggested discipline. That case encompassed seven client matters but concerned only one client abandonment. It also involved failure to communicate with clients, failure to return client property and advanced fees, a business transaction with a client without the proper disclosures or opportunity to seek independent counsel, and the improper solicitation of a client. None of the misconduct involved moral turpitude. Rose, admitted in 1971, presented evidence of his marital problems and expert testimony of his treatment for his emotional problems, both of which underlay his misconduct. Rose also presented impressive evidence of his pro bono work and significant civic and charitable activities. The Court found that balancing the seriousness of the misconduct against the mitigating evidence, the appropriate discipline was a two-year actual suspension.

In *Pineda* v. *State Bar* (1989) 49 Cal.3d 753, an attorney who abandoned clients in seven matters, retained unearned fees, and took a portion of a settlement set aside to pay a client's medical lien had his discipline increased by the Court from a one-year actual suspension to two years of actual suspension because of his multiple acts of wrongdoing and his misappropriation of client funds. The Court stopped short of disbarring Pineda because of his cooperation with the State Bar, his expressions of remorse and his determination to rehabilitate himself. (*Id.* at p. 760.)

In contrast, in *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, the attorney was a 1970 admittee who had abandoned six cases, failed to return unearned fees to three clients, failed to return the file to a client, did not pay a court-ordered discovery sanction until it was reduced to judgment and did not cooperate with the State Bar. Like respondent, Hawes had been a government attorney for many years prior to entering private practice. Unlike respondent, Hawes came forward with a strong evidence of mitigating circumstances, including the lack of harm to his clients and his undiagnosed manic depression and resulting alcoholism and drug abuse which the Court found to have contributed to his misconduct. Hawes presented evidence of his sustained recovery from his disorder. Persuaded by this mitigating evidence, the Court reduced the actual suspension for Hawes from the three years recommended by the review department to one year.

In *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074, an attorney admitted in 1972 defaulted in a case involving four abandonments, failure to return unearned fees to two clients and lack of communication with three of his clients, and failure to cooperate with the State Bar. While the Court rejected the State Bar's recommendation of disbarment, it also rejected Bledsoe's suggestion, citing to the Court's decision in *Gold* v. *State Bar* (1989) 49 Cal.3d 908, that a one-year actual suspension was sufficient. The Court noted that the *Gold* case involved only two client cases and they had been reimbursed voluntarily by Gold. The Court found the additional misconduct by Bledsoe toward four clients, coupled with his failure to participate in State Bar proceedings, to warrant a two-year actual suspension.

While there are cases of attorneys with more extensive or more serious misconduct who received discipline of one year or less, these attorneys presented extensive mitigating evidence, including professional and community service, and recovery from severe emotional distress or debilitating illness. (See, e.g., *Porter* v. *State Bar*, *supra*, 52 Cal.3d 518 [attorney who abandoned eight clients, made large misappropriations, deceived clients, and engaged in the unauthorized practice of law disciplined with one-year actual suspension]; *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071 [attorney who engaged in misconduct concerning 14 clients but demonstrated recovery from severe physical and emotional difficulties received one-year actual suspension.])

Balancing the facts and circumstances as found, the aggravating and mitigating evidence, and the unresponsive behavior of respondent toward the discipline system, the discipline suggested by the Office of Trials is, in our view, consistent with the case law and the standards and commensurate with the gravity of the underlying misconduct. We will adopt the conditions of probation recommended by the hearing judge in his initial decision filed on September 20, 1991, regarding restitution and conditions of probation, modifying them where appropriate to reflect changes in the recommended discipline and to refer to the newly created Probation Unit in the Office of Trials in lieu of the former Probation Department of the State Bar Court.

The hearing judge's restitution condition was carefully fashioned to take into account respondent's precarious financial situation and his need for rehabilitation, which restitution promotes, as well as serving the requirements of respondent's former clients. **[20]** The conditions that respondent submit a list of his open files to his probation monitor, draw up a law office plan, and take law office management courses are all unnecessary in light of our recommended actual suspension of two years and until respondent demonstrates his rehabilitation, fitness to practice, and learning and ability in the law. The standard 1.4(c)(ii) hearing will give respondent the opportunity to demonstrate that he has taken the initiative to remedy past office and financial practices, recognizes his professional responsibilities, has made restitution payments as ordered or has done so to the best of his financial capability, and is ready to resume a productive career in the law.[12]

III. RECOMMENDATION

We recommend that respondent Gilbert W. Boyne be suspended from the practice of law in the state of California for five years, that execution of the order be stayed, and that respondent be placed on probation for a period of five years upon the following conditions:

1. That respondent shall be suspended from the practice of law in California 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;

2. That respondent shall make restitution as follows:

(a) Respondent shall remain actually suspended from the practice of law until he makes restitution in the amount of $153 to Jean McKechnie and provides proof thereof to his probation monitor. The promptness with which respondent makes such restitution may be considered in assessing his rehabilitation at the hearing held pursuant to standard 1.4(c)(ii) prior to the termination of his actual suspension;

(b) Respondent shall make additional restitution in the following amounts: to Thomas Cain in the amount of $3,500 plus interest at the rate of ten (10) percent per year from February 1, 1989; to Julie Sanchez in the amount of $600 plus interest at the rate of ten (10) percent per year from July 1, 1989; to Jean McKechnie in the amount of $300 plus interest at the rate of ten (10) percent per year from March 1, 1990; and to Jack Niemeyer in the amount of $17,000 plus interest at the rate of ten (10) percent per year from March 15, 1985, with credit for $2,057 previously paid. Restitution shall be paid to the individuals named in this paragraph or their successors or assigns, or to the State Bar's Client Security Fund to the extent that it may have compensated any of the above-named persons for the above-stated losses. Restitution shall be distributed in the following order of priority: 1) McKechnie, 2) Sanchez, 3) Cain, and 4) Niemeyer;

12. We note for guidance at the standard 1.4(c)(ii) hearing that in his decision in the first proceeding, the hearing judge included a condition limiting respondent to no more than 30 active cases at any given time without express written consent of his probation monitor. Such consent was to be granted only upon "satisfaction of the probation monitor or Court, as appropriate that he has developed and is maintaining an adequate office management plan, is otherwise meeting his professional responsibilities, is complying with his probation order and appears mentally and emotionally capable of maintaining the proposed increased caseload."

(c) Respondent shall provide copies of all of his federal and state income tax returns to his probation monitor within thirty (30) days of filing said returns. Respondent shall pay no less than the following amounts in restitution: ten (10) percent of that portion of his calendar year net income (before taxes) which exceeds $8,000 but is less than $20,000; twenty-five (25) percent of that portion of his calendar year net income before taxes which exceeds $20,000;

(d) Respondent shall pay restitution in full to all parties as provided above within forty-eight (48) months of the effective date of the Supreme Court order in this matter, unless, for good cause shown by written motion filed initially in the State Bar Court and prior to the expiration of the forty-eight (48) month period, respondent obtains an extension of this obligation from the State Bar Court or the Supreme Court. Respondent's degree of progress in making restitution and good faith efforts to complete restitution as promptly as feasible may be considered in assessing his rehabilitation at the standard 1.4(c)(ii) hearing; and

(e) Respondent shall make restitution payments no less frequently than on or about June 1 of each year respondent is on probation. Respondent shall furnish satisfactory written proof of each restitution payment within forty (40) days of each payment to the Probation Unit and to respondent's probation monitor;

3. 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;

4. That during the period of probation, respondent 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 Unit, Office of Trials, 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, respondent 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 Probation Unit, Office of Trials, for assignment of a probation monitor. Respondent shall promptly review the terms and conditions of his probation with the probation monitor 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. 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 Unit of the Office of Trials and any probation monitor 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 Unit 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 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 five years shall be satisfied and the suspension shall be terminated.

It is further recommended that respondent be ordered to take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners of the State Bar of California within the period of his actual suspension and furnish satisfactory proof of such to the Probation Unit of the Office of Trials within said period.

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.

Finally, it is recommended that costs incurred by the State Bar in the investigation and hearing of this matter be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FRANCIS E. JONES, III

A Member of the State Bar

No. 88-O-14338

Filed May 10, 1993

SUMMARY

Respondent, while employed as a full-time associate in a law firm, entered into an agreement with a non-lawyer to set up a law corporation and to split fees with the non-lawyer. Over a two-year period, the non-lawyer handled all aspects of the personal injury practice without proper supervision from respondent. As a result, the non-lawyer used illegal means to solicit clients and, without respondent's knowledge, engaged in the practice of law in respondent's name, collected attorney fees in respondent's name without any attorney having performed any services, and misused settlement funds which were withheld to pay medical liens. Eventually, respondent reported the non-lawyer to the police, turned himself in to the State Bar, and cooperated fully both in the criminal prosecution of the non-lawyer and in his own disciplinary matter.

The hearing judge found respondent culpable of aiding the unauthorized practice of law, splitting fees with a non-lawyer, forming a law partnership with a non-lawyer, recklessly failing to act competently by failing to supervise the non-lawyer's activities adequately, and breaching his fiduciary duties to an extent that amounted to moral turpitude. The judge dismissed charges that respondent had violated his trust account duties in two specific cases, because the record did not establish that respondent knew about the non-attorney's mishandling of client trust funds in those cases. The judge also found that respondent's use of his own funds to satisfy unpaid medical liens did not constitute a trust account violation. Finding that respondent did not know about or condone the non-lawyer's capping practices, had been candid and cooperative with his victims, the State Bar, and law enforcement officials, and had engaged in pro bono and community activities, the hearing judge recommended a two-year suspension, stayed on conditions of two years probation and a six-month actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

The Office of Trials requested review, contesting the recommended degree of discipline. The review department affirmed the culpability findings of the hearing judge, but found that respondent's misconduct was very serious in that it created a great risk of harm to clients, third parties, and the public. Also, while respondent did not condone the non-lawyer's use of cappers, the record showed that he failed to take realistic action to end the practice even after receiving reliable information that it was probably occurring. Nor was respondent's mitigating evidence as significant as that produced in comparable cases, especially in that he had not established that he had taken adequate steps to avoid a recurrence of the misconduct. In order to protect the public, the review department increased the recommended discipline to a three-year stayed suspension, with three years probation and actual suspension for two years and until proof of rehabilitation, fitness to practice law, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

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: Millicent L. Rolon

For Respondent: Gert K. Hirshberg

HEADNOTES

[1] **204.10 Culpability—Wilfulness Requirement**
280.00 Rule 4-100(A) [former 8-101(A)]
Where respondent established a law practice in total disregard of the principles of the rule requiring client funds to be held in trust accounts, respondent could have been charged with and found culpable of violating that rule based on mishandling of trust funds by non-lawyer who ran practice, at least as to cases which respondent was aware were being handled in respondent's name.

[2] **130 Procedure—Procedure on Review**
151 Evidence—Stipulations
166 Independent Review of Record
The review department will not consider disputed, extrinsic evidence on review. Where respondent's counsel referred at oral argument to respondent's current activity, the review department permitted the parties an opportunity to file a stipulation regarding this subject, but when no stipulation was reached, the review department declined to consider the parties' separate declarations setting forth their individual views of the facts.

[3] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
252.20 Rule 1-310 (former 3-103)
695 Aggravation—Other—Declined to Find
Where an attorney permitted a non-lawyer to misuse the attorney's name to conduct a large personal injury practice, the attorney could not be held separately culpable for each item of harm that resulted, without proof of his or her actual knowledge.

[4 a, b] **221.00 State Bar Act—Section 6106**
252.20 Rule 1-310 (former 3-103)
Where respondent, oblivious to the Rules of Professional Conduct, intentionally created a personal injury practice in conjunction with a non-lawyer without adequate controls, and inadequately supervised the non-lawyer's conduct of the practice over a two-year period, acting with gross neglect and in a manner bordering on extreme recklessness, respondent's conduct violated the statute prohibiting acts of moral turpitude.

[5] **252.30 Rule 1-320(A) [former 3-102(A)]**
The ethical prohibition against fee-splitting between lawyer and non-lawyer is directed at the risk posed by the possibility of control of legal matters by the non-lawyer, interested more in personal profit than the client's welfare.

[6] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation
The trust fund and trust account rules are designed to safeguard client funds from the serious risk of loss or misappropriation, whether through carelessness or design.

[7 a-c] **735.10 Mitigation—Candor—Bar—Found**
745.10 Mitigation—Remorse/Restitution—Found
750.52 Mitigation—Rehabilitation—Declined to Find
833.40 Standards—Moral Turpitude—Suspension
901.10 Standards—Miscellaneous Violations—Suspension

Where respondent almost completely abdicated to a non-lawyer his professional duties with respect to a personal injury practice; failed to take prompt, realistic action to stop the non-lawyer's capping practices, and had not presented clear evidence regarding rehabilitation and necessary changes in his practice, then despite mitigating factors including respondent's cooperation with law enforcement and State Bar and satisfaction of medical liens out of his own funds, appropriate discipline for protection of public was three-year stayed suspension with three years probation and actual suspension for two years and until proof of rehabilitation, fitness to practice, and learning in the general law.

[8] **173 Discipline—Ethics Exam/Ethics School**
252.20 Rule 1-310 (former 3-103)

Where respondent had passed professional responsibility examination 10 years earlier, but seemed to have learned nothing from that experience which would have helped him avoid disciplinary proceeding arising out of his abdicating responsibility for his law practice to a non-lawyer, it was appropriate to require respondent to take and pass California Professional Responsibility Examination prior to expiration of his actual suspension.

[9] **176 Discipline—Standard 1.4(c)(ii)**
252.20 Rule 1-310 (former 3-103)

Where respondent had been found culpable of misconduct arising from his abdication of responsibility for his law practice to a non-lawyer, review department recommended that hearing regarding respondent's fitness to return to practice focus on adequate assurance that respondent could institute a law practice with appropriate ethical safeguards.

[10] **176 Discipline—Standard 1.4(c)(ii)**
179 Discipline Conditions—Miscellaneous

Where review department recommended that respondent be required to establish entitlement to return to good standing under standard 1.4(c)(ii) before actual suspension could be terminated, continuing education requirement recommended by hearing judge as condition of probation was not adopted by review department, because standard 1.4(c)ii) inquiry would evaluate steps respondent had taken to establish fitness to practice and present learning.

ADDITIONAL ANALYSIS

Culpability

Found

221.12 Section 6106—Gross Negligence
252.01 Rule 1-300(A) [former 3-101(A)]
252.21 Rule 1-310 [former 3-103]
252.31 Rule 1-320(A) [former 3-102(A)]
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Not Found

280.05 Rule 4-100(A) [former 8-101(A)]

Aggravation
Found
521 Aggravation—Multiple Acts—Found
584.10 Harm to Public
586.11 Harm to Administration of Justice
Mitigation
Found
730.10 Candor—Victim
740.10 Good Character
765.10 Pro Bono Work
Found but Discounted
710.33 No Prior Record
Standards
801.30 Effect as Guidelines
802.30 Purposes of Sanctions
Discipline
1013.09 Stayed Suspension—3 Years
1015.08 Actual Suspension—2 Years
1017.09 Probation—3 Years
Probation Conditions
1024 Ethics Exam/School
1025 Office Management
1030 Standard 1.4(c)(ii)
Other
106.40 Procedure—Pleadings—Amendment
220.40 State Bar Act—Section 6105
243.00 State Bar Act—Sections 6150-6154

OPINION

STOVITZ, J.:

This case underscores the need for members of the State Bar to heed fundamental lessons taught in law school professional responsibility courses as well as the learning acquired in preparation for the professional responsibility examination. It is also a classic example of the extensive harm which may be unleashed on an unknowing public when a lawyer abdicates basic professional responsibilities and allows a non-lawyer almost free rein to perform such responsibilities in the lawyer's name. In this case, respondent, Francis E. Jones, III a member of the State Bar with less than three years of practice, through his inexcusable ignorance of the law and recklessness or gross negligence, allowed a non-lawyer to operate a large scale personal injury practice involving capping, forgery and other illegal and fraudulent practices.

The only issue raised by the State Bar Office of Trials' request for review in this disciplinary proceeding is the recommended degree of discipline. There is no dispute that in 1982, respondent, while employed full-time as an associate in another firm, entered into an agreement with a non-lawyer, Yue K. Lok, to set up a law corporation and to split fees with Lok. Respondent delegated to Lok, without proper supervision, all aspects of a plaintiff personal injury practice for over a two year period which resulted in Lok using illegal means to solicit clients. Unknown to respondent, Lok engaged in acts constituting the practice of law in respondent's name, handled millions of dollars, collected over $600,000 in attorney fees in respondent's name but without any attorney's performance of services and misused nearly $60,000 withheld from client settlements for payment to medical providers.

To his credit, respondent turned Lok in to the police which resulted in Lok's felony conviction for forgery and respondent also turned himself in to the State Bar. After trial, and deeming this case most similar to our decision in *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, the hearing judge recommended that respondent be suspended from practice for two years, with execution stayed on conditions of two years probation and a six-month actual suspension. The Office of Trials' examiner argues that this case presents facts far more serious than the facts in our previous *Nelson* decision and is more similar to *In re Arnoff* (1978) 22 Cal.3d 740. On the authority of *In re Arnoff, supra*, the Office of Trials urges us to recommend a two-year actual suspension as part of a three-year stayed suspension. On review, respondent argues that the hearing judge's less severe recommendation was appropriate.

Our independent review of the record leads us to conclude that respondent's misconduct was considerably more serious than in *Nelson* particularly in creating a far greater risk of harm to clients, third parties and the public. Although Arnoff had two serious surrounding circumstances not present here, his mitigation was greater than respondent's. As discussed *post*, our primary goal in recommending discipline is the protection of the public.

Unlike either *Nelson* or *Arnoff* this record gives us no clear evidence that respondent has indeed put in place necessary law practice changes. We believe that the two-year actual suspension urged by the Office of Trials, followed by a showing of rehabilitation, learning in the law and fitness to practice under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct,[1] is clearly warranted and we so recommend to the Supreme Court.

I. FACTS

A. Background.

Respondent had lived in Taiwan for two years, was fluent in Mandarin Chinese and knew many in the Chinese-American community in Los Angeles. He was admitted to practice law in June 1982 and has no record of prior discipline. After several short-term jobs with Los Angeles law firms doing insurance

1. See Transitional Rules of Procedure of the State Bar, division V ("standards").

defense work, respondent became an associate in a large downtown Los Angeles firm specializing in this type of work. In late 1984, at the time he met Lok, he was working about 60 hours per week for this firm.

B. Culpability.

The charges involve one general count and two additional counts concerning named clients. We deal with the general count first. In late 1984, Lok was an insurance agent. He approached respondent with a business venture: Respondent would work part-time in a new plaintiff personal injury practice which Lok would administer. Respondent had practiced law for only about two years at the time and had no experience in plaintiff's personal injury cases. Given Lok's contacts with many in the Chinese-American community, Lok anticipated referring a large number of prospective clients to the practice. Respondent and Lok each envisioned the new practice as a part-time venture. Respondent planned to and did continue to work for the large law firm which employed him.[2] In late 1984, respondent and Lok entered into an agreement, never reduced to writing, to establish this new plaintiffs' personal injury practice. They agreed that half of all attorney fees collected would go to office upkeep and overhead, a quarter would go to respondent and Lok would keep the remaining quarter as his compensation.

Respondent decided to incorporate the new practice, signed articles of incorporation and gave them to Lok for filing. However respondent did not understand and comply with legal requirements for a professional corporation and was unaware that Lok had filed documents with the Secretary of State describing Lok as president and chief executive officer of the corporation. As late as mid-1987 respondent believed that Lok was only the administrator of the practice. When respondent and Lok opened this practice, respondent completed a signature card for an account at the Cathay Bank. However, at the time, respondent was not aware of the distinction between a trust account and a general, office operating account and was not sure which type of account Lok opened. As it turned out, Lok opened a general, non-trust account. Respondent testified that while in law school, he took a course in legal ethics, and, as required, passed the professional responsibility examination prior to his admission to practice law. However, he had no familiarity with trust account principles as the large law firm which employed him took care of those responsibilities. He also had no recollection of the rules of ethics prohibiting fee-splitting with non-lawyers.

An office for respondent's part-time practice was opened in Alhambra, about 10 miles east of respondent's full-time employment. Respondent authorized Lok to interview prospective clients, file informal claims with insurers and negotiate a settlement subject to respondent's approval. According to respondent, Lok complied with these directions. However, it is also undisputed that Lok accepted and handled on his own, but in respondent's name, hundreds of clients more than respondent was aware of. Respondent had no key to the office and he made only about 10 to 15 visits to it during the nearly two years the practice existed. During those visits, respondent met about 10 to 15 clients of the practice, which is about all he believed existed. He also reviewed the Cathay Bank's statements of the account and reviewed the flow of funds into and out of the account but did not reconcile the account statements. He testified that he reviewed the client files regarding the propriety of disbursements; but as noted, he was unaware that Lok was handling far more cases than respondent realized. Respondent never instructed Lok to deposit any funds received from insurers in trust accounts and it appears that none of the considerable sums received by Lok on behalf of clients was ever deposited in a trust account. Respondent received about $9,000 in fees from the cases he was aware Lok handled in this practice. Respondent never had an idea of the expenses of the Alhambra office and made no demand on Lok for an accounting of expenses.

2. No evidence was introduced to show whether or not respondent was permitted to engage in a law practice outside his employment.

Although the record is not precise as to the exact time frame, it appears that in early or mid-1985, not long after this Alhambra practice started, respondent got some general information that Lok might be using cappers to get cases for this practice.[3] Lok first denied using cappers, but sometime in 1986, he later became open with respondent about the practice. Also, at some time, the office was moved to another location in Alhambra.

In December 1986, respondent terminated the arrangement with Lok in order both to consolidate his law practice and to ensure that Lok did not pay cappers for cases. Respondent told Lok not to accept any new cases in respondent's name and Lok gave respondent 15 to 20 files which Lok identified as the remaining cases of this venture. That same month, respondent told Lok to remove respondent's name from the building directory. Lok did so but kept an office in the building listed in the directory under the designation "law office." Respondent did not object to this designation although he knew of no other attorney for whom Lok worked.

In about June 1987, respondent received rumors for the first time that doctors were not paid for medical treatment given clients in the Alhambra practice. At about the same time, an employee of Lok told respondent that Lok was still taking cases in respondent's name. The next day, respondent, accompanied by several others, went to Lok's office during office hours and seized all files and documents bearing respondent's name. The seized material included 200 to 300 client files of which about 50 were active. When respondent reviewed these records, he saw for the first time that Lok had forged respondent's signature in opening another bank account for the Alhambra practice at the Asian-American Bank. In contrast to the relatively low activity in the Cathay Bank account, Lok deposited over 400 insurance settlement checks into the Asian-American bank account between July 1985 and May 1987, exceeding a total of $2.15 million.

Shortly after seizing files from Lok's office, respondent returned to Lok's office and saw more items pertaining to law cases Lok was handling in respondent's name. A few days later, respondent reported the situation to police and Lok was ultimately convicted of forgery. Using his own funds, respondent paid $57,000 to medical providers who had not been paid by Lok for treatment rendered clients taken in by Lok in respondent's name.

Respondent testified that he reviewed the settlements Lok made in the cases he found in Lok's office in 1987 and concluded that they were good settlements for the client, even better than some of the settlements he had obtained when he embarked on his own private practice after leaving the large Los Angeles firm sometime before 1987.

In addition to the foregoing general findings the hearing judge made findings as to two specific client matters charged in the notice to show cause.

In the Truong matter, the hearing judge found that in late 1985, without respondent's knowledge, Lok accepted the personal injury case of Hiep Truong. Truong had signed a lien in favor of medical providers who had treated his injuries. Respondent was unaware of this lien or any aspect of the case until 1988 and Lok did not sign the lien. Without knowledge of Truong or respondent, Truong's case was settled for $14,060. This sum was deposited into the general account Lok had set up in the Asian-American bank. Promptly after depositing the $14,060, Lok paid Truong $5,667 as his full share. An equal amount, $5,667, was held as attorney fees. Lok did not pay the medical provider lienholder the $4,139 it claimed and the balance in the general account holding Truong's recovery fell to as low as $304.50 shortly after Lok paid Truong his share. After respondent first learned of the unpaid medical lien, he negotiated a compromise of it and paid it using personal funds he had placed in a trust account to replace funds which should have been kept in trust but were not.

3. A capper is one who acts as an agent of an attorney to solicit or procure business for that attorney. (Bus. & Prof. Code, § 6151 (a); *In the Matter of Nelson*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 182, fn. 3.)

In the Wong matter, the hearing judge found that in about October 1986, without respondent's knowledge, Lok accepted the personal injury case of See Yai Wong. As in the Truong matter, respondent had not met Wong, was unaware of a medical lien in favor of Wong's treating doctor and unaware of the April 1987 $10,000 case settlement which Lok concluded on his own. Lok paid Wong $3,878. Legal fees of $3,333 were withheld but the $2,210 bill owed Wong's treating doctor was not paid. Although the hearing judge found that the balance in the general bank account into which respondent had deposited the Wong settlement funds fell below $2,210, we regard that finding as based on an error. The date referred to by the judge on which the balance was insufficient was prior to the date of deposit of Wong's funds and the record does not show an inadequate balance after deposit. Respondent first learned of the Wong case when he visited Lok's office in June 1987. When respondent learned later that the treating doctor had not been paid, respondent negotiated a compromise of the bill and paid the doctor the agreed amount of $1,105.

With the minor exception noted above, we adopt the hearing judge's culpability findings. As we have already observed, neither party disputes the findings or the following conclusions which we also adopt.

In all three counts the judge concluded that respondent wilfully violated rule 3-101(A) of the former Rules of Professional Conduct[4] (aiding the unauthorized practice of law) by placing Lok in a position whereby he could represent clients without adequate supervision. She concluded that respondent also wilfully violated rule 3-102(A) by dividing fees with Lok and rule 3-103 by forming a partnership with Lok the principal activity of which was law practice. By recklessly failing to supervise Lok's activities in the Alhambra practice, respondent wilfully violated rule 6-101(A)(2) (intentional or reckless failure to act competently) and breached his fiduciary duties amounting to an act of moral turpitude proscribed by Business and Professions Code section 6106. The hearing judge found respondent not culpable of charges in the Truong and Wong matters of wilful violations of rule 8-101 regarding trust account duties in view of his lack of knowledge that Lok had established the mishandled accounts or accepted the cases resulting in loss to clients. The hearing judge also held that respondent's repayment of the doctors from his own funds was not a trust account violation.[5] **[1 - see fn. 5]**

C. Evidence and findings bearing on degree of discipline.

Respondent cooperated fully in the prosecution of Lok even though aware that his testimony would result in the State Bar learning of his role in the Alhambra practice. Two letters from prosecuting attorneys attested to this cooperation. Respondent reported the matter on his own to the State Bar before testifying in Lok's criminal trial and was cooperative in the State Bar proceedings.

At the time of the hearings below, respondent was in a sole law practice emphasizing civil litigation and immigration matters. He offered no details of how this practice was conducted and the only witness who added anything about this practice was respondent's wife, a part-time employee in respondent's office, who testified that respondent sought to avoid any improper activities.[6] **[2 - see fn. 6]** Respondent has rendered some legal services pro bono. He was also active in Lions Club and political activities and had assisted City of Los Angeles trade delegations with language translation.

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4. Unless noted otherwise, all references to rules are to the provisions of the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

5. [1] Respondent was not charged in the first count with a violation of rule 8-101(A). However, since he established his practice with Lok in total disregard of that rule's principles, he could have been charged with and, if so charged, found culpable of such a violation, at least as to the handful of cases of which he was aware Lok handled in respondent's name.

6. [2] At oral argument counsel for respondent alluded to respondent's current activity. Since that subject was outside the record, we deferred submission of the matter for one week to permit the parties to file a stipulation as to this subject. We received no stipulation within the allotted time. Instead, the parties attempted to file separate declarations setting forth the individual party's view of the facts. In light of guiding decisions, we decline to consider such disputed, extrinsic evidence on review. (See, e.g., *In re Rivas* (1989) 49 Cal.3d 794, 801; *Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 682-683.)

The hearing judge found these factors in aggravation: respondent's multiple acts of wrongdoing over a three-year period (std. 1.2(b)(ii)); the considerable harm to medical lien holders caused by respondent's gross neglect, and his failure to observe minimal standards of professional responsibility for the operation of a law practice. (Std. 1.2(b)(iv).) The judge made it clear that she did not deem aggravating that each of the counts showed violations of the same Rules of Professional Conduct regarding dividing fees with non-lawyers, aiding the unauthorized practice of law and forming a partnership with Lok for the practice of law.

In mitigation, the hearing judge gave very little weight to respondent's prior discipline-free record as he was in practice just over two years when his misconduct began. (See std. 1.2(e)(i); *Amante* v. *State Bar* (1990) 50 Cal.3d 247, 255-256.) However, the judge gave significant mitigating credit to respondent's substantial, spontaneous candor and cooperation with the State Bar, law enforcement and potential victims even though respondent was warned that his cooperation might implicate him. (Std. 1.2(e)(v).) In the latter regard, the hearing judge's decision noted that were it not for respondent's initiative in pursuing Lok's prosecution with law enforcement, Lok might have "simply moved on to misappropriate another attorney's name, with resulting harm to the public and to the administration of justice." Also found mitigating were respondent's good character and community activities (std. 1.2(e)(vi)) and his objective steps to make lienholders whole upon learning that they had not been paid by Lok. (Std. 1.2(e)(vii).)

Nevertheless, the hearing judge pointed out that the "full extent" of the harm resulting from Lok's acts is unknown and may never be known. She also set forth in her decision the many ways in which respondent's misconduct allowed Lok to misuse the name and status of an attorney. She nevertheless found that respondent had implemented office practices which would prevent the recurrence of such misconduct as had been found here. As to the latter finding in mitigation, the deputy trial counsel asserted at oral argument that it was not supported by the record and we agree. No evidence established the methods of respondent's practice or what his office practices were at the time of the hearing. However, the record supports all other mitigation and aggravation findings of the hearing judge and we adopt those other findings.

The judge reviewed a number of Supreme Court decisions over the years in cases of attorney misconduct involving similar violations to those found here. She found the present record to be most analogous to our decision in *In the Matter of Nelson*, *supra*, 1 Cal. State Bar Ct. Rptr. 178; and, based on the extensive mitigation she found in this case, she recommended the same discipline we recommended and the Supreme Court imposed in *Nelson*: a two-year suspension, stayed on conditions of a two-year probation including a six-month actual suspension. She opined that without the extensive mitigation, she would have been inclined to recommend two years of actual suspension; and, in the absence of our *Nelson* decision, she would have recommended a one-year actual suspension.

II. DISCUSSION

Although this case is not founded on improper solicitation as was *Nelson*,[7] we agree with the hearing judge that there are a number of similarities to the record we reviewed in *Nelson*. Yet as we shall discuss, there are very important differences as well. In *Nelson*, as in the present case, a relatively inexperienced member of the State Bar ignored basic precepts of attorney professional responsibility learned in law school and entered into an agreement with a non-lawyer to administer a new legal practice using the attorney's name with legal fees to be divided between the attorney and the non-lawyer. Both respondent and Nelson learned at some point that the non-lawyer was using cappers to steer cases to the

7. Respondent was not charged with unethical conduct regarding capping (Bus. & Prof. Code, § 6152) in the original notice to show cause and no culpability was found as a result. In her pre-trial statement, the examiner referred to an amendment to add a capping charge as a potential one she would make. She did move to so amend the notice on the day of trial. On objection of respondent, the hearing judge denied the motion to amend as prejudicially untimely. On review, the examiner does not dispute this ruling.

law practice, yet did not immediately end the practice. Both failed to supervise adequately the non-lawyers' actions in fundamental respects, resulting in improper practices. In both situations, problems developed after the attorneys ceased their involvement in the practice. Also, both were completely cooperative with the State Bar.

In urging that we impose substantially greater suspension than in *Nelson*, the Office of Trials points to several aspects of this case urged to be different from *Nelson*: the egregiousness of respondent's delegation of his professional duties to Lok, the far greater duration of respondent's arrangement with Lok compared to Nelson's with non-lawyer Carr, the more lax practices of respondent when he finally decided to terminate his arrangement with Lok compared to the decision by Nelson to turn his cases over to another member of the State Bar and finally, the far lesser evidence of rehabilitation shown by respondent. Indeed, in *Nelson*, the Office of Trials did not dispute the respondent's rehabilitation as attested to by an attorney with whom Nelson worked after he relocated from Los Angeles to Sacramento and diligently performed in a new legal practice for over five years. In contrast, respondent urges that we view this case as warranting the same degree of discipline as imposed in *Nelson* despite his failure to provide any unrelated witnesses to his alleged rehabilitation.

Despite some of the similarities we have found between this case and *Nelson*, we agree with the Office of Trials' analysis of the differences between the two cases and we find two additional significant differences as well. Nelson planned to move over to the office where non-lawyer Carr had started to administer the law practice on Nelson's behalf and proved that he supervised Carr about an hour each day although he was not always on site. In contrast, respondent set up his venture with Lok without intending to make it the location of his regular law practice and without intending to provide frequent supervision. He did not even obtain a key to the premises. Although Nelson established a proper trust account for the practice which Carr administered, respondent was oblivious to trust account regulations and did not even supervise adequately the incorporation of the practice.

[3] We agree with the aspect of the hearing judge's decision declining to hold respondent separately responsible for each item of harm which occurred without proof of his actual knowledge. Yet as the hearing judge appropriately observed, the true extent of harm which occurred in this case may never be known. From the records obtained from the criminal prosecution of Lok, we know that his misuse of respondent's name and status of attorney was massive, spanning over two years, involving over 350 cases and $2.15 million in collected settlements. It appears that Lok deducted a one-third attorney fee from each of these cases. Thus about $716,000 of what was paid by insurers went to attorney fees although the record shows that neither respondent nor any other attorney provided any legal services in these cases. While we have no evidence that any of these 350 or more personal injury claims either was not bona fide or resulted in an inadequate settlement, the complete absence of an attorney's involvement certainly increased the risk of these possibilities.

[4a] Respondent's obliviousness to the Rules of Professional Conduct and his inadequate supervision of Lok over a two-year period made possible exactly what transpired here. The rules with which respondent failed to comply were designed to prevent the very problems of lay control and diversion of funds which occurred. **[5]** Prior to respondent's admission to practice law, our Supreme Court observed that the ethical prohibition against fee-splitting between lawyer and non-lawyer was directed at the risk posed by the possibility of control of legal matters by the non-lawyer, interested more in personal profit than the client's welfare. (See *In re Arnoff*, *supra*, 22 Cal.3d at p. 748, fn. 4, citing *Gassman* v. *State Bar* (1976) 18 Cal.3d 125, 132.) **[6]** The Rules of Professional Conduct requiring attorneys' correct handling of trust funds and trust accounts have long been directed at prohibiting the more serious risk of loss or misappropriation of those funds, whether through carelessness or design. (See, e.g., *Heavey* v. *State Bar* (1976) 17 Cal.3d 553, 558; *Silver* v. *State Bar* (1974) 13 Cal.3d 134, 144-145.) **[4b]** More importantly, the magnitude of respondent's gross neglect was very serious, bordering on extreme recklessness. (See *Coppock* v. *State Bar*, *supra*, 44 Cal.3d at pp. 680-681.) Respondent intentionally created the Alhambra practice without any adequate

controls and he must bear considerable responsibility under Business and Professions Code section 6106 for what ensued.[8]

[7a] We do not overlook respondent's mitigation in first cooperating fully with the prosecution of Lok, although warned that this very proceeding could ensue, and then reporting the matter to the State Bar. Respondent paid $57,000 of his own funds to medical lien holders stemming from Lok's misconduct and he has shown the same abstinence from further misconduct as Nelson. His pro bono and community service activities are also factors in his favor. Urging that we not see this case as more serious than *Nelson*, respondent claims, inter alia, that respondent neither condoned nor knew of the capping activities of Lok. We agree that the record shows that respondent did not condone that conduct, but the record also shows that respondent did indeed acquire reliable information that Lok was probably using cappers, yet took no realistic action to end the practice or his arrangement with Lok until a later time.[9] In any event, the gravaman of this case is not capping, but almost complete abdication to a non-lawyer of respondent's professional duties with respect to the personal injury practice he set up.

As pointed out correctly by respondent's counsel, Arnoff's conduct also involved the extensive use of fraudulent medical reports either known to be false by Arnoff or about which Arnoff was grossly negligent. No such evidence appears in the present record. **[7b]** Yet both Arnoff and Nelson presented clear evidence to establish rehabilitation, particularly as to changes which had been made in the nature of their practices. Evidence that would give us similar confidence in respondent's belated understanding of the duties of an attorney is absent in this case.

Viewing the Standards for Attorney Sanctions for Professional Misconduct as guidelines (e.g., *Gary* v. *State Bar* (1988) 44 Cal.3d 820), respondent's commission of acts of moral turpitude could warrant recommendation of either disbarment or suspension (std. 2.3) depending upon the magnitude of the misconduct and the degree to which it related to the practice of law. We have detailed the magnitude of respondent's misconduct and note that it occurred in the law practice he authorized be run in his name. Under the standards, respondent's violation of any of the four rules of professional conduct he transgressed could warrant reproval or suspension depending on the gravity of the offense or the harm to victims. (Std. 2.10.)

[7c] The protection of the public is the key reason for imposing attorney discipline. (See *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 58-59; *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 198.) Based on our analysis of the serious misconduct involved in this matter and considering the aggravating and mitigating factors, we believe that the appropriate degree of discipline in this case is that urged by the Office of Trials: a three-year suspension, stayed, on conditions of a three-year probation and an actual suspension for two years and until respondent proves his rehabilitation, fitness to practice and learning in the law pursuant to the procedures established under standard 1.4(c)(ii). We shall also recommend compliance with most of the other conditions of probation and duties recommended by the hearing judge in her decision below.

[8] Respondent took the professional responsibility examination over 10 years ago but seemed to have learned nothing from that experience which would have helped him avoid this proceeding. We must therefore follow our usual recommendation, given that lapse of time, and we shall recommend that he be ordered to pass the California Professional Responsibility Examination prior to the end of his actual suspension. (Cf. *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366.) **[9]** Without seeking to limit or prescribe the

8. Business and Professions Code section 6105 makes it an independent ground of suspension or disbarment for an attorney to lend his name to be used as an attorney to a non-attorney. (See, e.g., *McGregor* v. *State Bar* (1944) 24 Cal.2d 283.) Respondent was not charged with this offense and we need not decide on this record whether or not he is culpable of it.

9. Although in comparing this case to *Nelson*, the hearing judge referred to respondent's lack of knowledge of Lok's engaging in capping activities, as noted *ante*, she had earlier found that respondent had received reliable information that Lok was so engaged.

scope of the standard 1.4(c)(ii) inquiry, we recommend that it particularly focus on adequate assurance that respondent is able to institute a law practice with appropriate ethical safeguards before terminating his actual suspension.

III. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Francis E. Jones, III, be suspended from the practice of law in this state for a period of three (3) years, that execution of such suspension be stayed and that respondent be placed on probation for a period of three (3) years on the following conditions:

1. That respondent shall be actually suspended for the first two (2) years of his 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.

2. That respondent shall comply with conditions 2 through 8 and 10 of the conditions of probation recommended by the hearing judge, contained on pages 32-36 of her decision, with the exception that respondent shall satisfy the law office management organization plan requirement of condition 8 prior to applying for termination of his actual suspension under standard 1.4(c)(ii) and with the further modification that references in all the conditions of probation to the former Probation Department of the State Bar Court shall instead be deemed to refer to the newly-created Probation Unit in the Office of Trials. **[10]** In view of our recommendation that respondent be required to establish his entitlement to return to good standing under standard 1.4(c)(ii), we have not adopted condition 9 requiring certain continuing education as the standard 1.4(c)(ii) inquiry will evaluate the steps respondent has taken to establish his fitness to practice and present learning.

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

We also recommend that respondent be required to pass the California Professional Responsibility Examination and provide proof of passage to the State Bar prior to the expiration of his actual suspension.

Finally, we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court and pay costs in the manner set forth on page 37 of the hearing judge's decision.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALFRED MORRISS MILLER

Petitioner for Reinstatement

No. 91-R-03564

Filed May 10, 1993

SUMMARY

Petitioner practiced law without misconduct from 1939 to 1976, when he became the executor of an estate from which he misappropriated funds. In 1982, the trustee of the estate objected to the final accounting. After failing to pay a stipulated sum to the trustee, petitioner admitted his misappropriation to the probate court and the State Bar, wound up his practice, voluntarily became an inactive member of the bar, and resigned with disciplinary charges pending. From May 1984 onwards, he worked as a paralegal for his son. In 1991, he sought reinstatement, and the hearing judge recommended that it be granted. (Hon. Jennifer Gee, Hearing Judge.)

The deputy trial counsel requested review. The primary issue was whether petitioner had met his heavy burden of proving rehabilitation and present moral qualifications in light of his prior misconduct. Petitioner had told former clients that he was "retiring" rather than resigning, and had continued his employment as a paralegal for his lawyer son despite misgivings about his son's use of a potentially misleading law firm name. In light of petitioner's overall showing, the review department held that neither of these facts was a sufficient basis to deny reinstatement. Given the hearing judge's very favorable credibility findings, the review department concluded that petitioner had met his burden of proof and recommended his reinstatement.

COUNSEL FOR PARTIES

For Office of Trials: Mary J. Schroeter

For Petitioner: Baron Lewis Miller

HEADNOTES

[1] **135 Procedure—Rules of Procedure**
2590 Reinstatement—Miscellaneous
An attorney who resigns with disciplinary charges pending rather than being disbarred must still establish rehabilitation through a reinstatement proceeding. (Trans. Rules Proc. of State Bar, rule 662.)

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] **169 Standard of Proof or Review—Miscellaneous**
2504 Reinstatement—Burden of Proof

Although review department gives great deference to credibility findings by hearing judge in favor of petitioner for reinstatement, petitioner continues to bear a heavy burden of proof on review. Petitioner must present overwhelming proof of reform and must show by the most clear and convincing evidence that efforts toward rehabilitation have been successful. Such evidence must demonstrate sustained exemplary conduct over an extended period of time.

[3] **135 Procedure—Rules of Procedure**
2504 Reinstatement—Burden of Proof

A petitioner for reinstatement must pass the Professional Responsibility Examination and must show present ability and learning in the general law, as well as rehabilitation and present moral qualifications for readmission. (Trans. Rules Proc. of State Bar, rule 667.) A claim that the petitioner has held himself or herself out as entitled to practice law pertains to the issue of rehabilitation and moral qualifications.

[4] **171 Discipline—Restitution**
2590 Reinstatement—Miscellaneous

Restitution is fundamental to the goal of rehabilitation. It forces attorneys to confront in concrete terms the harm caused by their misconduct.

[5 a, b] **159 Evidence—Miscellaneous**
745.10 Mitigation—Remorse/Restitution—Found
2504 Reinstatement—Burden of Proof

External pressures to pay restitution for misappropriated funds, including court orders and agreements with victims of misappropriation, do not preclude consideration of such restitution in reinstatement proceedings. The weight to be accorded to restitution depends on the petitioner's attitude, as evidenced by a spirit of willingness, earnestness, and sincerity. Where a reinstatement petitioner who had misappropriated funds from a probate estate had subsequently recognized the gravity of his misconduct; admitted his misappropriation to the probate court and the State Bar; cooperated in an audit of the estate's records; secured his debt to the estate by granting it interests in his real and personal property, and fully repaid both the misappropriated funds and additional interest, surcharges, fees, and costs, his restitution deserved significant weight even though it was required by a probate court order.

[6 a, b] **2504 Reinstatement—Burden of Proof**

Postmisconduct pro bono work and community service are factors evidencing rehabilitation and present moral qualifications. Where a petitioner for reinstatement did some pro bono research as a paralegal and performed volunteer work for, and made donations to, a museum, his showing could have been clearer and more impressive, but still constituted a factor in favor of his reinstatement.

[7] **2504 Reinstatement—Burden of Proof**
2590 Reinstatement—Miscellaneous

Although a petitioner for reinstatement does not need to occupy a fiduciary position in order to prove rehabilitation, evidence that the petitioner has successfully occupied such a position after misconduct is of probative value. Where a petitioner exercised fiduciary responsibilities for a probate estate and a trust after his resignation with disciplinary charges pending, his distribution of funds for the probate estate and the trust without problems constituted a factor in favor of his reinstatement, even though the sums involved were relatively small.

[8] **2504 Reinstatement—Burden of Proof**

Rehabilitation requires an acceptable appreciation of one's professional responsibilities and a proper attitude toward one's misconduct. Where a petitioner for reinstatement, after being unable to deliver funds misappropriated from an estate, had confronted the severity of his misconduct; confessed his wrongdoing to the probate court and the State Bar and cooperated with both; discussed his misconduct and plans for resignation and rehabilitation with his family; ended the excessive spending for which he had misappropriated funds; and voluntarily wound up his practice and resigned from the State Bar, this conduct reflected an awareness of his professional responsibilities and constituted a significant factor in favor of his reinstatement.

[9 a-d] **148 Evidence—Witnesses**
2504 Reinstatement—Burden of Proof

Character testimony and reference letters, especially from employers and attorneys, are significant in reinstatement proceedings. Great consideration is due to the testimony of members of the bar and public of high repute who have closely observed a petitioner for reinstatement. Not every witness or letter writer must have recent close contact with the petitioner; a variety of persons with different relationships to the petitioner can reflect present moral qualifications. Where a petitioner presented favorable testimony by five character witnesses, one of whom had observed him closely since his misconduct, and favorable reference letters from four persons, three of whom had had recent contact with him, such testimony and reference letters were entitled to consideration as factors supporting his reinstatement.

[10] **114 Procedure—Subpoenas**
148 Evidence—Witnesses
199 General Issues—Miscellaneous
2590 Reinstatement—Miscellaneous

Where a municipal court judge and a state appellate justice were subpoenaed as witnesses, it was proper for them to testify in a reinstatement proceeding.

[11 a, b] **2504 Reinstatement—Burden of Proof**

Where reinstatement petitioner's misconduct had occurred over a single period of four to six years; character witnesses provided an impressive description of petitioner's premisconduct character, and petitioner had practiced law without misconduct for at least 37 years and done extensive pro bono work, evidence suggested that petitioner's misconduct was aberrational.

[12] **230.00 State Bar Act—Section 6125**
231.00 State Bar Act—Section 6126
2590 Reinstatement—Miscellaneous

It was not improper for petitioner for reinstatement to have continued to work as a paralegal for his son in his former office after resigning with charges pending, where petitioner did not engage in any acts constituting the practice of law while so employed.

[13 a-c] **1913.42 Rule 955—Compliance—Notice**
2504 Reinstatement—Burden of Proof

Where an attorney, while winding up his law practice before resigning with disciplinary charges pending, told clients that he was "retiring" but made clear that he would not be practicing law, this notification did not violate rule 955 of the California Rules of Court because it was given while the attorney was still an active member of the bar. While the evasiveness of the notification was relevant to the attorney's rehabilitation and moral qualifications for subsequent reinstatement, it did not mandate an adverse conclusion on those issues.

[14] **231.00 State Bar Act—Section 6126**
2590 Reinstatement—Miscellaneous
Statement by resigning attorney to clients that he would assist another attorney in handling their matters was proper, where attorney did not suggest that he would be acting as clients' attorney in so doing.

[15] **231.00 State Bar Act—Section 6126**
2590 Reinstatement—Miscellaneous
Where a resigned attorney continued to work as a paralegal for another attorney, and two former clients of the resigned attorney, although aware he was no longer practicing law, submitted checks payable to him for legal services from the other attorney, and where he promptly endorsed the checks over to the other attorney, neither the checks nor the resigned attorney's handling of them supported the claim that he had held himself out as entitled to practice law.

[16] **231.00 State Bar Act—Section 6126**
2590 Reinstatement—Miscellaneous
Where a resigned attorney continued to work as a paralegal for a sole practitioner, and attorney-client contracts and letters from the sole practitioner contained plural references to attorneys, these plural references did not establish that the resigned attorney had held himself out as entitled to practice law, where the resigned attorney was not aware of these plural references, and the sole practitioner hired other attorneys to assist on a contract basis.

[17 a-d] **236.00 State Bar Act—Section 6132**
253.10 Rule 1-400(D) [former 2-101(A)]
2590 Reinstatement—Miscellaneous
A law firm is required by statute to remove from its business name the name of an attorney who is disbarred or resigns with discipline charges pending. The May 1989 Rules of Professional Conduct explicitly provide that a law firm's name can itself constitute a prohibited misleading communication, and the definition of "communication" in the predecessor rules was also broad enough to encompass law firm names. However, where a resigned attorney continued to work for his attorney son as a paralegal despite the son's adoption of a firm name which might have been construed to imply that the resigned attorney was a member of the firm, any possible misconduct by the son regarding his firm's name was not before the State Bar Court on the father's petition for reinstatement.

[18 a, b] **165 Adequacy of Hearing Decision**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
2504 Reinstatement—Burden of Proof
Where a resigned attorney continued to work as a paralegal for his son's law firm despite the son's adoption of a firm name which might have been construed to imply that the resigned attorney was a member of the firm, but the evidence indicated that the firm name was beyond the resigned attorney's control, and there was no credible evidence that the public or clients were in fact misled or that the resigned attorney had practiced law after resigning, the review department deferred to the hearing judge's favorable credibility determinations and concluded that the resigned attorney had not held himself out as entitled to practice law. The resigned attorney's continued employment in a situation where the public and clients could easily be misled clearly called into question his suitability for reinstatement, but under all the circumstances did not establish his lack of rehabilitation or present moral qualifications.

[19] **2504 Reinstatement—Burden of Proof**

Rehabilitation is a state of mind which may be difficult to establish. Readmission to the bar does not require perfection. No unnecessary burdens should be placed upon erring attorneys in proving rehabilitation and present moral qualifications.

[20 a-e] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted

Whether a petitioner has met the heavy burden of proof in a reinstatement proceeding depends on a comparison of the facts of the proceeding with the facts in other reported cases. Petitioners have obtained reinstatement despite weaknesses in their showings of rehabilitation and present moral qualifications. Where the showing of rehabilitation and present moral qualifications by a petitioner for reinstatement was as strong as similar showings by petitioners who obtained reinstatement despite alleged weaknesses in their cases, and where petitioner's case was distinguishable from reported cases in which petitioners failed to proved rehabilitation and present moral qualifications, the review department recommended reinstatement despite petitioner's evasive notice to clients that he was "retiring" and despite petitioner's continuing to work as a paralegal for a law firm even though he questioned the propriety of the law firm's name.

[21] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted

Reinstatement petitioner's admission of misconduct, cooperation with authorities, lifestyle changes, curtailment of spending, and restitution were significant factors in favor of reinstatement. Postmisconduct pro bono work, community service, and handling of fiduciary responsibilities, as well as character witnesses' testimony and reference letters, also supported reinstatement.

ADDITIONAL ANALYSIS

Other

166 Independent Review of Record

OPINION

NORIAN, J.:

We review the decision by a hearing judge of the State Bar Court to grant reinstatement to petitioner, Alfred Morriss Miller. The primary issue before us is whether petitioner has met his heavy burden of proving rehabilitation and present moral qualifications in light of his prior misconduct. We conclude that, given the hearing judge's very favorable credibility findings, petitioner has met his burden of establishing current moral fitness, and we recommend that he be reinstated.

I. FACTS

The record supports all of the hearing judge's findings of fact, and we adopt them. We also adopt the supplemental findings suggested by the deputy trial counsel in her opening brief on review, except for the suggested findings about the date when petitioner's misappropriation began and about the credibility of a former client who testified against petitioner. (See section III.I and fn. 5, *post*.)

Petitioner was admitted to the State Bar in 1939. He practiced law without misconduct until 1976, a period of 37 years, when he became executor of the probate estate of Elaine T. Barthorpe ("Barthorpe Estate").

Between 1976 and 1982, petitioner misappropriated about $86,250 from the Barthorpe Estate. He used the money to purchase art and antiquities and to travel extensively. He wrote checks on the Barthorpe Estate's account and deposited them into his own account. There was no evidence that petitioner's misconduct caused contemporaneous harm to any of the Barthorpe Estate's beneficiaries, who continued to receive their fixed monthly payments from remaining estate funds.

As executor of the Barthorpe Estate, petitioner filed a final accounting in May 1982. As trustee, the Bank of America objected to the final accounting. In October 1982, petitioner and the Bank of America reached a stipulation for the delivery of funds to the Bank of America. In November 1982, the probate court found petitioner in contempt for failure to comply with the stipulation. On December 8, 1982, petitioner admitted to the probate court that he had misappropriated funds from the Barthorpe Estate, although he did not know the total amount involved. On December 10, 1982, he voluntarily sent the State Bar a letter admitting his misappropriation.

The probate court ordered petitioner to pay $232,955 to the Barthorpe Estate. This amount covered the misappropriated $86,250 plus $146,705 in interest, surcharges, fees, and costs incurred as a result of the misappropriation. As security for the debt owed to the Barthorpe Estate, petitioner voluntarily provided a deed of trust on his home and his interest in another real property, as well as a security interest in all his art, antiquities, and furniture. By May 1986, he had completed payment of the entire amount owed to the Barthorpe Estate.

Between December 1982 and May 1984, petitioner wound up his law practice. He then voluntarily became an inactive member of the State Bar and tendered his resignation with disciplinary charges pending. In September 1985, he entered into a stipulation with the State Bar regarding the facts of his misconduct. On December 30, 1985, the Supreme Court accepted his resignation, which became effective in January 1986.[1] **[1 - see fn. 1]**

Since his resignation, petitioner has worked as a paralegal for his son, Baron Miller, who represented him in these petition proceedings. He has also done some pro bono and volunteer work. After his resignation, petitioner administered another probate estate and remained co-trustee of a trust. He completed the distribution of funds in both matters without complication or impropriety.

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1. **[1]** Although petitioner resigned with disciplinary charges pending and was not disbarred, he must still establish his rehabilitation through a reinstatement proceeding. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1092, fn. 4; see also *Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 745; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 314, fn. 2; Trans. Rules Proc. of State Bar, rule 662.)

II. PROCEDURAL HISTORY

In June 1991, petitioner filed a petition for reinstatement. Hearings were conducted between December 1991 and February 1992. In June 1992, the hearing judge filed a decision recommending reinstatement. The deputy trial counsel seeks review on two grounds: that the record does not clearly and convincingly show petitioner's rehabilitation and present moral qualifications and that petitioner has improperly held himself out as entitled to practice law.

III. DISCUSSION

A. Independent Review of the Record

Petitioner contends that we must give great weight to the hearing judge's findings. Although her determinations of testimonial credibility deserve great weight, we must independently review the record. (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373, 382.) This review requires us to reweigh the evidence and pass upon its sufficiency. (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 315.)

B. Petitioner's Burden of Proof

Petitioner argues that although he bore a heavy burden of proof before the hearing judge, the deputy trial counsel now must show that the hearing judge's findings lack support in the evidence. **[2]** Although we give great deference to credibility determinations of the hearing judge, petitioner continues to bear a heavy burden of proof. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1091; *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 222.) He must present "overwhelming proof of reform" (*Feinstein* v. *State Bar* (1952) 39 Cal.2d 541, 547, and cases cited therein) and "must show by the most clear and convincing evidence that [his] efforts . . . towards rehabilitation have been successful." (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1092.) Such evidence must demonstrate "'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; see also *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 223.)

C. Requirements for Reinstatement

[3] To obtain reinstatement, a petitioner must pass the Professional Responsibility Examination ("PRE") and must show present ability and learning in the general law, as well as rehabilitation and present moral qualifications for readmission. (Trans. Rules Proc. of State Bar, rule 667.) The record shows that petitioner passed the PRE and has present ability and learning in the general law, and the deputy trial counsel does not argue otherwise. The main issue before us is whether petitioner has sufficiently established his rehabilitation and present moral qualifications. The deputy trial counsel's claim that petitioner has held himself out as entitled to practice law pertains to this issue.

D. Restitution

[4] "Restitution is fundamental to the goal of rehabilitation." (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1094.) It forces culpable attorneys to """confront in concrete terms""" the harm caused by their misconduct. (*Id.* at p. 1093, quoting *Brookman* v. *State Bar* (1988) 46 Cal.3d 1004, 1009, quoting *Kelly* v. *Robinson* (1986) 479 U.S. 36, 49, fn. 10.)

The deputy trial counsel suggests that the hearing judge overemphasized petitioner's restitution and argues that whether restitution constitutes significant evidence of rehabilitation depends on whether the payment was spontaneous. Because petitioner complied with the probate court's restitution order, the deputy trial counsel argues that his restitution was induced by "external pressures" and therefore is not a significant factor in favor of his reinstatement.

We disagree. **[5a]** External pressures to pay restitution for misappropriated funds, including court orders and agreements with the victims of misappropriation, are common. Despite such pressures, the Supreme Court has considered restitution in proceedings in which petitioners have obtained reinstatement. (*Resner* v. *State Bar* (1967) 67 Cal.2d 799, 802, 809-810 [restitution owed pursuant to an agreement with the victim of misappropriation]; *In*

re Gaffney (1946) 28 Cal.2d 761, 763, 764-765 [restitution owed pursuant to a promissory note to the victim of misappropriation]; *In re Andreani* (1939) 14 Cal.2d 736, 744-746, 750 [restitution owed pursuant to a stipulated judgment].) The Court has stressed that the weight to be accorded to restitution depends on the petitioner's attitude, as evidenced by a spirit of willingness, earnestness, and sincerity. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 810; *In re Gaffney*, *supra*, 28 Cal.2d at pp. 764-765; *In re Andreani*, *supra*, 14 Cal.2d at p. 750.)

[5b] Petitioner's restitution in the current proceeding deserves significant weight. After the Bank of America's objection to his final accounting for the Barthorpe Estate and his failure to pay the necessary sum to the Bank of America in 1982, his behavior was exemplary. He recognized the gravity of his misconduct and admitted his misappropriation to the probate court and the State Bar. He facilitated the use of an outside accountant to audit the records of the Barthorpe Estate. To ensure payment of the entire debt to the Barthorpe Estate, he provided a deed of trust on his home and his interest in another real property, as well as a security interest in all his art, antiquities, and furniture. By May 1986, he fully complied with the probate court order to repay both the misappropriated $86,250 and the additional $146,705 in interest, surcharges, fees, and costs. His conduct thus reflects an appropriate willingness, earnestness, and sincerity.

E. Postmisconduct Pro Bono Work and Community Service

[6a] Postmisconduct pro bono work and community service are factors evidencing rehabilitation and present moral qualifications. (See *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 317.) One successful petitioner for reinstatement attended church regularly and participated in community affairs for five years. (*Allen* v. *State Bar* (1962) 58 Cal.2d 912, 914.) Another successful petitioner participated in community affairs, donated time to the Red Cross, and was active in his church for a number of years. (*Werner* v. *State Bar* (1954) 42 Cal.2d 187, 190.) A third successful petitioner donated his services to civic and public projects for much of six years. (*In re Andreani*, *supra*, 14 Cal.2d at p. 748.)

[6b] The record reveals postmisconduct pro bono work and community service by petitioner. As a paralegal, he did pro bono research on a prisoner's rights in a capital case and on free speech issues in another matter. He also performed volunteer work for, and made donations to, the Jewish Community Museum. Although petitioner's showing of postmisconduct pro bono work and community service could have been clearer and more impressive (cf. *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 317 [one full day donated every week for four years to doing pro bono work for a legal services program]), such work and service still constitute a factor in favor of his reinstatement.

F. Postmisconduct Fiduciary Responsibilities

Observing that petitioner divested himself of control of his own funds after his misconduct, the deputy trial counsel claims that petitioner should neither have undertaken his fiduciary responsibilities for the other probate estate nor have continued his fiduciary responsibilities for the trust. She suggests that such conduct reflects a lack of proper caution, given his misappropriation from the Barthorpe Estate, and is not a significant factor in favor of his reinstatement.

We disagree. **[7]** Although a petitioner for reinstatement does not need to occupy a fiduciary position in order to prove rehabilitation (*Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 404; *Werner* v. *State Bar*, *supra*, 42 Cal.2d at p. 194), evidence that the petitioner has successfully occupied such a position after misconduct is of probative value. (*Werner* v. *State Bar*, *supra*, 42 Cal.2d at p. 194.) In *Jonesi* v. *State Bar* (1946) 29 Cal.2d 181, 182-183, the Supreme Court granted the reinstatement petition of an attorney who had been convicted of grand theft, but who later managed a great deal of money and proved himself to be very honest. In *Preston* v. *State Bar* (1946) 28 Cal.2d 643, 644-645, 646-647, 650, the Supreme Court granted the reinstatement petition of an attorney who had been convicted of four counts of recording a false instrument, as well as conspiracy to commit grand theft, but who later properly handled large sums of money and gained a reputation for integrity. Even though the sums involved in petitioner's exercise of fiduciary responsibilities for

the other probate estate and the trust were relatively small, his distribution of funds for the other probate estate and the trust without problems constitutes a factor in favor of his reinstatement. (See *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403, quoting *Roth* v. *State Bar* (1953) 40 Cal.2d 307, 313 [petitioner's evidence must be considered in light of prior moral shortcomings].)

G. Admission of Wrongdoing, Cooperation with Authorities, and Curtailment of Spending

[8] Rehabilitation requires an acceptable appreciation of one's professional responsibilities (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 548; see also *Roth* v. *State Bar*, *supra*, 40 Cal.2d at p. 314) and a proper attitude toward one's misconduct. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *Wettlin* v. *State Bar* (1944) 24 Cal.2d 862, 870.) In late 1982, when petitioner was unable to deliver the necessary funds for the Barthorpe Estate to the Bank of America, he confronted the severity of his misconduct. He confessed his wrongdoing to the probate court and the State Bar and cooperated with both. He told his family that he had committed a serious ethical violation and that he had decided to resign, rehabilitate himself, and seek readmission in the future. He and his wife ended the exaggerated lifestyle and excessive spending for which he had misappropriated funds. In May 1984, having wound up his practice, he voluntarily became an inactive member of the bar and submitted his resignation, which became effective in January 1986. His conduct since 1982 thus reflects an awareness of his professional responsibilities, as well as the gravity of his misconduct, and constitutes a significant factor in favor of his reinstatement.

H. Testimony by Character Witnesses and Letters of Reference

[9a] Character testimony and reference letters, especially from employers and attorneys, are significant in reinstatement proceedings. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547; *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 317-318; see also *Preston* v. *State Bar*, *supra*, 28 Cal.2d at p. 651.) Great consideration is due to "[t]estimony of members of the bar and public of high repute who have closely observed [a] petitioner" for reinstatement. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403; see also *In re Andreani*, *supra*, 14 Cal.2d at pp. 749-750 [heavy weight accorded to "the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living" of a petitioner].)

In this proceeding, petitioner presented testimony by five character witnesses: three attorneys, a municipal court judge, and a state appellate justice.[2] **[10 - see fn. 2]** All confirmed petitioner's good moral character prior to the disclosure of his misconduct, as well as his skill and professionalism as an attorney. Except for the state appellate justice, who expressed no opinion, all recommended his reinstatement.

Petitioner also presented four reference letters urging his reinstatement: three from attorneys and one from a shorthand reporter. These letter writers praised petitioner's honesty, integrity, and competence as an attorney.

The deputy trial counsel argues that petitioner's witnesses and reference letters attest to his past character, not to his present character. She states that petitioner has relied upon old friends and colleagues who have spent little, if any, time with him since his resignation.

[9b] Although the character witnesses who testified at trial on petitioner's behalf included impressive members of the bench and bar, only one had had the opportunity to observe him closely since his misconduct: Baron Miller, who is his son, employer, and counsel in this proceeding. Leland Spiegelman, petitioner's former partner, has had relatively brief, infrequent encounters with him since 1984; attorney

2. **[10]** The municipal court judge and the state appellate justice properly testified under subpoena. (Cal. Code Jud. Conduct, canon 2B; *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 28, fn. 1; *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 290, fn. 4; see *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 318, fn. 5.)

Frank Winston has not been in contact with him often during the last few years; and neither Justice Donald King nor Judge George Choppelas had seen him since 1982.

[9c] Three of the four persons who wrote reference letters have apparently had more recent contact with petitioner. Attorney David Katz asserted that he had known petitioner for 28 years and continued to know him. Attorney Lowell Sucherman stated that he had known petitioner professionally and socially for over 25 years and had continued a social relationship with petitioner after 1984. Shorthand reporter Daniel Benard indicated that he had known petitioner for over 30 years, had common friends with petitioner, and saw petitioner "somewhat often."

[9d] The testimony by character witnesses and the reference letters for petitioner are entitled to consideration as factors in favor of his reinstatement. Although petitioner's character evidence could have been stronger (see, e.g., *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 318-320), we do not agree with the deputy trial counsel that this evidence should be discounted entirely. Not every witness or letter writer must have recent close contact with petitioner. A variety of persons with different relationships to petitioner can reflect his present moral qualifications. (*Id.* at p. 319.) Overall, those who testified and wrote letters for petitioner provided evidence of his current good character.

I. Petitioner's Misconduct

[11a] On the basis of testimony by petitioner's character witnesses, the hearing judge concluded that his misconduct was aberrational. The deputy trial counsel disputes this conclusion on the ground that his misappropriation "was on-going over a period of years and involved several transactions." The evidence, however, reveals only that petitioner improperly drew "checks from the account" of the Barthorpe Estate "[o]ver a period of time" between 1976 and 1982 and that he could have begun using money from the account in 1976, 1977, or 1978. (I R.T. pp. 13, 62, 64.)

[11b] The record contains substantial evidence about petitioner's character before 1976. In her opening brief on review, the deputy trial counsel acknowledged that petitioner's character witnesses provided an impressive description of his premisconduct character. At oral argument, the deputy trial counsel conceded that we may properly take into account the fact that petitioner practiced law without misconduct for at least 37 years. Further, it is undisputed that he did extensive pro bono work during his legal career. Such evidence about his earlier character suggests that his misconduct was aberrational.

J. Examiner's Claim that Petitioner Has Held Himself out as Entitled to Practice Law

Citing various facts, the deputy trial counsel claims that petitioner has held himself out as entitled to practice law. None of these facts supports the claim.

1. Work in the same office

[12] After his resignation, petitioner continued to work as a paralegal in the office which he had maintained as an attorney. The record contains no credible evidence that while working as a paralegal, petitioner engaged in any acts constituting the practice of law.[3] The deputy trial counsel does not deny that petitioner had the right to become a paralegal. As the hearing judge observed, California law does not require an attorney who has resigned to leave his former place of work. At the age of 68, petitioner decided to remain in the same office and do paralegal work for his son. By doing such work, he was able to earn money, assist his son, and maintain his ability and learning in the law. We conclude that it was not improper for him to work as a paralegal in the same office where he had worked as an attorney.

3. A former client testified that petitioner had held himself out as entitled to practice law during the time when he was working as a paralegal. The hearing judge, who heard and saw the witness, found her testimony neither credible nor plausible. We have no reason to modify this credibility determination. (Trans. Rules Proc. of State Bar, rule 453(a).)

2. Sale agreement

On April 30, 1984, petitioner executed an agreement to sell his law practice to his son as of May 1, 1984. Pursuant to covenant 3 of the agreement, petitioner was to inform his existing clients that he was "retiring on or about May 1, 1984," to suggest that they retain his son as their attorney, and to advise them that he would "assist [his son] in handling" their matters. An addendum to the agreement was signed on April 30, 1986, effective as of May 1, 1986; and a restated, modified agreement was signed on April 30, 1991, retroactively effective as of May 1, 1984. The modified agreement did not contain a provision requiring him to advise his clients that he would assist his son in handling their matters.

The record contains no example of the letters which the agreement required petitioner to send to his existing clients. Nor does it indicate how many such letters petitioner sent or what they actually said. **[13a]** Petitioner offered undisputed testimony that during the period from December 1982 to May 1984, when he was winding up his practice, he "notified" clients that he would be "retiring," that he "would not be practicing law," and that his son "would be in practice" and available for them to retain. (I R.T. p. 27.) The examiner sought no clarification of this testimony.

The deputy trial counsel argues that by using the word "retiring," petitioner implied that he was making a voluntary choice and was still entitled to practice law. Also, because petitioner applied for reinstatement on June 4, 1991, the deputy trial counsel infers impropriety from the deletion of the provision about petitioner's assisting his son in the modified agreement signed on April 30, 1991.

Petitioner objects to the deputy trial counsel's suggestion that he had an obligation to inform his clients that he was resigning with discipline charges pending. Such an obligation, according to petitioner, would have further humiliated him and would make the legal profession "unbearably intolerant and self-righteous . . . ." He maintains that by using the word "retiring," he was seeking to preserve his dignity and avoid scorn. He also points out that the modified sale agreement reflects various changes in the arrangement with his son.

[13b] Because petitioner informed his clients of his "retiring" while he was still an active member of the bar before he submitted his resignation, he did not violate the requirement of rule 955 of the California Rules of Court that he notify them of his resignation and consequent disqualification from the practice of law. Undisputed evidence establishes that when he resigned, he had only one client, to whom he gave proper notification. As the deputy trial counsel acknowledged at oral argument, petitioner complied with rule 955.

Although petitioner used the word "retiring," his son told every former client who sought representation that petitioner was not practicing law. No evidence shows that any such client had a justifiable basis to suppose that petitioner was practicing law after May 1984.

[14] The record does not indicate whether petitioner, in winding up his practice, actually stated to his clients that he would assist his son in handling their matters. Even if he made such statements, they were proper so long as he did not suggest that he would act as their attorney. The record contains no evidence of such a suggestion.

Nor does the record show impropriety because the modified sale agreement deleted the provision requiring petitioner to inform his clients that he would assist his son. Petitioner's son offered uncontroverted testimony that the deletion was not intended to conceal the fact that the earlier agreement contained such a requirement. The modified agreement however reflects various alterations in the arrangement between petitioner and his son and was entered into on a reasonable date, the anniversary of the original agreement and the addendum.

[13c] It was evasive for petitioner to notify clients that he was "retiring." As he conceded at oral argument, he wanted to conceal his misconduct and the pending disciplinary proceedings. To protect his

reputation, he was less than straightforward with his clients.[4] Petitioner's evasiveness reflects to some extent on his acceptance of responsibility for his actions and is therefore relevant to his rehabilitation and present moral qualifications. On balance, however, we do not find that this factor mandates an adverse conclusion regarding petitioner's rehabilitation and present moral qualifications.

3. Checks payable to petitioner

[15] Two former clients of petitioner submitted checks payable to him for legal services from his son's firm in resolving a property dispute. He previously had told the former clients that he was not practicing law. Upon receiving the checks, he promptly endorsed them over to his son. Neither these checks nor his handling of them supports the deputy trial counsel's claim that he held himself out as entitled to practice law.

4. Plural references to attorneys

[16] Attorney-client contracts and letters from the law firm of petitioner's son, Baron Miller, contain plural references to attorneys. Undisputed evidence shows that petitioner was not aware of the plural references in the contracts, that Baron Miller signed the letters in question, and that Baron Miller, although the only attorney in the firm, hired other attorneys on a contract basis to help handle cases. Thus, the plural references do not establish that petitioner held himself out as entitled to practice law.

5. Work for the firm of Miller & Miller

Since May 1984, petitioner has worked for Baron Miller, who began using the business name "Miller & Miller" after petitioner's resignation. Baron Miller adopted the name because he "had always wanted to become [petitioner's] partner and for [the two] to call [themselves] Miller & Miller." Although he "no longer believed that that could ever happen, [he] decided [he] would at least use the name." Also, he adopted the name because he "could see the suffering [petitioner] was going through, the embarrassment and humiliation, and [he] hoped that [his] expression of [his] desire to do business as Miller & Miller would pick [petitioner] up emotionally." (I R.T. p. 138.)

When people have inquired "who the other Miller of Miller & Miller is," Baron Miller has informed "them there is no other Miller, that [petitioner] was a lawyer and that [he] began using the name after [petitioner] retired." (*Id.* at pp. 138-139.) The people who make such inquiries are "generally not clients," but "acquaintances, new people," who somehow learn that Baron Miller does business as Miller & Miller, perhaps by seeing his business card. (*Id.* at pp. 143-144.) Although Baron Miller found it "hard to say" how many such inquiries he had received "over the years," he estimated that the total number was "[m]aybe 10 or maybe 20." (*Id.* at p. 144.)

On rare occasions, people who knew petitioner and knew that petitioner no longer practiced law asked Baron Miller about the name "Miller & Miller." Baron Miller responded that "it is [his] business name and [he] like[s] it." (*Id.* at p. 139.)

Several times, petitioner questioned Baron Miller about using the firm name "Miller & Miller." Petitioner "had read a code section that [he] felt [Baron Miller] should examine" to determine the propriety of the name. Although the record does not specify the code section, petitioner testified that "[t]he code section applied to lawyers who were no longer members of the firm, had [*sic*] no bearing on existing lawyers, or the name of [*sic*] the existing lawyers use." (*Id.* at p. 171; see also *id.* at pp. 42, 72.)

Baron Miller told petitioner that the firm's name was beyond petitioner's control and that Baron Miller would do what he decided to do. (*Id.* at p. 43.)

4. The deputy trial counsel does not discuss petitioner's statements about his resignation to former clients who called petitioner after his resignation. According to petitioner's testimony, when he received such calls, he told them "that I have resigned; that I've retired" (I R.T. p. 39); "that I have resigned" (*id.* p. 69); and "that I had retired." (II R.T. p. 265.) The hearing judge concluded that petitioner could not "recall exactly whether he verbally told the clients that he had resigned or retired." We accept this conclusion. (Trans. Rules Proc. of State Bar, rule 453(a).)

Petitioner felt that the firm's name was beyond petitioner's control because Baron Miller was the attorney and petitioner was not. (*Id.* at p. 72.)

Baron Miller asserted that his use of the name "Miller & Miller" was no different from the use of a fictitious business name by any other firm. (*Id.* at pp. 138, 141-142.) Yet he conceded that the name "could be misleading." A person "who is unaware that [petitioner] is no longer practicing law and who knows that [petitioner] used to practice law would, perhaps, believe that Miller & Miller means Alfred Miller and Baron Miller . . .—that seems obvious . . . ." (*Id.* at p. 142; see also *id.* at p. 274 ["for anyone who knows Alfred Miller and does not know that he's no longer practicing law, yes, they could be confused into thinking that Miller & Miller means Alfred Miller and Baron Miller as practicing lawyers today"].) Baron Miller stressed, however, that "that is not the case with any of [his] clients nor has it ever been the case with any of [his] clients since the time that [he] started to use [the] name ['Miller & Miller'], because every single client who was previously a client of [petitioner's] has been informed by [Baron Miller] that [petitioner] is no longer practicing law." (*Id.* at p. 274.)

[17a] In a supplemental brief requested by the review department, the deputy trial counsel argues that Baron Miller's use of the name "Miller & Miller" violates Business and Professions Code section 6132, which became effective January 1, 1989. Pursuant to section 6132, a law firm must remove from its business name the name of an attorney who is disbarred or resigns with discipline charges pending. According to the deputy trial counsel, Baron Miller should have stopped using the name "Miller & Miller" after the enactment of section 6132.

[17b] In supplemental briefing, the deputy trial counsel also argues that Baron Miller's use of the business name "Miller & Miller" violates rule 1-400 of the Rules of Professional Conduct, which prohibits certain communications by attorneys seeking employment. As of May 27, 1989, rule 1-400(A) defined the term "communication" as "any message or offer made by or on behalf of a member [of the bar] concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client"; rule 1-400(A)(1) specified that the term "communication" includes the name of a firm; and rule 1-400(D)(2) provided that a communication shall not "[c]ontain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public."[5] According to the deputy trial counsel, the name "Miller & Miller" implies that Baron Miller and petitioner practice law together. The deputy trial counsel argues that this name "has the potential for misleading the public," that "[p]etitioner knew this," and that petitioner asked Baron Miller not to use the name. "At the very least," contends the deputy trial counsel, petitioner's "passivity with regard to the use of the name shows a disregard for the potential for misleading the public and [petitioner's] former clients."

[17c] The deputy trial counsel's supplemental brief suggests that Baron Miller's use of the name "Miller & Miller" also violated the predecessor of current rule 1-400: former rule 2-101 of the Rules of Professional Conduct, effective from January 1, 1975, to May 26, 1989. Former rule 2-101(A) defined the term "communication" as "a message concerning the availability for professional employment of a member [of the bar] or a member's firm." Like current rule 1-400(D)(2), former rule 2-101(A)(2) prohibited any communication "which is false, deceptive, or which tends to confuse, deceive or mislead the public." Although former rule 2-101 did not list examples of what constitutes a communication in the way that current rule 1-400(A) does, the definition of a communication in former rule 2-101(A) was broad enough to encompass the name of a law firm. Also, as the examiner points out, California Ethics Opinion 1986-90 specified that former rule 2-101(A) applied to the name of a firm. (See Cal. Compendium on

5. Although some of the Rules of Professional Conduct were revised as of September 14, 1992, the relevant provisions of rule 1-400 remain the same.

Prof. Responsibility, pt. IIA, State Bar Formal Opn. No. 1986-90, at p. IIA-271.)

[17d] The examiner points to the possible violation by the law firm of section 6132 of the Business and Professions Code, as well as current rule 1-400 and former rule 2-101 of the Rules of Professional Conduct. Any alleged misconduct by the member who controlled the law firm—Baron Miller—is not before us for adjudication. The relevant issue for this reinstatement proceeding is whether and to what extent petitioner's showing of rehabilitation and present moral qualifications to practice law suffers because of his working as a paralegal for Baron Miller after Baron Miller began doing business as Miller & Miller.

[18a] Even if petitioner Alfred Miller had no control over the firm name—and there is no evidence in this record that he did—petitioner was obviously aware that the name "Miller & Miller" could confuse the public. Petitioner's repeated questioning of Baron Miller about the use of the name reveals concern about its propriety. That he continued to work as a paralegal for Baron Miller in circumstances where the public and clients could easily be misled clearly calls into question his showing of rehabilitation and present moral qualifications. However, the issue of whether petitioner held himself out as practicing law was the subject of close inquiry below; and we must defer to credibility determinations made by the hearing judge. Petitioner and Baron Miller were found to have undertaken successful efforts to ensure that clients were not misled into mistakenly believing that petitioner was practicing law. No credible evidence was found to establish either that the public or clients were in fact misled or that petitioner did ever practice law after his resignation.

[18b] Put in a positive light, petitioner's questioning of his son's choice of firm name can be interpreted as underscoring his concern for compliance with ethical obligations, not passivity and disregard for such obligations. Given petitioner's advanced age and familial relationship, it is understandable that he did not cease working as a paralegal at Miller & Miller even though he was uncomfortable with the firm name. Based on the credibility findings below, we cannot conclude that petitioner's continued employment as a supervised paralegal for Baron Miller after Baron Miller started doing business as Miller & Miller by itself establishes lack of rehabilitation or present moral qualifications to practice law.

In supplemental briefing, the deputy trial counsel also suggests the applicability to the current proceeding of *Crawford* v. *State Bar* (1960) 54 Cal.2d 659. In *Crawford*, an attorney formed a partnership with his father, who had recently been disbarred. They called the partnership "Crawford & Crawford" and divided the profits equally. Although the father was not named as an attorney and did not appear in court, he gave legal advice independent of the son and conferred directly with clients regarding the preparation of deeds and certificates, probate matters, escrows, real estate deals, and mining claims. The son was publicly reproved for violating a former rule prohibiting a member of the bar from employing another to solicit and for aiding or abetting the unauthorized practice of law.

The facts of the current proceeding differ radically from the facts of *Crawford*. Petitioner and Baron Miller did not form a partnership. Petitioner received wages, not a percentage of Baron Miller's profits. Petitioner did not give legal advice. Although petitioner was found to have met once with a client at Baron Miller's request when an emergency prevented Baron Miller from meeting with the client, petitioner did not act as an attorney and only gathered information for Baron Miller. Thus, *Crawford* does not apply to the current proceeding.

K. Petitioner's Showing of Rehabilitation and Present Moral Qualifications

[19] Rehabilitation is a state of mind which may be difficult to establish. (*Resner* v. *State Bar*, *supra*, 67 Cal.2d at p. 811; *In re Andreani*, *supra*, 14 Cal.2d at p. 749; *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 315.) Readmission to the bar does not require perfection. (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 315; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 37.) Nor should we place unnecessary burdens upon erring attorneys in proving rehabilitation and present moral qualifications. (*Tardiff* v. *State Bar*,

supra, 27 Cal.3d at p. 404; *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 315.) **[20a]** "Whether petitioner has met his heavy burden [of proof] depends on a comparison of the facts of the current proceeding with the facts in other reported California reinstatement proceedings." (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 320.)

[20b] Despite alleged weaknesses in their showings of rehabilitation and present moral qualifications, various petitioners have obtained reinstatement. In *Allen* v. *State Bar*, *supra*, 58 Cal.2d 912, Allen had pled guilty in 1957 to two counts of soliciting others to commit perjury and had been disbarred in the same year. Thereafter, he did some legal research and law-related work, but supported himself mainly through other employment. At his reinstatement proceeding, his honesty, integrity, and rehabilitation were attested to by numerous character witnesses, including a deputy probation officer, a businessman, three attorneys, a dentist, and a former employer. The minister of Allen's church testified that Allen had gained a new realization of the responsibilities and requirements of an attorney. In addition, Allen maintained his family relationships, attended church regularly, and participated in community affairs. Yet his application for reinstatement posed problems. After his disbarment, he engaged in activities that bordered upon, if they did not constitute, the practice of law. He asked questions at an administrative hearing on behalf of his employer when the employer's attorney was unable to attend the hearing, and he corrected and filed a brief after the hearing. He may have been indiscreet in associating with persons of questionable reputation; and he had minor errors in his income tax returns and his petition for reinstatement, although no evidence showed that he made these errors in order to deceive anyone. The Supreme Court concluded that these problems did not warrant denial of his reinstatement.

In *Resner* v. *State Bar*, *supra*, 67 Cal.2d 799, Resner had been disbarred for mishandling client funds. Prior to his disbarment in 1960, disciplinary charges were also pending against him for misappropriation from a client. During his misconduct, Resner suffered from severe emotional problems. After his disbarment, Resner worked in real estate development and did legal research for various lawyers. Numerous attorneys commented on his rehabilitation, trustworthiness, fiduciary responsibility, and character and recommended his reinstatement. His girlfriend and a former legal associate testified that he no longer suffered from his prior emotional problems. An attorney and long-time friend testified that he recognized his misconduct and was full of remorse. Although the Supreme Court recognized that he had improperly filed a general denial in a civil action against him, it reinstated him because of the general strength of his showing of rehabilitation and present moral qualifications.

In *Werner* v. *State Bar*, *supra*, 42 Cal.2d 187, Werner had been charged in 1937 with soliciting the offer of a bribe and with attempted grand theft. Although eventually acquitted on both criminal charges, he had been disbarred in 1944 on the basis of the record in the criminal case. After his disbarment, he worked at first for a railroad and later as a research clerk and appraiser for an attorney. He took an active role in community affairs and in his church and donated substantial time to the Red Cross. Many members of the bench and bar and many lay witnesses testified that he was a man of honesty, integrity, and fidelity. Among the witnesses were men who had known him throughout his career and who were familiar with the events leading to his disbarment and since his disbarment. He was restored to membership in fraternal organizations which had excluded him for moral reasons after his disbarment. The Southern California Women Lawyers investigated him and recommended his reinstatement. Although the Supreme Court recognized that he had made unwarranted denials in verified pleadings in civil actions brought against him after his disbarment, it reinstated him because of the general strength of his showing of rehabilitation and present moral qualifications.

[21] In the current proceeding, petitioner's admission of misconduct, cooperation with authorities, lifestyle changes, curtailment of spending, and restitution are significant factors in favor of his reinstatement. Also, his postmisconduct pro bono work, community service, and handling of fiduciary responsibilities, as well as the character witnesses' testimony and reference letters which he presented,

support his reinstatement. **[20c]** Although his notifications to clients that he was "retiring" were evasive and although his working as a paralegal for Baron Miller when he questioned the propriety of Baron Miller's doing business as Miller & Miller deserves criticism, these factors by themselves do not establish a lack of rehabilitation and present moral qualifications to practice law. Overall, his showing of rehabilitation and present moral qualifications is as strong as the showings by Allen, Resner, and Werner.

[20d] The facts of the current proceeding are distinguishable from the facts of reported reinstatement proceedings in which the petitioners have failed to prove rehabilitation and present moral qualifications. (See, e.g, *Hippard* v. *State Bar*, *supra*, 49 Cal.3d 1084, 1098 [no meaningful attempt by petitioner to make restitution in whole or in part and no inability to do so]; *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d 395, 405 [continued misdeeds by petitioner long after disbarment]; *Feinstein* v. *State Bar*, *supra*, 39 Cal.2d 541, 548 [no recognition by petitioner of wrongdoing and no attempt to determine whether his activities had resulted in losses to others or to reimburse his victims]; *In the Matter of Wright*, *supra*, 1 Cal. State Bar Ct. Rptr. 219, 227-228 [no effort by petitioner to pay certain creditors, lack of concern by petitioner to keep creditors informed of his whereabouts, character evidence limited to an affidavit from an attorney employer, failure by petitioner to inform the employer of his disbarment, and omission from his reinstatement application of a relatively recent lawsuit against the employer]; *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. 25, 32-33, 37-38 [inexcusable carelessness by petitioner in his application for reinstatement by failing to disclose two lawsuits to which he was a party].) Evidence of the sort which prevented reinstatement in these reported proceedings is not found in the current proceeding.

Recently, in *In the Matter of Brown*, a hearing judge also made credibility determinations in favor of the petitioner to which we deferred. There, however, the findings made by the hearing judge were inconsistent with her conclusion that Brown had not proved rehabilitation and present moral qualifications to practice law. (See *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 315, 317, 318, 320-321.) In the current proceeding, the hearing judge made findings which were consistent with her ultimate conclusion. Unlike *In the Matter of Brown*, precedent supports the hearing judge's conclusion in the current proceeding.

IV. CONCLUSION AND RECOMMENDATION

[20e] We conclude that petitioner has met the requirements for reinstatement. We thus recommend to the Supreme Court that petitioner be reinstated as a member of the State Bar upon his paying the necessary fees and taking the required oath.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RAYMOND C. GRUENEICH

A Member of the State Bar

Nos. 91-N-05518, 91-P-06419

Filed May 14, 1993

SUMMARY

As a result of misconduct involving abandonment of clients and failure to return unearned fees, respondent previously received three years stayed suspension and was actually suspended for four months, placed on probation, and ordered to comply with rule 955, California Rules of Court. In this proceeding, respondent was found to have failed to comply with rule 955 and to have violated several conditions of his probation. The hearing judge, finding mitigating circumstances including respondent's numerous pro bono activities and severe personal problems, declined to recommend disbarment and instead recommended actual suspension for 30 months and until respondent could show rehabilitation and fitness to practice. (Hon. Alan K. Goldhammer, Hearing Judge.)

The State Bar Office of Trials requested review, seeking respondent's disbarment pursuant to recent Supreme Court decisions in rule 955 proceedings. Respondent had participated only intermittently in the disciplinary proceeding at the hearing level and failed to file a brief on review. Despite respondent's demonstration of high personal ethics and dedication to client causes, he had injured clients in whose cases he had lost interest and had failed to comply with numerous stipulated conditions of his original suspension order, including rule 955. Although this failure was due to chronic disorganization rather than venality, respondent had shown no likelihood of getting his practice under control. The review department held that under the circumstances, applicable case law compelled a recommendation of disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Mark Torres-Gil

For Respondent: No appearance

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] **130 Procedure—Procedure on Review**
165 Adequacy of Hearing Decision
166 Independent Review of Record
1093 Substantive Issues re Discipline—Inadequacy

Where Office of Trials argued that recommended discipline was too low in light of existing findings, and also suggested supplemental findings, and on de novo review, review department agreed that discipline was insufficient in light of findings made by hearing judge, review department did not need to address issue of supplemental findings.

[2 a-f] **582.10 Aggravation—Harm to Client—Found**
750.52 Mitigation—Rehabilitation—Declined to Find
760.34 Mitigation—Personal/Financial Problems—Found but Discounted
765.10 Mitigation—Pro Bono Work—Found
1911.20 Rule 955—Failure to Appear
1913.24 Rule 955—Delay—Filing Affidavit
1913.42 Rule 955—Compliance—Notice

Disbarment is generally the appropriate sanction for a wilful violation of rule 955, California Rules of Court. Where respondent not only failed to notify courts and file timely affidavit of compliance as required by rule 955, but also had wilfully failed to comply with other stipulated conditions of prior discipline; respondent had injured a number of clients, and posed substantial risk of continuing to do so; respondent's participation in rule 955 proceeding was sporadic; respondent provided evidence of personal problems but no evidence that he was likely to overcome them, organize his practice, and comply with prior disciplinary probation; and respondent provided no evidence of rehabilitation, but rather evidence that his problems had increased, then despite respondent's history of pro bono work, idealism, honesty, and altruism, disbarment recommendation was required for public protection.

[3] **114 Procedure—Subpoenas**
148 Evidence—Witnesses
199 General Issues—Miscellaneous
740.10 Mitigation—Good Character—Found

Judges are required under canon 2B of the California Code of Judicial Conduct not to testify voluntarily as character witnesses, but where subpoenas were issued to compel judges to testify, their declarations regarding good character of disciplinary respondent could be considered by State Bar Court.

[4] **204.90 Culpability—General Substantive Issues**
430.00 Breach of Fiduciary Duty
582.10 Aggravation—Harm to Client—Found
586.19 Aggravation—Harm to Administration of Justice—Found
765.39 Mitigation—Pro Bono Work—Found but Discounted

An attorney owes the same fiduciary obligations to all clients, paying or nonpaying. Impecunious clients are ill-served by well-meaning attorneys who fail to deliver the services for which they were engaged. Nor are the courts or public served by litigation brought without likelihood it can be realistically be prosecuted to completion.

[5] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
173 Discipline—Ethics Exam/Ethics School
1715 Probation Cases—Inactive Enrollment
1911.90 Rule 955—Other Procedural Issues
2503 Reinstatement—Showing to Shorten Waiting Period

Review department, in recommending respondent's disbarment for failure to comply with rule 955, California Rules of Court, was not required to address issue whether time respondent had already spent on inactive enrollment due to probation violation, or on suspension due to failure to pass professional responsibility examination, should be counted toward required waiting period to apply for reinstatement. (Trans. Rules Proc. of State Bar, rule 662.) Respondent could raise those issues before a hearing judge at the time he wished to file a reinstatement petition.

ADDITIONAL ANALYSIS

Culpability
Found
1915.10 Rule 955
Aggravation
Found
511 Prior Record
Discipline
1810 Disbarment
1921 Disbarment
Other
1751 Probation Cases—Probation Revoked

OPINION

PEARLMAN, P.J.:

In May of 1991, as a result of stipulated misconduct primarily involving abandonment of several clients and failure to return unearned fees, respondent received three years stayed suspension and was ordered actually suspended for four months, placed on probation and ordered to comply with the notification requirements of rule 955, California Rules of Court (hereafter "rule 955").[1] In these consolidated proceedings for alleged violation of probation and wilful failure to comply with rule 955, respondent was found to have failed to file the affidavit required by rule 955(c) for almost one year after it was due despite repeated warnings from his probation monitor, the examiner and the hearing judge that failure to comply with the requirements of that rule generally results in disbarment. He was also found to have substantially failed to comply with rule 955(a) and to have failed to file any required probation reports, prepare a law office management plan, or make restitution to clients as he had been ordered to do as conditions of his probation.

Based on the numerous probation violations, the hearing judge exercised his authority to place respondent on immediate inactive enrollment pursuant to Business and Professions Code section 6007 (d)[2] from the date of his decision until further order of this court or the Supreme Court. However, after finding mitigating circumstances, including respondent's numerous pro bono activities for which he received a State Bar president's pro bono publico award, and severe personal problems, the hearing judge recommended a total of 30 months suspension and compliance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) in lieu of disbarment.

The Office of Trials requested review, seeking disbarment pursuant to recent Supreme Court decisions in rule 955 proceedings. Respondent failed to file an opposing brief and we consequently precluded him from appearing at oral argument.

Despite respondent's demonstration of high personal ethics and dedication to particular client causes since he was admitted to practice in 1979, the record shows that he has injured a number of other clients in whose cases he apparently lost interest but failed to withdraw and has repeatedly failed to comply with numerous stipulated conditions of his original suspension order including compliance with rule 955. This failure was found to be due to chronic disorganization rather than venality, but respondent has shown no likelihood of getting his practice under control. The applicable case law, which we recently reviewed in *In the Matter of* Babero (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, appears to compel disbarment under these circumstances and we so recommend to the Supreme Court.

DISCUSSION

[1] The findings below were extensive and are for the most part unchallenged on review. However, the Office of Trials has suggested a number of supplemental findings, in addition to arguing that the degree of discipline is too low in light of the existing findings. Upon undertaking de novo review of the record we agree that the recommended discipline is insufficient in light of the findings made by the hearing judge. We therefore do not need to address the supplemental findings urged by the Office of Trials.

[2a] As the Supreme Court reiterated in *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131, "disbarment is generally the appropriate sanction for a wilful violation of rule 955." The hearing judge found that respondent wilfully failed to comply with the requirements of rule 955. Bercovich, like respondent, filed a belated declaration attempting to justify

1. Rule 955 required respondent to give timely notification to clients, courts and opposing counsel of his disciplinary suspension by registered or certified letter, to deliver to all clients in pending matters their papers or property and to file a timely affidavit with the Supreme Court showing he complied with this rule.

2. Under Business and Professions Code section 6007 (d), a hearing judge may order involuntary inactive enrollment of an attorney immediately upon a finding of violation of probation when the attorney is already under a suspension order any portion of which has been stayed and the hearing judge recommends actual suspension.

his failure to comply with rule 955(c). Bercovich argued that his inaction was based on emotional and medical problems. Bercovich had been active in bar activities and had been a judge pro tempore of the municipal court, but none of the evidence offered in mitigation was found to justify a sanction short of disbarment. In particular, the Supreme Court noted Bercovich's consistent untimeliness in the State Bar proceedings as raising "a serious question as to his ability and fitness to practice law." (*Id.* at p. 132.) With respect to his attempt to attribute his shortcomings to emotional difficulties, the Supreme Court noted that "if we accept petitioner's claim of emotional paralysis, we must ask whether he can now practice law in accordance with the standards of professional conduct. He provides no evidence that he is able to do so." (*Ibid.*)[3] **[2b - see fn. 3]**

[2c] There are a number of similarities here to the situation in *Bercovich*. In the court below, respondent was also repeatedly untimely,[4] and he did not participate at all on review. With respect to respondent's law practice, the hearing judge noted that "while the quality of his work is excellent on particular aspects of particular cases, he is unable to handle a caseload without neglecting and dissatisfying clients." No evidence of rehabilitation was offered. To the contrary, the hearing judge pointed to respondent's own testimony that he has become increasingly disorganized; that he had become preoccupied with the needs of his profoundly handicapped son to the detriment of his practice; and that he was aware that he had obtained a reputation that he "was slipping between the cracks in cases." Respondent's situation is exacerbated by the vow of poverty he has taken, but he has repeatedly accepted new low-paying or no-fee cases with insufficient funding by clients of anticipated costs when he was already unable to handle his existing caseload.

Respondent's inability to manage his practice without client neglect is extremely unfortunate. In his career, he has represented at little or no cost a number of clients who could not otherwise obtain representation. Four clients and an attorney provided evidence on respondent's behalf below as did two judges.[5] **[3 - see fn. 5]** One judge, who vouched for respondent's passionate concern for his clients, stated that he has "never met an attorney who more embodied the ideals of our legal profession[;] . . . his first priority is his own integrity with his clients, with opposing counsel and with the Court . . . . We need a few Rays in our world . . . . The idealistic lawyer operating on the fringe, unencumbered by economics, keeps us all honest . . . a constant reminder to the bench that we are here to do justice . . . not to be compromised on the alter [sic] of judicial efficiency, and that the rights of the individual citizen are to be zealously guarded and enforced."

[2d] Despite his idealistic goals, respondent has admitted to failure to meet deadlines or adequately advance several cases in which he remains counsel of record (the Saunders/Syracusa matters and the Assenza, Avila, Bishop, and Deming matters). **[4]** He has a prior record of discipline pursuant to stipulation in case number 88-O-11973 which involved seven different clients, five of whom had never received the return of unearned fees and a sixth who had loaned money to respondent without ever receiving repayment. The same fiduciary obligations exist to all clients, paying or nonpaying. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 780.) Respondent's honesty and altruism are undisputed. However, respondent has not recognized that impecunious clients are ill-served by well-meaning attorneys who fail to deliver the services for which they were engaged. Nor are the courts or public served by litigation brought without likelihood that it can realistically be prosecuted to completion.

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3. The Supreme Court found Bercovich's belated claims of emotional and physical problems untimely and insufficiently documented to affect its decision. (*Id.* at p. 127.) However, it considered the merits of his claim of emotional incapacity in any event because of the ultimate nature of the sanction recommended by the State Bar. (*Ibid.*) **[2b]** Here, respondent provided timely evidence of his personal problems but provided no evidence that he was likely to overcome his problems, organize his practice and comply with the probation terms if a sanction short of disbarment were ordered.

4. Respondent waited until after the Office of Trials applied for an entry of default before he filed an answer to the notice to show cause re revocation of probation. Respondent failed to file a pretrial statement and failed to appear at the pretrial conference although he did appear at the trial.

5. **[3]** The judges' declarations were submitted pursuant to subpoenas being issued to compel their testimony. Judges are required under canon 2B of the California Code of Judicial Conduct not to testify voluntarily as character witnesses. (See *In re Rivas* (1989) 49 Cal.3d 794, 798.)

As indicated above, the prior disciplinary proceeding against respondent resulted in, among other things, respondent's actual suspension for four months as well as various probation conditions his violation of which resulted in one of the two consolidated proceedings before us. Also as part of respondent's prior stipulated discipline, the Supreme Court ordered respondent to take and pass the professional responsibility examination ("PRE") and to comply with rule 955.

[2e] In the trial below, respondent was found to have made some informal efforts to comply with rule 955(a) by orally notifying clients, courts and opposing counsel and to have made some belated formal notifications to clients and opposing counsel, but not to have filed any required notices in the courts where the actions were pending. Respondent did not file his rule 955 affidavit until July 17, 1992, which he himself described as "an effort to at least belatedly accomplish partial substantial compliance with the Order of the Supreme Court filed on May 15, 1991 . . . ." He further was found to have failed to file any probation reports, to develop his law office management plan or to make any meaningful payments in restitution. The hearing judge found that "his self-imposed poverty is not an adequate excuse for his failure to reimburse his clients for moneys they lost due to respondent's carelessness or incompetence." Respondent further failed to take the PRE and was suspended therefor by order of this court dated June 23, 1992, effective July 4, 1992, and has remained on suspension ever since.[6]

[2f] Respondent's involvement in these State Bar proceedings has been sporadic. His concern for his license has apparently diminished as his personal problems have increased. Some similarities exist to *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, in which the respondent repeatedly failed to comply with probation conditions and the rule 955 requirement and, like respondent, failed to participate on review despite a request for her disbarment. We recommended disbarment in that case, not because of any evidence of acts of dishonesty, but because it appeared necessary to protect the public, enforce professional standards and maintain public confidence in the legal profession. (Cf. *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 16.) Because respondent has demonstrated wilful failure to comply with stipulated conditions of his prior discipline, has already injured a number of clients and poses a substantial risk of continuing to do so, public protection dictates a disbarment recommendation as a result of the findings in these consolidated proceedings as well.

If respondent can successfully address his problems he will be able to seek reinstatement with the possibility of again becoming an effective advocate for clients.[7] **[5 - see fn. 7]** It is ironic that his concern for client welfare has not extended to taking the necessary steps to comply with stipulated disciplinary conditions of his prior suspension designed to permit him to maintain his license to practice law.

For the reasons stated above, we recommend that respondent Raymond C. Grueneich be disbarred from the practice of law in this state and that costs of this proceeding be awarded the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:
NORIAN, J.
STOVITZ, J.

6. We take judicial notice that he also has not paid his State Bar dues and was suspended on that basis as well effective August 10, 1992.

7. **[5]** Rule 662 of the Transitional Rules of Procedure of the State Bar requires a petition for reinstatement to be filed five years after disbarment or resignation with charges pending. For good cause a petition for reinstatement may be considered three years after the effective date of a member's disbarment or resignation with charges pending. That rule expressly gives credit for time spent on interim suspension against the five-year or three-year period. In *In re Lamb* (1989) 49 Cal.3d 239, 249, the Supreme Court gave the respondent credit for stipulated time on inactive enrollment against the waiting period for seeking reinstatement "[u]nder the circumstances, and in furtherance of the policy that disbarred attorneys should receive 'credit' against the reinstatement period for any related interim ban on practice." Whether time spent on inactive enrollment under section 6007 (d) and time under suspension for failure to pass the PRE should be counted toward the required waiting period have not been addressed by the parties and we need not reach these issues at this juncture. If the Supreme Court adopts our recommendation or accepts respondent's resignation and respondent wishes to petition for reinstatement at the earliest possible date, he can at that time raise these issues before a hearing judge. If either period is so adjudicated, the time period for applying for reinstatement would run from either July 4, 1992 (PRE suspension), or September 11, 1992 (section 6007 (d) order), rather than the effective date of the Supreme Court order.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CHARLES FITZGERALD HOWARD

A Member of the State Bar

No. 91-P-04064

Filed June 17, 1993

SUMMARY

In a probation revocation proceeding, respondent was found to have violated the terms and conditions of his disciplinary probation by failing to timely deliver certain financial records pertaining to his former client to a certified public accountant, by failing to show satisfactory proof that he had complied with a certain superior court order, and by failing to submit certain quarterly reports. Respondent's default was entered for failing to file an answer to the notice to show cause, and the hearing judge, after a default hearing, recommended that 90 days of respondent's previously imposed stayed suspension be revoked and that respondent be actually suspended from the practice of law for 90 days. (Hon. Christopher W. Smith, Hearing Judge.)

The Office of Trial Counsel sought review solely on the issue of the degree of discipline, contending that the recommended discipline should be increased to two years actual suspension along with the requirement that respondent demonstrate his rehabilitation, present fitness to practice and present learning and ability in the general law before being relieved of the actual suspension. The review department concluded that the circumstances of the probation violations and the prior discipline, coupled with respondent's failure to participate in the proceeding, warranted increasing the recommended discipline to one year actual suspension with the requirement that respondent demonstrate his rehabilitation, present fitness to practice and present learning and ability in the general law before being allowed to resume the practice of law. The review department also placed respondent on involuntary inactive enrollment for the probation violations, so that the actual suspension would commence immediately.

COUNSEL FOR PARTIES

For Office of Trials: Gene S. Woo

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**
107 Procedure—Default/Relief from Default
165 Adequacy of Hearing Decision
565 Aggravation—Uncharged Violations—Declined to Find
1711 Probation Cases—Special Procedural Issues

A respondent may be disciplined only for misconduct properly charged in the notice to show cause. In probation revocation matter, where notice to show cause charged that respondent failed to deliver financial records to an accountant, and hearing judge found that respondent failed to render an accounting, respondent was properly found culpable of failing to deliver the records, based on his admission by default of the allegations of the notice to show cause. Respondent's failure to file quarterly reports other than those listed in the notice to show cause could not be used as a basis for culpability or as aggravating circumstances in a default matter.

[2] **106.30 Procedure—Pleadings—Duplicative Charges**
130 Procedure—Procedure on Review
165 Adequacy of Hearing Decision
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
251.10 Rule 1-110 [former 9-101]

Where respondent violated Supreme Court order imposing disciplinary probation, and hearing judge properly found that respondent had violated statute requiring compliance with probation conditions, respondent was also culpable of violating statute requiring compliance with court orders. However, review department did not need to modify hearing judge's decision to include additional statute and rule violations where review department's recommendation did not depend on whether the misconduct also violated those additional duplicative violations.

[3] **172.19 Discipline—Probation—Other Issues**
802.30 Standards—Purposes of Sanctions
1719 Probation Cases—Miscellaneous

The primary goal of disciplinary probation is the protection of the public and rehabilitation of the attorney.

[4] **171 Discipline—Restitution**
176 Discipline—Standard 1.4(c)(ii)
214.10 State Bar Act—Section 6068(k)
1714 Probation Cases—Degree of Discipline

Where respondent violated conditions of disciplinary probation by failing to turn over former client's files and records, precluding accountant from assessing losses incurred due to respondent's misconduct so that determination could be made regarding restitution, such probation violations were serious and warranted lengthy actual suspension and requirement to prove rehabilitation, learning in the law, and fitness to practice before returning to law practice.

[5] **176 Discipline—Standard 1.4(c)(ii)**
179 Discipline Conditions—Miscellaneous
802.69 Standards—Appropriate Sanction—Generally
1099 Substantive Issues re Discipline—Miscellaneous
2329 Section 6007—Inactive Enrollment for Failure to Answer—Miscellaneous

Normally, the requirement that a disciplined attorney show rehabilitation, fitness to practice, and learning in the law prior to returning to practice is imposed where the attorney's actual suspension is two years or greater. However, where period of time that attorney was enrolled inactive on account of failure to answer notice to show cause, coupled with one-year actual suspension recommended by review department, resulted in attorney being continuously ineligible to practice law for greater than two years, it was appropriate to recommend compliance with such requirement.

[6] **172.19 Discipline—Probation—Other Issues**
176 Discipline—Standard 1.4(c)(ii)
179 Discipline Conditions—Miscellaneous
802.30 Standards—Purposes of Sanctions
802.69 Standards—Appropriate Sanction—Generally
1099 Substantive Issues re Discipline—Miscellaneous

In attorney disciplinary matters, a period of stayed suspension subject to probation conditions is applied primarily as an additional measure to protect the public, courts and legal profession. However, where one-year actual suspension, coupled with requirement that attorney demonstrate rehabilitation, present fitness to practice and present learning in the law before being relieved of his actual suspension, would protect public, courts and profession, review department concluded that stayed suspension and probation were not necessary.

[7 a, b] **106.90 Procedure—Pleadings—Other Issues**
130 Procedure—Procedure on Review
165 Adequacy of Hearing Decision
166 Independent Review of Record
1715 Probation Cases—Inactive Enrollment

In probation revocation matter, where notice to show cause informed respondent who was subject to stayed suspension that he could be enrolled inactive upon finding of probation violation and recommendation of actual suspension therefor, it would have been appropriate for hearing judge to order such inactive enrollment with or without request from Office of Trial Counsel, and where hearing judge had not done so, review department made such order. Under statute providing that inactive enrollment for probation violation shall be credited against ensuing actual suspension, review department recommended that respondent's one-year actual suspension commence as of the date of his inactive enrollment.

[8] **173 Discipline—Ethics Exam/Ethics School**
1719 Probation Cases—Miscellaneous

In probation revocation matter, where order imposing probation had also required that respondent pass professional responsibility examination and respondent had not yet done so, review department recommended that this provision of original discipline order remain in effect notwithstanding revocation of probation.

ADDITIONAL ANALYSIS

Culpability

Found

214.11 Section 6068(k)
220.01 Section 6103, clause 1

Not Found

251.15 Rule 1-110 (former 9-101)

Aggravation

Found

511 Prior Record
611 Lack of Candor—Bar

Discipline

1815.06 Actual Suspension—1 Year

Probation Conditions

1830 Standard 1.4(c)(ii)

Other

1093 Substantive Issues re Discipline—Inadequacy
1751 Probation Cases—Probation Revoked

OPINION

NORIAN, J.:

We review this matter at the request of the Office of Trial Counsel of the State Bar. A hearing judge of the State Bar Court found that respondent, Charles Fitzgerald Howard, was culpable of violating certain conditions of his previously imposed disciplinary probation and recommended that he be actually suspended from the practice of law for a period of 90 days. Respondent's default was entered because he failed to file an answer to the notice to show cause and he has been inactively enrolled as a member of the State Bar since March 1992 pursuant to Business and Professions Code section 6007 (e). The Office of Trial Counsel sought review solely on the issue of the degree of discipline, contending that the recommended discipline should be increased to two years actual suspension along with the requirement pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("standard(s)") that respondent demonstrate his rehabilitation, present fitness to practice and present learning and ability in the general law before being relieved of the actual suspension. Although our opinion modifies the hearing judge's decision, we adopt his basic conclusion that respondent is culpable of violating his previously imposed disciplinary probation conditions. Based on our independent review of the record, we conclude that the recommended discipline should be increased to one year actual suspension and until he has satisfied the requirements of standard 1.4(c)(ii) that he demonstrate his rehabilitation, fitness to practice and learning and general ability in the law before being allowed to resume the practice of law.

FACTS

The hearing judge made limited findings of fact. We augment those findings with the following, which we conclude are established by clear and convincing evidence in the record.

A. Previous discipline

Respondent was admitted to practice law in California in June 1949. Effective September 21, 1990, the Supreme Court suspended him from the practice of law for three years, stayed the execution of that suspension, and placed him on probation for three years subject to certain conditions, including actual suspension for the first thirty days of probation. (*In the Matter of Howard* (S015607), minute order filed August 22, 1990.)

The discipline was based on respondent's stipulation to facts and discipline. The stipulated facts revealed that respondent was appointed trustee of a testamentary trust which was established upon the death of Bessie Fouts in 1973. For several years, respondent managed the trust assets in a satisfactory manner and assisted the beneficiary, Margaret Fouts (Fouts), in the handling of her personal financial matters. In 1985, Fouts became concerned with respondent's handling of her financial matters.

In early 1987, Fouts terminated respondent's services and requested an accounting and return of both her personal and the estate files. Respondent agreed to release the files, but did not do so. Fouts made several more unsuccessful attempts during 1987 to have respondent return her files. In November 1987, Fouts filed a malpractice lawsuit against respondent.[1] In December 1987, respondent stipulated that he would, within certain designated time frames, submit his resignation as trustee, deliver Fouts's personal assets to her new attorneys, turn over copies of Fouts's files and records to her new attorneys, and file a petition of resignation and render an accounting of the trust assets. The stipulation was filed with the court and the order attached to the stipulation was signed by the court in December 1987. Respondent released some documents to Fouts's new attorneys, but he did not comply with any of the other terms of the stipulation and order.

In March 1988, Fouts subpoenaed her files and records from respondent. Respondent failed to pro-

1. The record in the current proceeding does not reveal the outcome of the lawsuit.

vide the requested documents by the specified date. In April 1988, respondent released to Fouts certain documents. In January 1989, an order granting a motion to surrender all files and financial records was signed by the judge. The order required respondent to file a petition for resignation, render an accounting, and to turn over copies of the files and related records in his possession forthwith. At the time of the prior State Bar case, respondent had not rendered an accounting of the trust assets or filed a petition for resignation or released additional records and documents in his possession to Fouts.

Respondent failed to cooperate in the State Bar's investigation of this prior matter and he allowed his default to be entered in the formal proceeding. Pursuant to the stipulation to facts and discipline, respondent's default was vacated; his conduct was stipulated to be in wilful violation of sections 6068 (b), 6068 (i), and 6103 of the Business and Professions Code;[2] and he stipulated to the discipline, including the probation conditions, imposed by the Supreme Court.

Among other provisions, the probation conditions required that, within designated time frames, respondent was to have a certified public accountant ("CPA") render an accounting of the trust assets, determine the amount of additional tax liabilities and other financial losses incurred by Fouts as a result of respondent's conduct, and to release to the accountant all records, files, documents, and papers pertaining to Fouts's financial matters; to comply with the January 1989 court order to the extent that he had not done so, and submit proof of his compliance to the probation department; and to submit to the probation department quarterly reports regarding his compliance with the probation conditions no latter than January 10, April 10, July 10, and October 10 of each year of the probation.[3]

B. Present misconduct

In September 1990, the State Bar Court, through its probation department, informed respondent by letter of the name, address and phone number of his probation monitor. Enclosed with the letter were copies of the Supreme Court order and the probation conditions, and other information necessary to comply with the order. In October 1990, respondent met with his probation monitor to discuss the terms and conditions of this probation. Respondent confirmed that he would comply with the various terms. The probation monitor spoke with respondent twice in January 1991, at which time respondent said that he understood the probation conditions and would act upon them. The probation monitor received no further communication from respondent.

The probation department received the CPA's report in February 1991. The report contained an accounting of the trust assets and accounts for certain trust fund checks. However, the report stated that the accountants were not provided with enough information to determine the tax liabilities or other financial losses, if any, incurred by Fouts. As of the date of the current State Bar trial (May 1992), respondent had not furnished the probation department with proof that he complied with the January 1989 court order, and had not filed the quarterly reports that were due January 10 and April 10, 1991.

In June 1991, a notice to show cause was filed alleging that respondent violated the terms and conditions of his disciplinary probation by failing to timely deliver the appropriate financial records to the CPA so "as to render an accounting of losses incurred by client Fouts"; by failing to show satisfactory proof that he had complied with the January 1989 court order; and by failing to submit the quarterly reports that were due January 10 and April 10, 1991. The notice charged that respondent thereby violated sections 6093 (b), 6068 (k), and 6103, and rule 1-110 of the Rules of Professional Conduct of the State Bar.[4]

2. All further references to statutes are to the Business and Professions Code unless otherwise noted.

3. The probation conditions also required respondent to pay restitution to Fouts in an amount that was to be determined by the probation department, subject to review of the State Bar Court, based on the CPA report of the losses Fouts incurred as a result of respondent's misconduct. The restitution and proof of payment were to be submitted to the probation department within one year of the effective date of the Supreme Court's order.

4. All further references to rules are to the Rules of Professional Conduct of the State Bar of California, effective May 27, 1989.

Respondent participated in a status conference that was held in November 1991. At this conference, respondent informed the hearing judge that he intended to file an answer to the notice to show cause. Respondent did not file an answer and his default was entered in February 1992. (Rule 552.1, Trans. Rules Proc. of State Bar.) Based upon respondent's failure to answer the notice and on application of the Office of Trial Counsel, the hearing judge ordered respondent's involuntary inactive enrollment as a member of the State Bar in March 1992. (See Bus. & Prof. Code, § 6007 (e).)

After a default hearing the hearing judge found respondent culpable of violating the conditions of his probation by failing to render an accounting of the financial losses incurred by the trust; by failing to show satisfactory proof of compliance with the January 1989 court order; and by failing to file the January 10 and April 10, 1992, quarterly reports, "or any other required quarterly reports." The hearing judge concluded that respondent had thereby wilfully violated section 6068 (k), and dismissed the remaining charges. Finding respondent's prior discipline and failure to participate in the disciplinary proceeding as aggravating circumstances and finding no mitigating circumstances, the hearing judge recommended that 90 days of respondent's previously imposed stayed suspension be revoked and that respondent be actually suspended from the practice of law for 90 days.[5]

DISCUSSION

The Office of Trial Counsel argues on review that respondent has failed to demonstrate rehabilitation because he has failed to comply with the conditions of his probation. According to the Office of Trial Counsel, respondent's failure to demonstrate rehabilitation, combined with his failure to participate in the current proceeding, indicates that the discipline recommendation should be increased to two years actual suspension along with the requirement that, before being relieved of his actual suspension, respondent comply with standard 1.4(c)(ii).[6]

A. Culpability

[1a] Before we consider the Office of Trial Counsel's arguments, we must clarify respondent's culpability in this default matter. Respondent may only be disciplined for misconduct properly charged in the notice to show cause. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 36.) As pertinent here, the notice charged that respondent failed to deliver appropriate financial records to the CPA so an accounting of the losses incurred by Fouts could be rendered. The hearing judge found that respondent failed to render an accounting of the financial losses incurred by the trust. Nevertheless, by defaulting, respondent admitted the allegation in the notice that he failed to deliver Fouts's financial records (see rule 552.1, Trans. Rules Proc. of State Bar), and the CPA's accounting (exh. 3) supports this allegation.[7] Thus the record establishes that respondent failed to deliver Fouts's financial records as charged in the notice to show cause and we so modify the hearing judge's decision.

[1b] The notice to show cause also charged that respondent failed to file the quarterly reports that were due January 10 and April 10, 1991. We modify the hearing judge's decision to delete, as a basis for culpability, respondent's failure to file quarterly reports other than these two reports. We also do not consider the uncharged violations as aggravating circumstances in this default matter. (*In the Matter of Heiner* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 301, 316, fn. 32.)

[2] Finally, we adopt the hearing judge's conclusion that respondent wilfully violated section 6068 (k)

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5. The hearing judge made no other recommendation. It is not clear whether he intended respondent's probation to be continued, and if so, on the same, or different, terms and conditions.

6. 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 . . . ."

7. The CPA's accounting was included as attachment D to exhibit 3. Exhibit 3 was marked for identification, but was not introduced into evidence. The failure to introduce the exhibit was apparently an oversight as exhibit 3-A, which modified exhibit 3, was introduced. We correct this oversight by admitting exhibit 3.

by failing to comply with the conditions attached to his disciplinary probation. We also note that respondent is culpable of violating section 6103 as his failure to comply with his disciplinary probation was a wilful violation of the Supreme Court order which imposed the probation. (Cf. *Read* v. *State Bar* (1991) 53 Cal.3d 394, 406; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 575.) Nevertheless, it is not necessary to modify the hearing judge's decision to include this additional violation as our recommendation does not depend on whether the misconduct violated both sections 6068 (k) and 6103. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1059-1060.) For the same reason, we need not address the hearing judge's dismissal of the other duplicative charges.

B. Discipline

Except for *Potack* v. *State Bar* (1991) 54 Cal.3d 132, past probation revocations have been by Supreme Court minute order and therefore do not provide express guidance in determining the appropriate discipline to recommend in such cases. (See *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.) **[3]** However, the primary goal of disciplinary probation is the protection of the public and rehabilitation of the attorney. (*Ibid.*; *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291.)

In *Potack* v. *State Bar*, *supra*, 54 Cal.3d 132, the Supreme Court revoked the attorney's disciplinary probation and imposed two years actual suspension based on the attorney's failure to file a quarterly report which was aggravated by the attorney's failure to timely comply with his restitution probation condition. The misconduct which led to the imposition of Potack's probation included the failure to perform services competently, the failure to maintain a proper client trust account, the failure to promptly refund an unearned advanced fee, and the representation of conflicting interests without written consent. As a result of the original misconduct, the Supreme Court suspended Potack for three years, stayed, with three years probation on conditions including one year actual suspension. (*Id.* at pp. 134-135.)

Potack defaulted in the probation revocation proceeding. He attempted to file a tardy quarterly report, but it was rejected by the probation department because it did not comply with requirements of his probation reporting condition. He did not file an amended report. Potack also made full, though tardy, restitution during the pendency of the probation revocation proceeding. The Supreme Court concluded that the failure to abide by the terms and conditions of the probation was a serious violation that warranted two years actual suspension. (*Id.* at p. 139.)[8]

[4] Respondent's misconduct for which the probation was ordered was not as egregious as Potack's underlying misconduct. However, respondent has not turned over the files and records in his possession as he was ordered to do by the superior court in the malpractice action and by the Supreme Court in the discipline case. In addition, he has not demonstrated that he has complied with the other requirements of the January 1989 order. Although respondent has released to the CPA the files and records regarding the trust, his failure to release Fouts's personal files has precluded the CPA from assessing any losses incurred by Fouts as a result of respondent's misconduct and has precluded a determination of whether disciplinary restitution is appropriate. These probation violations are serious and warrant a lengthy period of actual suspension. In light of respondent's underlying misconduct and the seriousness of the probation violations, we conclude that the purpose of disciplinary probation will best be served by increasing the recommended discipline from three months actual suspension to one year actual suspension and imposing a standard 1.4(c)(ii) requirement prior to his resumption of practice.

8. Our opinion in *In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. 525, preceded the Supreme Court's opinion regarding the same attorney and was based on a second probation revocation notice to show cause which charged Potack with violating his probation by failing to make the restitution which was considered as an aggravating circumstance in *Potack* v. *State Bar*. We recommended that if the Supreme Court imposed a two-year or greater actual suspension in *Potack* v. *State Bar*, taking into account the belated restitution as an aggravating circumstance, that no additional discipline be imposed in *In the Matter of Potack*. (*In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 541.) The Supreme Court imposed two years actual suspension in *Potack* v. *State Bar*, and accepted our recommendation that no additional discipline be imposed in *In the Matter of Potack*. (*In the Matter of Potack* (Bar Misc. 5066), minute order filed November 6, 1991.)

[5] Normally, the requirement that a disciplined attorney comply with standard 1.4(c)(ii) is imposed where the actual suspension is two years or greater. Respondent has been inactively enrolled as a member of the State Bar since March 1992. Coupled with the one-year actual suspension we recommend, respondent will thus have been continuously ineligible to practice law for greater than two years by the time the one-year suspension terminates. It is therefore appropriate to recommend that respondent comply with standard 1.4(c)(ii).

[6] We have previously noted that in attorney disciplinary matters, a period of stayed suspension subject to probation conditions "is applied primarily as an additional measure to protect the public, courts and legal profession." (*In the Matter of Marsh*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 298.) We do not believe stayed suspension and probation are necessary in the present case. The one-year actual suspension coupled with the requirement, pursuant to standard 1.4(c)(ii), that respondent demonstrate his rehabilitation, present fitness to practice and present learning in the law before he is relieved of his actual suspension will protect the public, courts and profession.

[7a] We also consider that it would have been appropriate for the hearing judge, with or without a request from the Office of Trial Counsel, to have ordered respondent's inactive enrollment pursuant to section 6007 (d). Under the provisions of this subdivision, the State Bar Court may order the involuntary inactive enrollment of an attorney: where the attorney is under a suspension order, any portion of which has been stayed during a period of probation; where we find that the probation has been violated; and where we recommend to the Supreme Court that the attorney receive an actual suspension on account of the probation violation. The notice to show cause in the present matter informed respondent that he could be enrolled inactive under this statute, but the Office of Trial Counsel did not request, and the hearing judge did not make, such an order. Nevertheless, the requirements of the subdivision are satisfied in this case and we therefore order respondent's inactive enrollment pursuant to section 6007 (d).

[7b] We also note that section 6007 (d) provides that any period of inactive enrollment under the subdivision shall be credited against the period of actual suspension ordered. We therefore recommend that respondent's period of actual suspension commence as of the date of his inactive enrollment under section 6007 (d).

FORMAL RECOMMENDATION

We recommend that the probation ordered by the Supreme Court in respondent's underlying disciplinary matter (S015607) be revoked; that the stay of the two-year suspension be set aside; and that respondent be actually suspended for one year from the effective date of his inactive enrollment pursuant to the provisions of section 6007 (d) of the Business and Professions Code, 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) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V).

We further recommend that respondent be ordered to comply with the provisions of 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 date the Supreme Court order is effective. **[8]** As respondent's State Bar membership record indicates that he was suspended for failing to take and pass the professional responsibility examination as ordered by the Supreme Court (S015067), we also recommend that this provision of the Supreme Court's August 1990 order remain in effect. We also recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

Finally, we order that respondent be immediately enrolled as an inactive member of the State Bar pursuant to the provisions of section 6007 (d) of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT L

A Member of the State Bar

No. 90-O-12262

Filed June 24, 1993

SUMMARY

Shortly before trial in a disciplinary proceeding, counsel for respondent, asserting that respondent was unable to assist in his own defense, moved to have his client placed on inactive status under Business and Professions Code section 6007(b)(3), which permits the State Bar to seek the involuntary inactive enrollment of attorneys on the basis of mental infirmity or illness. The Office of Trials did not oppose respondent's inactive enrollment, but opposed any abatement of the disciplinary proceeding. Based on respondent's claimed inability to assist counsel in his defense, the hearing judge ordered respondent enrolled inactive under Business and Professions Code section 6007(b)(1), which requires the involuntary inactive enrollment of an attorney who asserts a claim of insanity or mental incompetence and alleges inability to understand a proceeding or assist counsel. Without further evidence or hearing, the hearing judge also abated the underlying disciplinary proceeding. (Hon. Ellen R. Peck, Hearing Judge.)

The Office of Trials sought review, arguing that inactive enrollment under section 6007(b)(1) requires a greater showing than a mere claim of inability to assist counsel and that respondent should be required to produce some quantum of proof in support of the claim. It also argued that the competing interests of respondent's due process rights and the strong public interest in prosecution of State Bar matters should require the evidence as a whole to establish respondent's incompetence prior to abatement of the proceeding.

The review department held that an attorney must be enrolled inactive under section 6007(b)(1) upon the attorney's assertion of a claim in any pending proceeding that the attorney is unable to understand the nature of the proceeding or to assist counsel, and that no affirmative showing of mental illness beyond the making of the statutory claim is required. However, the issue of abatement of the disciplinary hearing is a separate determination. To justify abatement, the respondent must demonstrate by a preponderance of the evidence that he or she is unable by reason of mental incompetence to assist counsel in defense of the proceeding.

In this matter, where the expert evidence was inadequate and respondent's counsel's declaration regarding his client's incompetence was inconsistent with his earlier declaration attesting to respondent's ability to perform paralegal work in a superior manner, the review department concluded that the hearing judge had not properly exercised her discretion when she abated the disciplinary proceeding without holding a

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hearing allowing for the presentation and resolution of conflicting evidence regarding respondent's claimed inability to assist counsel. Accordingly, the review department remanded the matter solely on the issue of abating the underlying disciplinary proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Alison R. Platt, Victoria Molloy

For Respondent: No appearance

HEADNOTES

[1] **130 Procedure—Procedure on Review**
139 Procedure—Miscellaneous
199 General Issues—Miscellaneous
2051.90 Section 6007(b)(1) Proceedings—Other Procedural Issues
2119 Section 6007(b)(3) Proceedings—Other Procedural Issues
Because hearings and records regarding inactive enrollment under Business and Professions Code section 6007(b) are confidential, respondent was not identified in review department's opinion regarding issues raised by such inactive enrollment. However, where such issues arose during a disciplinary proceeding, the record in that proceeding remained public, subject to the hearing judge's discretion to seal specific portions of the record where proper grounds appeared.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
2051.90 Section 6007(b)(1) Proceedings—Other Procedural Issues
2119 Section 6007(b)(3) Proceedings—Other Procedural Issues
Orders for inactive enrollment under section 6007(b)(1), like those under section 6007(b)(3), are subject to independent review pursuant to rule 450 of the Transitional Rules of Procedure.

[3 a, b] **167 Abuse of Discretion**
2051.50 Section 6007(b)(1) Proceedings—Burden of Proof
A member of the State Bar is required by statute to be enrolled inactive upon the assertion of a claim of insanity or mental incompetence made in any pending proceeding, alleging inability to understand the proceeding's nature or to assist counsel. Where the member intentionally asserts such a claim, no further showing is required and the State Bar Court has no discretion not to enroll the member inactive.

[4] **111 Procedure—Abatement**
199 General Issues—Miscellaneous
2051.50 Section 6007(b)(1) Proceedings—Burden of Proof
2051.60 Section 6007(b)(1) Proceedings—Abatement
Given the severe consequences of inactive enrollment, public protection supports inactive enrollment of an attorney who intentionally makes a claim of mental incompetence, even if the attorney was actually rational and was misguidedly making the claim as a strategy to impede disciplinary prosecution. Any issue of bad faith may be addressed in the context of the requested abatement of the disciplinary case. The mere enrollment of the attorney inactive does not dictate abatement of the underlying disciplinary proceeding.

[5] **111 Procedure—Abatement**
167 Abuse of Discretion
An abatement order is a procedural matter, for which the standard of review is one of abuse of discretion.

[6 a-d] **111 Procedure—Abatement**
147 Evidence—Presumptions
162.90 Quantum of Proof—Miscellaneous
194 Statutes Outside State Bar Act
2051.60 Section 6007(b)(1) Proceedings—Abatement
2116 Section 6007(b)(3) Proceedings—Abatement
A determination whether a disciplinary proceeding should be abated on the ground of inability of the respondent to assist in the defense resembles a competency hearing in a criminal matter. In the law of attorney discipline, the respondent is presumed competent. Inability to assist in the defense of a disciplinary proceeding suggests a more serious form or degree of mental illness than inability to practice competently without endangering clients or the public. Therefore, facts sufficient to institute inactive status proceedings under section 6007(b) may not be sufficient to support abatement of a disciplinary proceeding. The appropriate standard for abatement is proof by a preponderance of the evidence that the attorney is incompetent to assist in the defense.

[7 a, b] **111 Procedure—Abatement**
192 Due Process/Procedural Rights
802.30 Standards—Purposes of Sanctions
2051.60 Section 6007(b)(1) Proceedings—Abatement
The respondent in a disciplinary proceeding has a right to a fair hearing. The State Bar's interest in protecting the public and maintaining integrity and public confidence in the legal profession would not be served by disciplining an attorney who is mentally incompetent to the degree that she or he cannot assist in a defense against disciplinary charges. Therefore, if an attorney is unable to assist in his or her own defense, due process requires that the disciplinary proceeding be abated.

[8] **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
Ordinarily, the standard of proof in disciplinary proceedings is by clear and convincing evidence, and that standard has been applied in involuntary inactive enrollment proceedings under both section 6007(c) and section 6007(b)(3).

[9] **111 Procedure—Abatement**
159 Evidence—Miscellaneous
162.20 Proof—Respondent's Burden
2051.60 Section 6007(b)(1) Proceedings—Abatement
A motion supported by written submissions, including a detailed psychiatric report, could, if unopposed, be sufficient evidence to warrant abating a disciplinary proceeding due to the respondent's inability to assist in the defense. However, where the adequacy of the respondent's showing is questioned, the respondent's evidence may be weighed in the context of the whole record in the disciplinary proceeding. Any proffered medical submission regarding the respondent's mental competency should address the nature of the medical examination or tests conducted; the attorney's symptoms; the diagnosis and cause of the condition, and any past or proposed treatment. The report should note whether the illness raises doubts about the respondent's ability to assist in the defense, and should relate the respondent's condition to a recognized legal definition of competency.

[10] **139 Procedure—Miscellaneous**
159 Evidence—Miscellaneous
162.20 Proof—Respondent's Burden
2051.60 Section 6007(b)(1) Proceedings—Abatement
Medical evidence regarding an attorney's competency to assist in the defense of a disciplinary proceeding should be submitted to the State Bar Court at the hearing level. The reliability of evidence concerning a person's mental state is virtually impossible to test in the absence of cross-examination.

[11 a, b] **111 Procedure—Abatement**
159 Evidence—Miscellaneous
167 Abuse of Discretion
2051.60 Section 6007(b)(1) Proceedings—Abatement
Where it was unclear what evidence hearing judge considered in deciding to abate disciplinary proceeding due to respondent's claimed inability to assist counsel, and where respondent's medical evidence lacked important elements and was conclusory, and respondent's counsel's declaration was undermined by contrast with earlier declaration regarding respondent's superior performance of paralegal tasks, review department concluded that hearing judge failed to exercise her discretion properly in abating proceeding without holding hearing to allow presentation and resolution of conflicting evidence.

ADDITIONAL ANALYSIS

Other

2052.10 Section 6007(b)(1) Proceedings—Inactive Enrollment Ordered

OPINION

STOVITZ, J.:

This opinion addresses first-impression questions concerning inactive enrollment under section 6007 (b)(1), Business and Professions Code[1] and the abatement of pending disciplinary proceedings if the subject attorney is enrolled inactive under that section. (See § 6007 (f).)[2]

During an original disciplinary proceeding, respondent L,[3] **[1 - see fn. 3]** represented by counsel, moved that he be enrolled as an inactive member of the State Bar under section 6007 (b)(3).[4] He asserted that he was unable to assist in his own defense in the disciplinary proceeding. The deputy trial counsel and hearing judge correctly construed respondent's motion as made under section 6007 (b)(1). Although the deputy trial counsel claimed that respondent's showing was inadequate for inactive enrollment, she did not oppose his enrollment under section 6007 (b)(3) if the disciplinary proceedings would not be abated. The judge ordered respondent enrolled as an inactive member under section 6007 (b)(1) and abated the underlying disciplinary proceeding. The Office of Trials seeks our review.

We conclude that the hearing judge properly ordered respondent enrolled as an inactive member, but that the record does not show that she exercised the required discretion before abating the disciplinary proceeding. We will therefore remand this proceeding to the hearing judge to reconsider the abatement of the underlying disciplinary proceeding in light of our opinion.

I. PROCEDURAL HISTORY

Respondent was admitted to practice law in California in September 1979. The official membership records of the State Bar show that he has been suspended continuously since July 3, 1990, for nonpayment of State Bar membership fees. (See § 6143.) On October 23, 1991, the Office of Trials filed the underlying disciplinary proceeding by means of a 10-count notice to show cause ("notice"). Respondent retained counsel and filed his answer to the notice on February 6, 1992. Appended to his answer was a declaration of his counsel dated February 4, 1992, stating that although respondent had considerable physical, psychological and financial problems and had been receiving treatment for them, he had nevertheless been working for the past 10 months in counsel's office in a non-lawyer capacity doing "research, pleadings, motions, summons and complaints." According to respondent's counsel, the quality of his work was superior and his attention to detail was exemplary. Counsel observed also that respondent showed a deep concern for client problems and was extremely aware of time constraints for client matters. Counsel intended to urge respondent to pay his State Bar fees and return to good standing, as counsel believed that respondent would be an asset to the practice of law, in need of experienced lawyers "who are also mindful of their ethical obligations."

The State Bar filed an amended notice on April 20, 1992, and respondent answered on May 8, 1992. The amended notice charged respondent with misconduct over a two-year period, from early 1988 through November 1990, including misappropriating

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code. Section 6007 (b)(1) was added effective January 1, 1984, and reads as follows: "The board shall also enroll a member of the State Bar as an inactive member in each of the following cases: [¶] (1) A member asserts a claim of insanity or mental incompetence in any pending action or proceeding, alleging his or her inability to understand the nature of the action or proceeding or inability to assist counsel in representation of the member."

2. Section 6007 (f) provides that "The pendency or determination of a proceeding or investigation provided for by this section shall not abate or terminate a disciplinary investigation or proceeding except as required by the facts and law in a particular case."

3. **[1]** Because of the confidentiality of hearings and records under section 6007 (b), we do not identify the respondent. (See § 6086.1 (a)(2)(A); *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424.) The record in the disciplinary proceeding is, and remains, public, subject to the hearing judge's discretion to seal specific portions of the record where proper grounds appear.

4. Section 6007 (b)(3) provides for inactive enrollment upon a decision by the State Bar Court that due to mental infirmity or illness or because of habitual use of intoxicants or drugs, the attorney is unable to practice law practice law competently or without substantial threat of harm to the interests of clients or the public.

settlement and other client funds totaling in excess of $50,000 from clients in four matters; settling three cases without the knowledge and consent of clients; misleading clients about the status of three cases which had been settled or dismissed; issuing two checks with insufficient funds in his bank account to cover them; not communicating significant developments to clients and failing to cooperate with the State Bar in its investigation. Counsel engaged in two settlement conferences and several prehearing conferences with a hearing judge.[5] On May 22, 1992, respondent's counsel stated that he intended to move that his client be placed on a "medical inactive status." Motion papers, accompanied by a declaration by respondent's counsel and a letter from a psychiatrist who had examined respondent,[6] were filed with the court on June 11, 1992. The declaration of respondent's counsel asserted that he had not received the assistance necessary from respondent to prepare for the disciplinary hearing and that in his view, respondent's medical condition, including psychiatric problems, were the cause.

On June 15, 1992, the Office of Trials opposed respondent's motion. The deputy trial counsel's objection to placing respondent on inactive status appeared to focus on abatement of the proceedings. She contended that the evidence, including the psychiatrist's report respondent furnished, did not support the showing required to abate the pending disciplinary proceedings. She suggested that since respondent raised his mental condition, that the court issue an order for a mental examination as the least intrusive means of determining respondent's mental condition. (See *In the Matter of Respondent B*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 432.)

On June 19, 1992, the hearing judge conducted a status conference at which she allowed argument from the parties on respondent's motion for inactive enrollment. The deputy trial counsel offered to stipulate to respondent's inactive enrollment under section 6007 (b)(3), but assumed that the disciplinary trial would proceed. The judge stated her intent not only to enroll respondent inactive under section 6007 (b)(1), but also to abate the disciplinary proceeding.

On June 22, 1992, the hearing judge filed an order finding that the State Bar had adequate notice of section 6007 (b)(1) as an alternative basis for placing respondent on inactive status. The judge ruled that although respondent's motion stated that it requested relief pursuant to section 6007 (b)(3), respondent's counsel's assertion of respondent's inability to assist counsel fell more appropriately within the ambit of section 6007 (b)(1).

The hearing judge also concluded that the plain language of section 6007 (b)(1) did not require any showing by respondent in order to be placed on inactive status beyond an assertion that respondent's mental state was such that he was unable to assist his counsel in the disciplinary matter. Rejecting any standard of proof, the hearing judge reasoned that if a showing of good cause or a hearing was required, the statute would reflect it and it did not. She also rejected any claimed inconsistent procedure set forth in the Transitional Rules of Procedure of the State Bar as being "irrelevant" because in resolving any conflict, section 6007 (b)(1) would control.

In addition, the hearing judge found that, even assuming that section 6007 (b)(1) required some showing by respondent of evidence that he was unable to assist his counsel, respondent had met that burden. She relied on the June 3, 1992, psychiatrist's

5. The examiner's pre-trial statement filed May 22, 1992, included the statement that if the State Bar Court found respondent culpable of the charges, the Office of Trials would seek disbarment.

6. The psychiatrist's letter stated that the doctor observed respondent on June 3, 1992, and reviewed medical records which respondent brought with him. The psychiatrist summarized respondent's family, educational and medical history and concluded that respondent was in a psychotic depression resulting in a serious incapacity. The psychiatrist expressed the belief that respondent was unable to practice law at the time or to assist in his own defense. In the doctor's view, respondent was unable to focus his attention on matters dealing with "objective delineation of a judicial nature" and was preoccupied by self-hate and despair. The doctor's report did not state the length of his observation of respondent, whether he had administered any tests to him, whether he had observed any examples of his performance in the practice of law or what information or evidence led to his conclusions.

report as well as on respondent's counsel's evaluation. (See *ante*.)

The hearing judge distinguished two cases relied upon by the deputy trial counsel who argued that there was an insufficient showing of mental incapacity by respondent. Those cases were *Slaten* v. *State Bar* (1988) 46 Cal.3d 48 and *Ballard* v. *State Bar* (1983) 35 Cal.3d 274, 284-287. She found those cases dealt with section 6007 (b)(3), not section 6007 (b)(1), that *Ballard* specifically involved a prior version of section 6007 (b), and that any language in it addressing the assertion of inability to assist counsel was not applicable to the statute in its current form. She concluded that respondent's showing was adequate under the statute to enroll him inactive. Without any further discussion, she abated the disciplinary proceedings. She permitted the deputy trial counsel to perpetuate testimony in the disciplinary case in order that no evidence would be lost.

The Office of Trials sought review on a number of grounds.[7] It argues that section 6007 (b)(1) required more than the claim or assertion of the inability to assist counsel. It relies on language from *Ballard* v. *State Bar*, *supra*, 35 Cal.3d at p. 286, quoted with approval in *Slaten* v. *State Bar*, *supra*, 46 Cal.3d at p. 54, that the inability to assist in the defense is a more serious form or degree of mental illness than the inability to represent clients competently. Therefore, given the seriousness of the mental disease professed by respondent, the Office of Trials urges that respondent must be required to produce some quantum of proof in support of his claim before being placed on inactive status and the underlying disciplinary proceeding abated. Moreover, the Office of Trials claims that the competing interests of due process rights of respondent on one side against the strong public interest in the prosecution of State Bar matters on the other should require the evidence as a whole to establish respondent's mental incompetence prior to the abatement of the disciplinary proceeding. In the deputy trial counsel's view, the evidence presented to establish respondent's mental competency is inadequate.

II. DISCUSSION

The analysis on review of a hearing judge's order of inactive enrollment under section 6007 (b)(1) is fundamentally different from that of an order of abatement of disciplinary proceedings under section 6007 (f). We discuss these issues separately.

A. Inactive enrollment under section 6007 (b)(1).

[2] For the reasons we gave in *In the Matter of Respondent B*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 430, fn. 6, in analyzing proceedings to enroll attorneys inactive under section 6007 (b)(3), we hold that the hearing judge's order of inactive enrollment under section 6007 (b)(1) is subject to independent review pursuant to rule 450 of the Transitional Rules of Procedure of the State Bar.

[3a] To the extent that the Office of Trials contends that a substantive showing is required to support inactive enrollment under section 6007 (b)(1) beyond the claim required by statute, we must reject that contention. The Legislature has determined that a member of the State Bar is to be enrolled inactive upon the assertion of a claim of insanity or mental incompetence made in any pending proceeding, alleging inability to understand the proceeding's nature or alleging inability to assist counsel. That is exactly what respondent alleged. Neither the Legislature nor the Board of Governors of the State Bar have required any affirmative showing of mental illness beyond the making of the statutory claim.

The absence of a requirement to support a mental illness claim with additional, substantive evidence is not limited to section 6007 (b)(1). For example, under section 6007 (a), an attorney is to be enrolled inactive merely upon receiving defined inpatient treatment, or upon other judicial determinations

7. Neither respondent nor his counsel filed a brief in response to the examiner's request for review and thus respondent did not participate at oral argument.

of mental incapacity. Under section 6007 (b)(2), an attorney is to be enrolled inactive merely upon the entry of a court order assuming jurisdiction over the attorney's law practice. In contrast, when the foregoing conditions have not occurred, but the State Bar nonetheless believes that a member's continued practice poses a substantial threat of harm to clients or the public, the Office of Trials may move for inactive enrollment. To safeguard the member's rights, the Legislature has required a certain affirmative showing to be made in those proceedings. (See §§ 6007 (b)(3), 6007 (c)(1); see also *Conway* v. *State Bar* (1989) 47 Cal.3d 1107.) **[3b]** However, where the *member* intentionally asserts the claim of mental incompetence, in a pending proceeding, alleging inability to understand the proceeding or assist in counsel in defending the charges, as respondent did, no further showing is required and the hearing judge has been given no discretion not to enroll the member inactive under section 6007 (b)(1).

[4] The Office of Trials raises the issue whether a claim of insanity or mental incompetence might also be made by a perfectly rational attorney as a strategic device. Given the severe consequences to the member of inactive enrollment (see, e.g., §§ 6125-6126), public protection goals would still support the inactive enrollment merely upon the making of the claim where intended, even if misguidedly made as a strategic device to impede the prosecution of the disciplinary proceeding. The issue of bad faith could then be appropriately addressed in the context of the requested abatement of the disciplinary proceeding. As we shall now discuss, the mere enrollment of the attorney inactive does not dictate abatement of the underlying disciplinary proceeding.

B. Abatement of disciplinary proceeding.

[5] The hearing judge's order on the issue of abatement is a procedural matter, with the standard of review being one of abuse of discretion. (See *Ballard* v. *State Bar*, *supra*, 35 Cal.3d at p. 286, fn. 22; *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, 276; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214.)

The hearing judge ordered the disciplinary case to be abated simply upon respondent's motion papers and her order of inactive enrollment under section 6007 (b)(1), without further inquiry into the facts and circumstances that might sustain or refute the conclusion that abatement was required and without the articulation of criteria for abatement and weighing the record against those criteria. Since section 6007 (f) provides that an inactive enrollment shall not abate a disciplinary proceeding "except as required by the facts or law in a particular case," we invited the deputy trial counsel to file a supplemental brief on the issue of what showing is required under section 6007 (f) to abate the proceeding after respondent's inactive enrollment. The deputy trial counsel argues that the decision to abate a pending disciplinary matter because of the inactive enrollment here must be based on a finding that respondent was actually incompetent to assist in his defense, citing *Slaten* v. *State Bar*, *supra*, 46 Cal.3d at p. 54. In her opening brief, the deputy trial counsel drew a comparison to criminal procedure. As we shall discuss, in this area of abatement arising from inactive enrollment under section 6007 (b), the principles found in cases such as *Slaten* and analogies to criminal procedure are each apt.

Criminal procedure halts proceedings upon a showing of substantial evidence, such as a sworn statement of a mental health professional, that a defendant cannot understand the criminal proceeding or assist counsel in his or her defense. (Pen. Code, § 1368; *People* v. *Gallego* (1990) 52 Cal.3d 115, 162.) Once doubt arises as to the competency of the defendant, the criminal court is required to defer the criminal matter pending resolution of the competency issue. (*People* v. *Superior Court (Marks)* (1991) 1 Cal.4th 56; *People* v. *Hale* (1988) 44 Cal.3d 531, 540-541.) Thereafter, a competency proceeding is held to determine if a preponderance of the evidence establishes the defendant's mental capacity to understand the proceeding or assist counsel, a higher standard of proof than necessary to interrupt the criminal process initially. (Pen. Code, § 1369.) The competency hearing is a special proceeding, not a criminal action, and is governed by the rules for civil,

rather than criminal, proceedings. (*People* v. *Skeirik* (1991) 229 Cal.App.3d 444, 455; 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Trial, § 2989, p. 3667.)[8] At the hearing, the defendant must rebut the presumption of mental competence. (*People* v. *Medina* (1990) 51 Cal.3d 870, 882; Pen. Code, § 1369, subd. (f).) The defendant is subject to examination by psychiatrists or psychologists appointed by the court.[9] (Pen. Code, § 1369, subd. (a).) If the defendant is found to be mentally competent by a preponderance of evidence, then the criminal prosecution resumes. (Pen. Code, § 1370.)

Although attorney disciplinary matters are sui generis (*Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-302), the deputy trial counsel argues that there is sufficient similarity between the policy interests underlying the criminal competency standards and the interests at stake in determining competence in an attorney disciplinary setting such that comparable standards should be adopted to ensure administrative due process and the protection of the public interest. (*Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 226 [application of criminal or civil rules to State Bar disciplinary matters to assure administrative due process determined by facts and policy interests presented]; see also *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929-930.)

[6a] In the law of attorney discipline, the respondent is presumed competent. (*In the Matter of Respondent B*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 438.) **[7a]** Respondent has a right to a fair hearing in this disciplinary proceeding. (*Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1115-1116.) This interest may not be as great for an attorney with a license at stake as for a criminal defendant who faces the loss of liberty or whose life is in the balance. (See *Black* v. *State Bar* (1972) 7 Cal.3d 676, 687-688.) The State Bar's interest is in protecting the public, safeguarding the integrity of the legal profession and the courts and maintaining high standards and public confidence in the legal profession, not in punishing the individual attorney. (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111; *Cooper* v. *State Bar* (1987) 43 Cal.3d 1016, 1025.) However, these important prophylactic aims are not served by disciplining an attorney who is mentally incompetent to the degree that he or she cannot assist in a defense against the disciplinary charges.

[7b] If the attorney is unable to assist in his own defense, due process requires that the proceeding be abated. (*Ballard* v. *State Bar*, *supra*, 35 Cal.3d at p. 286, fn. 22; see *Slaten* v. *State Bar*, *supra*, 46 Cal.3d at p. 55.) In weighing whether one attorney's evidence of mental illness, allegedly resulting in his inability to assist counsel, was sufficient to warrant abatement of the proceedings, the Supreme Court concluded that he had failed to relate his alleged mental illness to "any recognized legal definition of competency (e.g., Pen. Code, § 1367)." (*Slaten* v. *State Bar*, *supra*, 46 Cal.3d at p. 56.) **[6b]** In our view, it is the abatement determination—whether the discipline matter goes forward or is abated until the attorney is able to again understand the discipline case or assist in its defense—which most closely resembles the competency hearing under Penal Code section 1369.

[6c] The Supreme Court's statement in *Slaten* is significant on this point. The Court said: "'Inability to assist in the defense should be distinguished from inability to practice competently and without endangering clients or the public. *The former suggests a more serious form or degree of mental illness than the latter.* Accordingly, *facts sufficient to support a finding of probable cause to institute inactive*

8. In contrast to the preponderance of the evidence standard used in a criminal proceeding, the establishment of a conservatorship under the Probate Code requires clear and convincing proof. (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611; see also *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [requiring proof beyond a reasonable doubt for conservatorship under the grave disability provisions of the Lanterman-Petris-Short Act].) The conservatorship standards of proof are influenced by the stigma and adverse consequences flowing from such an involuntary proceeding. The discretionary decision whether to abate disciplinary proceedings does not involve comparable concerns. We note however, in a related context, that the Transitional Rules of Procedure of the State Bar require automatic abatement of proceedings against "a member who has been judicially declared to be of unsound mind or, on account of mental condition, incapable of managing his or her own affairs until a judicial determination has been made to the contrary." (Rule 351, Trans. Rules Proc. of State Bar.)

9. Two doctors are chosen, one by each side, if the defendant believes he is competent to stand trial. (Pen. Code, § 1369, subd. (a).)

status proceedings under section 6007, subdivision (b) may not be sufficient to support abatement of a disciplinary proceeding.'" (*Slaten* v. *State Bar*, *supra*, 46 Cal.3d at p. 54, quoting *Ballard* v. *State Bar*, *supra*, 35 Cal.3d at p. 286, fn. 22, emphasis added.)

In two reported cases, the Supreme Court considered assertions that abatement of the disciplinary proceedings was appropriate because the attorneys involved suffered from a mental condition which rendered them unable to assist in their defense of the disciplinary cases. Neither offered a detailed analysis. In *Newton* v. *State Bar* (1983) 33 Cal.3d 480, the Court ordered a pending disciplinary case abated until proceedings had been concluded under the predecessor to the present section 6007 (b)(3). Both the volunteer hearing referee and the former review department found insufficient evidence to conclude that the attorney was unable to practice law without endangering clients, but did recommend the attorney seek psychiatric help. (*Id.* at p. 483.) The Court's review of the record, augmented by the pro se attorney's written submissions and oral argument before the Court, raised sufficiently serious questions regarding the attorney's mental condition for the Court to order the abatement. (*Id.* at p. 484.)

In *Slaten* v. *State Bar*, *supra*, 46 Cal.3d 48, the Court rejected an attorney's assertion that it was an abuse of discretion for the State Bar not to abate his disciplinary case while he allegedly was so impaired by mental illness as to be unable to assist counsel or conduct his own defense. (*Id.* at p. 56.) The Court stated that it was the attorney's burden to establish grounds for the abatement. (*Id.* at p. 54.) It viewed the attorney's evidence in the context of the record of the disciplinary proceeding and characterized it as "very weak" (*id.* at p. 57), noting that none of the attorney's pleadings or other written communications with the State Bar provided an indication of the attorney's impaired condition, in contrast to the attorney in *Newton* v. *State Bar*, *supra*, 33 Cal.3d 480. The medical evidence submitted by Slaten, consisting of three letters, was scrutinized as well and found to be vague and deficient because it lacked the data or reasoning upon which the doctor based his diagnosis and opinion and did not provide notice of a specific condition which could be held to impair the attorney's ability to assist in his own defense. They indicated only that the attorney could not represent himself. The attorney's own actions in securing these medical opinions was proof to the Court that the attorney could take purposeful acts to assist in his own defense. (*Slaten*, *supra*, 46 Cal.3d at p. 56.)

Although the present Transitional Rules of Procedure of the State Bar do not specify a formal procedure for considering how or when a disciplinary proceeding should be abated incident to a section 6007 inactive enrollment, we believe that the *Slaten* case provides important guidance as to the showing required for an abatement.

We must examine what standard of proof is warranted to abate the pending matters "as required by the facts and law in a particular case." (Bus. & Prof. Code, § 6007 (f).) **[8]** Ordinarily, unless provided elsewhere, the standard of proof in disciplinary matters is by clear and convincing evidence. In both section 6007 (c) and section 6007 (b)(3) proceedings, that standard has been applied. (*In the Matter of Respondent B*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 431.) However, in contrasting the procedural safeguards accorded attorneys in section 6007 (b)(3) cases with those under 6007 (c), the Supreme Court has acknowledged that differing risks to the public posed by attorneys faced with inactive enrollment under one or the other section may justify different procedures. (*Conway* v. *State Bar*, *supra*, 47 Cal.3d at pp. 1117-1118.)

[6d] As we have noted, *ante*, procedures in criminal matters to test competency to stand trial are special proceedings akin to civil proceedings with the standard of proof being a preponderance of the evidence. In *Slaten* v. *State Bar*, *supra*, quoting again from the *Ballard* case, the Court stated that "'*substantial indications* that an attorney is incompetent to assist in the defense of the [disciplinary] proceeding'" might require abatement consistent with due process. (*Slaten* v. *State Bar*, *supra*, 46 Cal.3d at p. 55, quoting *Ballard* v. *State Bar*, *supra*, 35 Cal.3d at p. 286, fn. 22, emphasis added.) Accordingly, we conclude that the preponderance of the evidence standard used in criminal competency proceedings is the appropriate standard for abatement of underlying disciplinary charges upon an inactive enrollment under section 6007 (b).

[9] A motion with supporting written submissions, including a detailed psychiatric report passing muster under *Slaten* could, if unopposed, in many instances, be sufficient to provide the hearing judge with competent evidence upon which to ground a decision to abate. However, where as here, the adequacy of respondent's showing is questioned, the Supreme Court has provided additional guidance. In the *Slaten* case, it did not limit itself to the evidence proffered by the attorney, but weighed such evidence in the context of the whole record of the disciplinary proceedings. (*Slaten* v. *State Bar*, *supra*, 46 Cal.3d at p. 56.) The Court outlined the substantive issues that should be addressed in any proffered medical submission on a respondent's competency. These include the nature of the medical examination; the tests, if any, conducted by the expert; the symptoms of the respondent's condition; the diagnosis and cause, if determined, of the condition, and any past or proposed treatment. (*Id.* at pp. 55-56.) The report should note if the illness is of sufficient seriousness as to raise doubts about the attorney's ability to assist in his own defense. Finally, it should relate the respondent's condition to a recognized legal definition of competency. (*Ibid.*) **[10]** The Court indicated a preference for the medical evidence to be submitted to the State Bar Court at the hearing level and noted that the reliability of evidence concerning a person's mental state is virtually impossible to test in the absence of cross-examination. (*Ibid.*)

[11a] Applying these tests to respondent's showing of incapacity in the absence of a hearing, the issue ultimately is whether the hearing judge abused her discretion in abating this matter. It is not clear from the hearing judge's decision either what evidence, if any, she specifically considered in support of her decision to abate or what tests she applied to evaluate the eligibility of this case for abatement. In her alternate basis for inactive enrollment under section 6007 (b)(1), the hearing judge indicated her reliance on the two June 1992 submissions by respondent's counsel. The letter from the psychiatrist who met with respondent once lacked some important requirements contemplated by *Slaten*. While very detailed in reciting respondent's prior medical history, it did not indicate the nature of the doctor's examination of respondent, whether any tests were given respondent, or whether symptoms manifested by respondent related to his condition beyond obesity, and it was virtually conclusory that respondent suffers from a serious depression which undermined his ability to assist his own counsel. While the doctor did indicate that respondent was unable to focus on judicial considerations, his report was again conclusory in linking respondent's condition to the Penal Code's definition of legal competency. (Pen. Code, § 1367, subd. (a).)

[11b] The judge may have given weight to the June 1992 declaration of respondent's counsel. Yet that declaration is seriously undermined when contrasted with the same counsel's February 4, 1992, declaration in which counsel stated that he had observed respondent for the past 10 months and respondent was performing paralegal-type tasks in a superior manner and displaying very high ability to focus on his responsibilities, despite his personal, financial and psychological problems. Counsel's changed opinion, coming on the eve of trial, with no explanation of counsel's laudatory assessment of respondent's mental state just a few months earlier, when coupled with the weaknesses of the psychiatrist's report we have discussed, provided no adequate basis for abatement. By abating the proceeding on this record, without holding a hearing allowing for the presentation and resolution of the conflicting evidence of respondent's claimed inability to assist counsel, we must conclude that the hearing judge failed to properly exercise the discretion vested in her. (Cf. *Gardner* v. *Superior Court* (1986) 182 Cal.App.3d 335, 340; see *In the Matter of Morone*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 214.)

III. CONCLUSION

For the reasons stated, we conclude that sufficient questions were raised by the deputy trial counsel regarding the adequacy of respondent's showing to require a hearing on the issue of abatement, submission of evidence, including the taking of live testimony if appropriate, specific findings of fact regarding the evidence, and conclusions of law as to respondent's showing of incompetency by a preponderance of evidence before ordering the underlying disciplinary proceeding abated. Solely as to the issue of abatement of the pending disciplinary proceeding, we remand this matter to the hearing department for further proceedings consistent with this opinion.

We concur:
PEARLMAN, P.J.
NORIAN. J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT M

A Member of the State Bar

No. 93-C-11180

Filed July 12, 1993

SUMMARY

The State Bar Court ordered respondent placed on interim suspension because of a felony conviction for drunk driving. Respondent filed a petition to set aside the order.

The review department held that whether interim suspension is warranted prior to a hearing on the merits of a felony conviction depends, among other things, on the nature of the crime, its relationship to the practice of law, the undisputed surrounding factual circumstances, and the likely range of final discipline. Respondent had practiced law for 22 years with no prior disciplinary record and had been convicted of drunk driving twice. Although his current misconduct resulted in serious injury to another person, it did not involve violent behavior, clients, or the practice of law. The final disciplinary order was likely to impose a sanction far less severe than would result from the interim suspension order. Also, the Office of the Chief Trial Counsel pointed to no indication of any adverse effect of the misconduct on respondent's practice, no indication of any violation of respondent's criminal sentence, and no particular danger posed to respondent's clients from vacating the interim suspension order. Accordingly, the review department found good cause to vacate the order.

COUNSEL FOR PARTIES

For Office of Trials: Rachelle M. Bin

For Respondent: Arthur Margolis

HEADNOTES

[1] **130 Procedure—Procedure on Review**
199 General Issues—Miscellaneous
1549 Conviction Matters—Interim Suspension—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues

Normally, no published opinion results from a petition to set aside an interim suspension order based on a criminal conviction. Where final discipline had not been entered and might not be warranted, the review department could not determine whether it was appropriate to publicize

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respondent's name in connection with opinion and order vacating interim suspension. Opinion therefore did not name respondent, although proceeding remained public.

[2] **101 Procedure—Jurisdiction**
1549 Conviction Matters—Interim Suspension—Miscellaneous
The Supreme Court has delegated to the State Bar Court its statutory power to place on interim suspension attorneys who have been convicted of crimes.

[3] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
The general policy of the State Bar is not to refer a first offense misdemeanor drunk driving conviction to the Supreme Court for discipline.

[4] **1549 Conviction Matters—Interim Suspension—Miscellaneous**
The purpose of interim suspension is to protect the public, courts, and legal profession until all facts relevant to a final disciplinary order are before the State Bar Court.

[5] **162.90 Quantum of Proof—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1549 Conviction Matters—Interim Suspension—Miscellaneous
Interim suspension is imposed on an attorney who commits a crime of moral turpitude or a felony, unless an exception is appropriate in the interest of justice, with due regard to maintaining the integrity of, and confidence in, the legal profession. Whether interim suspension is warranted prior to a hearing on the merits of a felony conviction depends, among other things, on the nature of the crime, its relationship to the practice of law, the undisputed surrounding factual circumstances, and the likely range of final discipline.

[6 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1543 Conviction Matters—Interim Suspension—Vacated
1699 Conviction Cases—Miscellaneous Issues
Although drunk driving is a serious societal problem, it may or may not become a matter subject to professional discipline. Where an interim suspension order would impose a degree of discipline far more severe than the probable final discipline, the range of final discipline is dispositive of the good cause requirement for vacating the order.

[7 a, b] **1541.10 Conviction Matters—Interim Suspension—Ordered**
1543 Conviction Matters—Interim Suspension—Vacated
1549 Conviction Matters—Interim Suspension—Miscellaneous
The existence of express statutory authority to grant exceptions to interim suspension constitutes a legislative determination that public confidence will not necessarily be undermined by vacating the interim suspension of a convicted felon. On a sufficient showing, the Supreme Court has set aside interim suspensions for crimes involving moral turpitude per se, indicating that such relief is also available for felonies which may or may not involve moral turpitude.

[8 a-c] **191 Effect/Relationship of Other Proceedings**
1541.10 Conviction Matters—Interim Suspension—Ordered
1543 Conviction Matters—Interim Suspension—Vacated
1549 Conviction Matters—Interim Suspension—Miscellaneous
1691 Conviction Cases—Record in Criminal Proceeding
Where a felony could have been charged as a misdemeanor, the reduction of the felony conviction to a misdemeanor in postconviction proceedings does not affect the characterization of the crime

as a felony for the purpose of interim suspension, but it may be taken into account in determining whether good cause exists for vacating an interim suspension order. If the reduction were ignored, arbitrary results might follow based on the discretionary charging practices of different prosecutors.

[9] **1512 Conviction Matters—Moral Turpitude—Per Se**
1541.20 Conviction Matters—Interim Suspension—Ordered
1549 Conviction Matters—Interim Suspension—Miscellaneous

The Legislature has determined that public protection and integrity and confidence in the State Bar warrant interim suspension of attorneys convicted of misdemeanors only where there is probable cause to believe that the misdemeanor involves moral turpitude per se, and even in such cases good cause may justify not imposing interim suspension, as in the case of shoplifting.

[10 a-e] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1543 Conviction Matters—Interim Suspension—Vacated

Whether good cause exists for vacating or not imposing an interim suspension order depends on the facts that are not genuinely in dispute in each case. Good cause existed for vacating an interim suspension order following a felony drunk driving conviction where respondent had practiced law for 22 years with no prior disciplinary record; respondent had been convicted of drunk driving twice; respondent's conviction involved serious injury to another person, but did not involve violent behavior, clients, or the practice of law; where the final disciplinary order was likely to impose a sanction far less severe than would result from the interim suspension order; and where there was no indication of any adverse effect of the misconduct on respondent's practice, of any violation of respondent's criminal sentence, or of any particular danger to respondent's clients.

[11] **139 Procedure—Miscellaneous**
151 Evidence—Stipulations
802.30 Standards—Purposes of Sanctions
1099 Substantive Issues re Discipline—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues

A stipulated disciplinary order does not constitute precedent, but does represent a determination by the Office of the Chief Trial Counsel and the hearing judge that the degree of discipline ordered satisfies the need to protect the public, the courts, and the legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession.

[12] **179 Discipline Conditions—Miscellaneous**
1099 Substantive Issues re Discipline—Miscellaneous
1549 Conviction Matters—Interim Suspension—Miscellaneous

From the point of view of a suspended attorney, the effect of a suspension is the same regardless of whether it is called interim or actual: the attorney is denied the right to practice law for the duration of the suspension.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

Respondent[1] **[1 - see fn. 1]** was admitted to the practice of law in California on January 5, 1972, and has no prior record of discipline. On March 18, 1993, respondent was convicted of violating section 23153, subdivision (a) of the Vehicle Code, driving under the influence causing injury, a felony.

[2] Effective December 1, 1990, the Supreme Court delegated to the State Bar Court its "statutory powers pursuant to Business and Professions Code sections 6101 and 6012 with respect to the discipline of attorneys convicted of crimes . . . [including] . . . the power to place attorneys on interim suspension as authorized by subdivision (a) and (b) of section 6102 . . . ." (Cal. Rules of Court, rule 951(a).)

On May 4, 1993, solely on account of his felony conviction, this court ordered respondent placed on interim suspension pursuant to section 6102 (a) of the Business and Professions Code, effective June 8, 1993.[2] On May 19, 1993, he filed a petition to set aside the order for interim suspension. Thereafter, we temporarily postponed the effective suspension date pending receipt of opposing papers from the Office of the Chief Trial Counsel, oral argument before this review department and issuance of an opinion on this petition.

In respondent's petition his counsel asserts that good cause exists not to order interim suspension on six grounds: "(a) Precedent shows that the crime does not involve moral turpitude; (b) It is likely that an interim suspension would impose a degree of discipline far more harsh and disastrous to Petitioner than the degree of discipline that will be found to ultimately be warranted; (c) The offense was wholly unrelated to the practice of law; (d) Petitioner, who has no prior discipline in his practice of about 22 years, has an outstanding career; (e) The crime does not reflect adversely upon Petitioner as an attorney. The integrity of and confidence in the legal procession would not be undermined by vacating the interim suspension order in this case; (f) An interim suspension would destructively cause professional misfortune and chaos for Petitioner, when it would not be in the interest of justice to do so."

Respondent's brief is supported by his declaration under penalty of perjury, as well as that of his counsel, together with numerous exhibits. The supporting papers describe the underlying incident as one in which respondent, while driving under the influence of alcohol in the early evening of December 13, 1992, made a left turn at an intersection in front of a motorcycle officer, resulting in a collision injuring the officer.[3]

On March 18, 1993, respondent pled no contest to and was convicted of one count of violating Vehicle Code section 23153, subdivision (a). Respondent was placed on summary probation for three years with certain conditions, including that he attend a first-offender,[4] **[3 - see fn. 4]** three-month alcohol awareness program, that he attend five griev-

1. **[1]** Normally, no published opinion would result from a petition to set aside an order for interim suspension. Also, since no final discipline has been entered in the case of this conviction, which may or may not show a basis for discipline, we cannot determine at this stage whether it would be appropriate to publicize respondent's name in connection therewith. (See, e.g., *In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 258, fn. 2.) At respondent's counsel's request, therefore, despite the objection of the deputy trial counsel, this opinion does not designate the name of the respondent. The proceeding remains public.

2. Unless otherwise noted, all references to sections are to the Business and Professions Code.

3. We are not in a position to make findings with respect to the circumstances at this time, but the deputy trial counsel indicated at oral argument that the recited basic facts are not disputed. According to the respondent, two breathalyzer tests resulted in readings of 0.19 percent and his urine samples showed 0.17 percent blood alcohol. The Office of the Chief Trial Counsel has not yet undertaken discovery and we in no way intend to limit additional facts which may be developed at the hearing below on the merits.

4. **[3]** The documents provided by respondent also reflect that respondent has one previous conviction for drunk driving in 1978 which was not referred for discipline. This appears to have been pursuant to the general policy of the State Bar not to refer first offense misdemeanor drunk driving convictions to the Supreme Court for recommendation of discipline. (See *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 266, fn. 6.)

ing sessions of Mothers Against Drunk Driving, that he perform thirty days of volunteer work at a facility operated by the California Youth Authority, that his driving privilege be suspended for one year, and that he pay a fine and assessments totaling $2,736. In a supplement to his petition to set aside interim suspension, respondent attached a copy of the court record showing that, on May 26, 1993, his felony conviction was reduced to a misdemeanor. He also attached a copy of favorable progress reports on the court-ordered service to the California Youth Authority and on his compliance to date with requirements of the court-ordered rehabilitation program.

In its opposition to respondent's motion, filed May 24, 1993, the Office of the Chief Trial Counsel relies principally on our prior decision in *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608, denying a motion to vacate interim suspension following Meza's conviction of a felony for engaging in multiple sexual acts with a child under age 14. The Office of the Chief Trial Counsel also points out that the crime of which respondent was convicted caused bodily injury, requiring a stronger showing of good cause to set aside the interim suspension, citing *In re Strick* (1987) 43 Cal.3d 644, 656. The Office of the Chief Trial Counsel further notes that information has not been provided as to prejudice to specific clients and contends that it is unclear how justice would be served or public confidence in the legal profession maintained by setting aside the interim suspension order and allowing respondent to continue practicing law.

DISCUSSION

[4] In *In the Matter of Meza, supra*, 1 Cal. State Bar Ct. Rptr. 608, we ordered interim suspension of an attorney convicted of a crime inherently involving moral turpitude, noting 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." (*Id.* at p. 613, citing *In re Bogart* (1973) 9 Cal.3d 743, 748; *Shafer* v. *State Bar* (1932) 215 Cal. 706, 708.) "An attorney convicted of a felony involving moral turpitude [commits a crime] the nature of which is calculated to injure his reputation for the performance of the important duties which the law enjoins." (*In re Jacobsen* (1927) 202 Cal. 289, 290.) Interim suspension is the measure invoked by the court to suspend an attorney "whose acts indicate he or she may be unfit to practice law." (*In re Strick* (1983) 34 Cal.3d 891, 898.)

[5] Until 1985, interim suspension was limited to crimes of moral turpitude. Section 6102 (a) was amended in 1985 to its present wording which adds as an alternative to a crime of moral turpitude "or is a felony under the laws of California or the United States." The statute allows exceptions to interim suspension "in the interest of justice . . . , with due regard . . . to maintaining the integrity of and confidence in the profession." Whether interim suspension is warranted prior to a hearing on the merits of a felony conviction depends, among other things, on the nature of the crime, its relationship to the practice of law, the undisputed surrounding circumstances and the likely range of final discipline.

[6a] The Office of the Chief Trial Counsel does not address respondent's basic contention that interim suspension would impose a degree of discipline far more severe than the final discipline in this case is likely to be in light of precedent. While drunk driving is a serious societal problem with potentially tragic results, it may or may not become a matter subject to professional discipline against a lawyer's license. (*In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. at p. 263.) The primary public protection against such crimes is the criminal justice system. If we were to order interim suspension, even if the proceeding were expedited, respondent would likely be suspended for a year before a contested hearing and review could be completed. (Cf. rule 799.7, Trans. Rules Proc. of State Bar [expedited disciplinary proceedings following order of involuntary inactive enrollment].) No California precedent has been cited for one year of actual suspension for an offense of this type. Nor when questioned at oral argument was the deputy trial counsel even able to cite any case ordering more than six months suspension.

[6b] If respondent were placed on interim suspension, respondent might successfully move to vacate the interim suspension order after a favorable result at hearing, as happened in a recent case. Nonetheless, the deputy trial counsel concedes that

the decision in the hearing department is likely not to issue until after a minimum of seven months. If we put respondent on interim suspension, he would therefore be unable to practice law for at least seven months prior to obtaining a decision on the merits. Respondent points out that similar convictions have sometimes resulted only in reproval. For the reasons stated below, we consider the range of final discipline against respondent's license dispositive of the good cause requirement to vacate the order of interim suspension.

[7a] The Office of the Chief Trial Counsel contends that public confidence would necessarily be undermined if this court granted a motion to vacate an interim suspension order of any convicted felon, albeit one whose crime was since reduced to a misdemeanor. The Legislature has determined to the contrary, adopting a statute which, as already noted, expressly permits motions for relief to be granted under section 6102 (a) "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." In *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 743, we noted that the Supreme Court had set aside its order of interim suspension of DeMassa for harboring a felon, a federal crime involving moral turpitude per se. DeMassa's motion was made on the grounds 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 character letters addressed to the sentencing judge on his behalf. An interim suspension order was also set aside by the Supreme Court in *In re Kristovich* (1976) 18 Cal.3d 468 for another crime involving moral turpitude per se—perjury and preparation of false documentary evidence.

[7b] If interim suspension can be set aside on sufficient showing, despite conviction of a felony involving moral turpitude per se, obviously it is also available for felonies which may or may not involve moral turpitude. As the Supreme Court 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), "The 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." No more recent Supreme Court pronouncement to the contrary has been cited by the Office of the Chief Trial Counsel. We must therefore examine the showing made here and determine whether it demonstrates good cause to vacate our interim suspension order.

Meza's crime was clearly far more serious than the instant crime. It involved moral turpitude per se and similar crimes had resulted in a wide range of discipline, including disbarment. (See, e.g., *In re Duggan* (1976) 17 Cal.3d 416.) Meza also had another conviction referral pending at the time his interim suspension was ordered. **[8a]** Here, the offense was a "wobbler"—a felony that could have originally been charged as a misdemeanor under Penal Code section 17, subdivision (b)(4), in which event the deputy trial counsel concedes that it would not have resulted in an interim suspension order by this court. (See § 6102 (a).) **[9]** The Legislature has determined that public protection and integrity and confidence in the State Bar only warrant interim suspension of misdemeanant attorneys when there is probable cause to believe that the misdemeanor involves moral turpitude per se, and even in such cases "good cause" may justify the court in not imposing interim suspension. Pursuant thereto, both the Supreme Court and this court have in several instances declined to impose interim suspension for shoplifting convictions.

[8b] As pointed out by the Office of the Chief Trial Counsel, the subsequent reduction of the crime to a misdemeanor in post-conviction proceedings does not affect the characterization of the crime as a felony for purposes of this court initially placing respondent on interim suspension. (See § 6102 (b).) Nonetheless, the fact that the crime has now been reduced to a misdemeanor is a factor which we can take into account in determining whether good cause exists for vacating the order of interim suspension. We recently did so in an order vacating an order of interim suspension with respect to a conviction for felony assault with a deadly weapon which was later reduced to a misdemeanor based on the prosecutor's

declaration that the charges should have been amended to charge a misdemeanor before the plea was accepted.

[8c] We note that prosecutors in the criminal justice system have discretion either to amend charges before accepting a plea or to consent to the conversion of a felony to a misdemeanor by court order in post-conviction proceedings. In either event, the seriousness of the crime is diminished from a felony to a misdemeanor, a factor we cannot ignore in analyzing good cause for vacating an interim suspension order when one characterization (felony) has vastly different consequences than the other (misdemeanor) on a member's ability to practice law prior to a hearing on the merits and receipt of a final disciplinary order. Otherwise, arbitrary results might follow merely from disparate charging practices of district attorneys' offices throughout the state.

[10a] It is the job of this court to determine in each case, based on the facts before it, whether good cause exists to vacate an order of interim suspension or to decline to impose interim suspension. At this juncture, we cannot resolve genuinely disputed factual issues. (See *In the Matter of Meza*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 612-613.) However, it is undisputed that this case involves a second conviction for drunk driving; that the conviction did not involve clients or the practice of law; and that the convicted attorney is a member of the State Bar with no record of discipline in his 22 years of practice.

In *In re Kelley* (1990) 52 Cal.3d 487, a divided Supreme Court imposed a public reproval on an active member of the State Bar after two drunk driving convictions not involving moral turpitude occurring two years apart. A dissenting justice found no nexus to the practice of law and would have dismissed the proceeding. Although here respondent's conduct did involve a felony conviction and serious injury, the State Bar may or may not be able to develop facts showing lack of respect for the legal system as was found to be the nexus to the practice of law in *In re Kelley*.[5] It also appears somewhat fortuitous that Kelley's erratic driving did not result in any injuries,[6] but we do note that this factor has been taken into account in determining whether to impose discipline, and to what degree, in prior drunk driving cases both in California and elsewhere. (See discussion in *In the Matter of Respondent I*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 271.) Nonetheless, even serious injury requiring hospitalization has not necessarily resulted in a final order involving actual suspension in prior unappealed California drunk driving cases cited by the respondent.

While serious resulting injury is a factor to be considered, we also note that in *In re Hickey* (1990) 50 Cal.3d 571, an inebriated attorney's violent behavior toward his wife and others leading to his conviction under Penal Code section 12025, subdivision (b) resulted only in 30 days actual suspension. Two felony convictions subsequently reduced to misdemeanors for violent conduct which occurred under the influence of alcohol resulted in six months actual suspension in *In re Otto* (1989) 48 Cal.3d 970. **[10b]** Here, there is no indication in the conviction record itself of violent behavior and the fact of serious injury alone would not indicate other misconduct warranting similar discipline in this case as in *In re Hickey* or *In re Otto*. Moreover, as previously noted, an interim suspension order could likely subject respondent to seven months to a year's suspension prior to imposition of final discipline, even if the matter was handled as expeditiously as possible in hearing and review.

[10c] In view of the range of discipline in prior drunk driving cases from dismissal in *In the Matter of Respondent I*, *supra*, 2 Cal. State Bar Ct. Rptr. 260 to two months actual suspension in *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208 for four convictions of that offense, we

5. Unlike the fourteen years that separated respondent's two convictions, Kelley's second offense occurred during the probationary period for the first offense in violation of the criminal sentence. Kelley also became agitated at the arresting officer who summoned the assistance of a second officer to complete the arrest. (*In re Kelley*, *supra*, 52 Cal.3d at p. 491.) We cannot comment at this stage of the proceedings on respondent's cooperation and remorse, but merely note respondent's offer of proof on these issues.

6. In 1984, Kelley was arrested and convicted after driving her car into an embankment. (*Ibid.*)

note the substantial likelihood that the final disciplinary order in the instant proceeding would involve a far lesser sanction than would occur should we order interim suspension here. **[11]** While stipulated disciplinary orders do not constitute precedent, the reprovals ordered pursuant to stipulation in prior drunk driving cases cited by respondent do represent a determination by the Office of the Chief Trial Counsel as well as the hearing judge in each cited instance that the degree of discipline ordered therein satisfied the need to protect the public, the courts and the legal profession; to maintain high professional standards by attorneys and to preserve public confidence in the legal profession.

[10d] Under the circumstances, substantial injustice would be done to respondent if he were "interimly suspended" pending final disposition of his case for a greater period than the maximum discipline the deputy trial counsel could reasonably expect to obtain if she succeeded at the hearing. Far greater injustice would be done if respondent were to prevail at the hearing only to have the final outcome result in no actual disciplinary suspension or far less suspension than already endured on an "interim" basis. **[12]** From the point of view of the suspended attorney, "Whether a suspension be called interim or actual . . . the effect on the attorney is the same—he is denied the right to practice his profession for the duration of the suspension." (*In re Leardo* (1991) 53 Cal.3d 1, 18.)

[10e] The Office of the Chief Trial Counsel has pointed to no indication of any adverse impact from respondent's misconduct on respondent's law practice before or since his conviction, no indication of violation of his criminal sentence which includes suspension of his driver's license for one year and no particular danger posed to his clients by his continued ability to practice law pending a hearing in the State Bar Court on the merits of this conviction referral. We conclude that appropriate discipline fashioned on the full record after a hearing ought to protect the public adequately, satisfy the interests of justice and preserve the integrity of the profession and public confidence in the profession.

For the reasons stated above, we find good cause to vacate our prior order of interim suspension. Since respondent's conviction is now final, our earlier referral order is hereby augmented to include a hearing and decision recommending the discipline to be imposed. Nothing contained herein is intended to express any opinion as to the outcome of the hearing below.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID GREENE LILLY

A Member of the State Bar

No. 92-C-12350

Filed July 19, 1993

SUMMARY

Respondent was convicted of grand theft by embezzlement from the estate of a former client, of which respondent was the executor. The review department recommended that respondent be summarily disbarred, finding that both of the statutory requirements for summary disbarment were satisfied.

First, specific intent to steal was an element of respondent's offense. Second, although the offense was not committed in the course of the practice of law, it was committed in such a manner that a client of respondent's was a victim. The review department held that summary disbarment may be recommended based on victimization of a client even when the crime does not occur in the practice of law, and even though the betrayal of the client's trust occurred after the client's death. Because of the magnitude of respondent's theft, the review department concluded that his misconduct would result in disbarment regardless of alleged mitigating circumstances, justifying a summary disbarment recommendation.

COUNSEL FOR PARTIES

For Office of Trials: Nancy J. Watson

For Respondent: Jeremiah Casselman

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] **139 Procedure—Miscellaneous**
1699 Conviction Cases—Miscellaneous Issues
Summary disbarment excludes the opportunity for an evidentiary hearing.

[2 a, b] **101 Procedure—Jurisdiction**
162.90 Quantum of Proof—Miscellaneous
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Moral Turpitude—Per Se
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
Summary disbarment is statutorily authorized if an attorney commits a California or federal felony as to which: (1) an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement; and (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. If the State Bar Court determines that disbarment would be ordered by the Supreme Court without regard to mitigating circumstances, a recommendation of summary disbarment is justified.

[3] **139 Procedure—Miscellaneous**
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
In considering whether to recommend summary disbarment, the State Bar Court is generally limited to determining whether the statutory and case law criteria have been met on the face of the conviction papers, although undisputed additional facts may also be taken into account.

[4a, b] **802.64 Standards—Appropriate Sanction—Limits on Mitigation**
1512 Conviction Matters—Moral Turpitude—Per Se
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
Where respondent, while acting as the executor of a deceased client's estate, embezzled more than $500,000 from such estate, the magnitude of the theft would result in disbarment regardless of alleged mitigating circumstances.

[5] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
Where respondent committed grand theft by embezzlement, the felony conviction papers demonstrated that an element of respondent's offense was the specific intent to deceive, defraud, steal, or make or suborn a false statement.

[6a, b] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1699 Conviction Cases—Miscellaneous Issues

Where respondent embezzled funds from a deceased former client's estate while serving as the estate's executor, but not its attorney, neither the estate nor the beneficiaries of the estate were respondent's clients, nor did respondent commit the offense in the practice of law.

[7] **101 Procedure—Jurisdiction**
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment

By statute, summary disbarment is available only for a narrow range of grievous misconduct. Grand theft by an attorney in the capacity of executor of an estate, though egregious, does not come within the statutory definition of an offense justifying summary disbarment unless it was committed in the practice of law or in such a manner that a client was a victim.

[8 a-d] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment

The statutory requirement for summary disbarment that an attorney's crime be committed in such a manner that a client was a victim is met even when the victimization occurred outside the practice of law, and may apply even when the victim was a former or deceased client. Where an attorney is appointed under a former client's will as executor of the client's probate estate, and is convicted of grand theft by embezzlement from the estate, there is such a clear nexus between the crime and the trust and confidence of the client that was violated that the client-as-victim requirement for summary disbarment is satisfied.

ADDITIONAL ANALYSIS

Discipline

1610 Disbarment

Other

1541.10 Conviction Matters—Interim Suspension—Ordered
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P.J.:

This proceeding, arising out of respondent Lilly's conviction for grand theft by embezzlement from a probate estate, was originally referred to the State Bar Court by the Office of the Chief Trial Counsel as a felony which did not qualify for summary disbarment under Business and Professions Code section 6102 (c). In papers filed with this court, the deputy trial counsel asserted that the crime did not occur in the practice of law, but was perpetrated by respondent[1] as executor for the probate estate of Martin Hiatt. The Office of the Chief Trial Counsel also asserted that respondent drafted the will which made him the executor of the estate. In ordering the interim suspension of respondent on March 1, 1993, we noted that the allegation that respondent drafted the will of Martin Hiatt raised the question whether a client was a victim of the crime within the meaning of Business and Professions Code section 6102 (c)[2] and directed the Office of the Chief Trial Counsel to readdress the issue of summary disbarment.

In addition to obtaining written responses from both parties, we requested the parties to appear at oral argument to address the issue whether summary disbarment was appropriate.

DISCUSSION

[1] In *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71, we reviewed the history and constitutional parameters of summary disbarment which by definition excludes the opportunity for any evidentiary hearing in the State Bar Court prior to disbarment. **[2a]** Currently, section 6102 (c), effective in 1986, sets forth the statutory criteria for summary disbarment. Section 6102 (c) provides as follows: "After the judgment of conviction of an offense specified in subdivision (a) has become final . . . 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."

[2b] If we determine that the statutory criteria have been met, we must also determine whether the Supreme Court would order disbarment without regard to mitigating circumstances. (*In the Matter of Segall*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 81.) If so, then a recommendation of summary disbarment is justified.

[3] In considering whether to recommend summary disbarment, we are generally limited to a determination that the statutory and case law criteria have been met on the face of the conviction papers. The conviction conclusively establishes all of the elements of the crime. (Bus. & Prof. Code, § 6101; see, e.g., *In re Young* (1989) 49 Cal.3d 257, 268.) However, in addition to looking to the facts conclusively established by the conviction, we may also take into account undisputed additional facts. Thus, in *In the Matter of Segall*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 75, we also considered the undisputed fact that the amount of fraudulent billings by Segall exceeded $250,000. **[4a]** Here, it is undisputed that Martin Hiatt was respondent's client during Hiatt's lifetime;[3] that Hiatt appointed respondent executor

1. This is the same respondent as in *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, which, effective in April of this year, resulted in respondent's actual suspension for three years and until he makes the requisite showing to resume the practice of law under standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.) According to the testimony in the preliminary hearing in the criminal case underlying the present proceeding, a State Bar deputy trial counsel, after discovering in the prior unrelated State Bar proceeding irregularities in respondent's trust account involving payments from the estate of Hiatt, alerted the district attorney's office, which initiated the criminal proceedings.

2. Unless otherwise noted, all further references to sections are to the Business and Professions Code.

3. The Office of the Chief Trial Counsel has offered uncontradicted documents filed in the probate proceeding including a declaration under penalty of perjury executed by respondent Lilly that the decedent, Martin Hiatt, was a client.

of his will[4] and that respondent was ordered as part of his criminal sentence to make restitution of more than $500,000 embezzled from the estate of Hiatt.

[5] We first consider whether the referred felony conviction papers demonstrate that an element of the offense was the specific intent to deceive, defraud, steal, or make or suborn a false statement. Grand theft by embezzlement includes the specific intent to steal and is therefore a felony meeting the first prong of the test for summary disbarment under section 6102 (c). (CALJIC No. 14.02; 2 Witkin & Epstein, Cal. Crim. Law (2d ed. 1988) Necessity of Intent, § 584, p. 660.)

[6a] The second question we must address is whether the conviction papers demonstrate on their face that the crime was committed in the practice of law or "in any manner such that a client of the attorney was a victim." The Office of the Chief Trial Counsel was unable to find any reference in the criminal proceeding to the alleged fact that the respondent drafted the will of Martin Hiatt and no longer relies on that allegation in this proceeding. Respondent's counsel does not dispute that Martin Hiatt was a former client of respondent's, but argues that no "client" was a victim of the crime committed by respondent in his capacity as executor of the estate of Martin Hiatt. We agree with the parties that neither the estate nor the beneficiaries were respondent's clients and the offense was not committed in the practice of law.

[6b] As we noted in *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 373, an executor need not be an attorney and an attorney is not necessarily acting in the practice of law when acting as an executor. However, in *Layton, supra*, the attorney occupied a dual capacity as *both* attorney for the estate *and* executor. In such event, "the services that he renders in the dual capacity all involve the practice of law." (*Layton* v. *State Bar* (1990) 50 Cal.3d 889, 904.) Here, both sides agree that respondent was not also acting as attorney for the estate. Another attorney served in that capacity.

The Office of the Chief Trial Counsel nonetheless argues that respondent had a fiduciary duty to the estate and its beneficiaries which was akin to that which a lawyer owes a client and that summary disbarment is appropriate for grand theft by an attorney acting as an executor, even though the statutory criteria set forth in section 6102 (c) are not technically met. No precedent is cited for this position which the deputy trial counsel at oral argument characterized as a matter of first impression.

[7] The argument that grand theft by an attorney in the capacity of executor of an estate should categorically be treated the same as grand theft in the course of the practice of law is one that is better addressed to the Legislature. We can only apply existing law. In enacting section 6102 (c) after 30 years without any statutory provision for summary disbarment, the Legislature made summary disbarment available only for a narrow range of grievous misconduct. In this connection, we note that a large number of violent felonies are not within the ambit of section 6102 (c), including murder. Grand theft from an estate, as egregious as such conduct is, does not

4. Respondent testified on cross-examination in *In the Matter of Lilly, supra*, 2 Cal. State Bar Ct. Rptr. 185 regarding an "advance on fees" as executor he had received from the estate of Hiatt which he used to pay back funds owed to a different client. He also testified that he did not have court authorization for such payment before the hearing judge ruled such evidence of uncharged misconduct irrelevant to the culpability phase of the hearing and the examiner ceased this line of inquiry. As reflected in the preliminary hearing testimony now before us, the State Bar deputy trial counsel apparently then referred the issue for investigation and did not seek to introduce any evidence with respect thereto at the subsequent disciplinary phase of the State Bar Court trial. The hearing judge nonetheless, on her own initiative, made a finding in aggravation based thereon. We affirmed that finding in *In the Matter of Lilly, supra*, 2 Cal. State Bar Ct. Rptr at p. 189, fn. 2, based on respondent's failure to ask the judge to strike the testimony as to the unauthorized fee advance in the culpability phase which allowed the testimony to remain part of the record to be considered at the disciplinary phase. However, we also did not give the finding in aggravation great weight because we could only discern therefrom the lack of court authorization without knowing whether there was beneficiary consent or other factors which might affect the question of whether the "fee advance" constituted an intentional act of theft versus a unilateral taking of funds to satisfy attorney fees which may have less serious consequences in attorney disciplinary cases. (See, e.g., *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317; *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092.)

come within the definition of an offense justifying summary disbarment under section 6102 (c) *unless* it was committed in the practice of law *or* in such a manner that a client was a victim.

[8a] We must therefore address the applicability of the phrase in section 6102 (c) "or in any manner such that a client of the attorney was a victim" as an alternative basis for summary disbarment. Although the estate and its beneficiaries were clearly victims, they were not respondent's clients. At oral argument we asked both parties to focus on the question whether the crime was committed in such a manner that Martin Hiatt, Lilly's deceased former client, was also a victim within the meaning of section 6102 (c). Respondent's counsel assumed arguendo that the decedent could be characterized as a victim of respondent's crime, but argued that the crime must also be committed in the practice of law. He cited *In re Utz* (1989) 48 Cal.3d 468 and *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96 as supporting his position that summary disbarment is inapplicable under the circumstances established here. We disagree. Both cases stand for the proposition that the illegal conduct involved therein did not constitute the practice of law. However, neither Stamper nor Utz victimized any clients, so these cases do not affect our interpretation of the alternative provision of 6102 (c) that victimization of a client, even *outside* the practice of law, is grounds for summary disbarment.

[8b] Obviously, respondent was not representing the decedent as a current client at the time he committed embezzlement from the estate. However, section 6102 (c) does not expressly limit its scope to victimization of current clients. The word "client" without qualification as to whether it includes former living or deceased clients is also used in other legislation. Most notably, section 6068 (e) requires an attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Similarly, Evidence Code section 950 defines client broadly for purposes of the attorney-client privilege. Both sections 6102 (c) and 6068 (e) clearly include deceased clients within their ambit with limited exceptions also spelled out by statute. (See, e.g., Evid. Code, § 960.)

"The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides*." (*Cox* v. *Delmas* (1893) 99 Cal. 104, 123; accord, *Clancy* v. *State Bar* (1969) 71 Cal.2d 140, 146; *Hunniecutt* v. *State Bar* (1988) 44 Cal.3d 362, 372; see generally 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 95, p. 113.) "The fiduciary relationship makes it improper for an attorney to act contrary to . . . the interests of his present *or former* client." (1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 102, p. 122, emphasis added.)

We must therefore consider whether the Legislature intended to embrace former clients within the ambit of section 6102 (c). More particularly, we must consider whether the Legislature intended client victims to include a deceased client whose estate is in the hands of the client's attorney now acting as executor.

In analyzing this issue we derive some guidance from *In re Utz*, *supra*, 48 Cal.3d 468. In determining that the term "offense" in section 6102 (c) was limited only to the actual offense and not the circumstances of its commission, the Supreme Court noted that "If the Legislature had intended the term 'offense' in section 6102, subdivision (c) to take on a broader meaning, it easily could have included additional terms" as it did in section 6102, subdivision (d). (*In re Utz*, *supra*, 48 Cal.3d at p. 483.) In contrast to the narrow term "offense," the Legislature used broad language in the second prong of section 6102 (c): "in any manner such that a client of the attorney was a victim." **[8c]** While we cannot address all the permutations that might arise with respect to former clients to determine whether the Legislature can fairly be said to have intended summary disbarment to apply in each conceivable situation, the most likely opportunity for an attorney to steal from a client who has named him or her as executor of the client's estate is after the client dies, when the attorney has direct access to all of the client's assets and the client is no longer there to hold him or her directly accountable for the misconduct.

[8d] It is not surprising that clients would look to their most trusted fiduciaries during their lifetime

to act as fiduciaries in managing their estates after their death. It is precisely because the attorney-client relationship is one of utmost confidence that the commission of a felony in betrayal of that confidence receives the harshest sanction the disciplinary system imposes. There is such a clear nexus between the felony committed here and the trust and confidence of the client that was violated, we must conclude that the Legislature intended the phrase "in any manner such that a client was a victim" in section 6102 (c) to include a deceased client whose trust is betrayed by the plundering of his estate by the attorney he named as executor.

[4b] In view of the magnitude of the theft involved in this case, even without a prior record of discipline, the Supreme Court would undoubtedly order disbarment regardless of alleged mitigating circumstances. (See, e.g., *In re Basinger* (1988) 45 Cal.3d 1348, 1358, fn. 3.) We therefore recommend to the Supreme Court that respondent David Greene Lilly be summarily disbarred.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BRIAN STUTT RODRIGUEZ

A Member of the State Bar

Nos. 88-O-14072, 90-O-11274, 91-P-07029

Filed July 21, 1993

SUMMARY

Respondent was found culpable by a hearing judge of eleven counts of misconduct, involving three instances of misappropriating client funds and gross neglect of his trust account, sending letters in two cases threatening to file criminal or administrative charges to secure an advantage in litigation, failing to cooperate with the State Bar's investigation of two complaints against him, and misleading a superior court judge to excuse a failure to appear in court. Also, as a result of prior misconduct, respondent had been placed on actual suspension for a minimum of two years and ordered to comply with probation conditions and give notice of the suspension under rule 955, California Rules of Court. In this proceeding, respondent was found to have failed to give the required notice of his prior suspension, violated the terms of his probation, and, in one instance, practiced law while on suspension. The hearing judge recommended that respondent remain on actual suspension for an additional period of time. (Hon. Alan K. Goldhammer, Hearing Judge.)

The Office of Trials requested review, contesting the hearing judge's discipline recommendation and urging that respondent be disbarred. Respondent also sought review, requesting that the review department reverse the hearing judge's findings that respondent violated his probation conditions and dismiss the probation revocation case. The review department, on independent review, generally affirmed the culpability findings of the hearing judge, and found respondent culpable of three additional instances of unauthorized practice of law. While acknowledging the presence of some mitigating evidence, the review department concluded that the hearing judge gave greater weight to that evidence in the balance than was warranted by the serious and wide-ranging misconduct committed by respondent. A disbarment recommendation would have been appropriate based on the rule 955 violations alone. Further, respondent's prior suspension and probation had been ineffective to stem his misconduct, and he had been unable to comply with court orders. After reviewing comparable Supreme Court case law, the review department recommended disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Mark Torres-Gil

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**
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 [former 7-105(1)]

Where respondent's description of his car problems in explaining his failure to appear for a court hearing differed only in degree from the actual events, the difference did not constitute deception or an attempt to mislead the court. The steps respondent took once he experienced the car problems might not have been adequate to excuse his failure to appear, but this aspect of his conduct was not charged as a disciplinary violation and thus could not form the basis of a culpability finding.

[2] **213.40 State Bar Act—Section 6068(d)**
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]

Where respondent represented to a judge that he had failed to attend an earlier hearing because he had been in another city appearing before another judge in a family law matter, when in fact he had had no court appearance but had been in the other courthouse on other errands, his statement was materially dishonest, because the proffered excuse was intended to carry more weight than the truth would have. Respondent's deception therefore constituted an act of dishonesty in violation of the moral turpitude statute, as well as a violation of the statute and rule of professional conduct prohibiting attorneys from misleading judicial officers.

[3] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement

Wilfulness with regard to a rule of professional conduct violation does not require proof of an evil intent or bad purpose, but merely proof that the attorney intended to do that which the rule prohibits.

[4] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

Where respondent did not believe his client had a strong case and thought more evidence was needed in order to prevail, he had a choice: proceed diligently in advancing the client's legitimate claims, or promptly advise the client that she had no meritorious claims and withdraw from representation if the client insisted on pursuing her claim. He could not simply let excessive time pass, lead his client to believe he would advance her claim and neither do so nor take appropriate action to withdraw so the client might consult other counsel. This course of action warranted a finding that respondent was culpable of incompetent representation.

[5 a-c] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation

Where respondent honestly believed that he was entitled to retain portions of his clients' cost advances, even though this belief was unreasonable and unsubstantiated, respondent's retention of the funds did not necessarily warrant a conclusion that his conduct was dishonest, especially where respondent's gross negligence in handling the same funds had already been held to violate the moral turpitude statute.

[6] **106.30 Procedure—Pleadings—Duplicative Charges**
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation

Where hearing judge concluded that respondent misappropriated a portion of client's cost advance under trust account rule, and violated moral turpitude statute by gross negligence in supervising client trust funds, it was unnecessary for review department to amend hearing judge's conclusions to establish that those sections were violated, and review department declined to adopt additional conclusion that respondent acted dishonestly in misappropriating client's funds.

[7] **230.00 State Bar Act—Section 6125**

Where respondent knowingly permitted a civil complaint bearing his name as counsel to be filed after the effective date of his suspension from practice, respondent thereby violated statute prohibiting practicing while suspended. Even if respondent prepared complaint prior to suspension, did not intend to practice while suspended, and was only trying to assist client by having complaint filed, this did not constitute an excuse for respondent's conduct.

[8] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
1099 Substantive Issues re Discipline—Miscellaneous
1911.90 Rule 955—Other Procedural Issues

Claim that respondent's failure to give required notice of suspension in four different client matters should not have been charged as four separate violations was relevant to degree of discipline but not to culpability.

[9 a, b] **213.20 State Bar Act—Section 6068(b)**
221.00 State Bar Act—Section 6106
1913.29 Rule 955—Delay—Generally
1913.42 Rule 955—Compliance—Notice

Where respondent had been ordered to give notice of prior disciplinary suspension and to file affidavit of compliance with such order, and respondent failed to give timely notice and failed to notify opposing counsel in three matters, and respondent's affidavit of compliance was filed late and incorrectly stated that all courts and opposing counsel had been notified of his suspension, respondent's gross neglect and lack of diligence in complying with the order to give notice violated the statute requiring respect for courts, but did not constitute an intentional misrepresentation of facts to the Supreme Court in violation of statute prohibiting acts of moral turpitude and dishonesty.

[10] **230.00 State Bar Act—Section 6125**

While suspended from practice, an attorney may research any point of law or draft any legal document so long as it is done for the independent review of an active member of the State Bar in good standing who will take responsibility for the work to the client. Where respondent drafted a detailed points and authorities directly for a client while respondent was suspended, this conduct constituted unauthorized practice of law, regardless of respondent's laudable motive in attempting to aid the client at a critical time in the client's case.

[11 a, b] **230.00 State Bar Act—Section 6125**

Once an attorney is placed on suspension, he or she is prohibited from engaging in any law practice or even holding himself or herself out to opposing counsel as entitled to practice. Respondent's sending a counteroffer in settlement to opposing counsel in one matter the day after his suspension became effective, and his post-suspension use of his secretary in another matter to communicate with opposing counsel concerning a settlement offer pending at the time of his suspension, constituted unauthorized practice of law.

[12 a-c] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
141 Evidence—Relevance
171 Discipline—Restitution
745.51 Mitigation—Remorse/Restitution—Declined to Find

Restitution payments made under pressure of disciplinary proceedings are entitled to little or no weight in mitigation of discipline. However, whether restitution has been completed is important to deciding whether it should be required as a condition of probation, or, if disbarment is recommended, to whether respondent must make restitution as an issue bearing on rehabilitation for reinstatement. Thus, evidence of restitution payments made by respondent's father was relevant and properly admissible, even though not constituting mitigation, and review department granted motion to admit such evidence on review where hearing judge had declined to accept it. However, other evidence offered by respondent on review regarding Client Security Fund claim filed by respondent's client was not admitted by review department where it was not relevant to issues in proceeding. (See rule 570, Trans. Rules Proc. of State Bar.)

[13] **172.19 Discipline—Probation—Other Issues**
1712 Probation Cases—Wilfulness
1719 Probation Cases—Miscellaneous

It is the responsibility of an attorney on probation to comply with a probation condition requiring the attorney to meet with an assigned probation monitor referee. Even if respondent encountered difficulty in setting up such a meeting, where respondent did not seek the assistance of the State Bar Court's clerk's office, and instead permitted a substantial delay to pass before the required meeting occurred, respondent's neglect constituted a wilful breach of his probation duties.

[14 a, b] **172.17 Discipline—Probation Monitor—Powers and Duties**
172.19 Discipline—Probation—Other Issues
1712 Probation Cases—Wilfulness

It was unreasonable for respondent to believe that he had been excused by his probation monitor referee from filing one of the quarterly reports clearly required by his probation conditions, where respondent knew of his duty to file the quarterly reports timely and knew the exact dates on which those reports were due. Respondent therefore breached his probation duties by failing to file the report.

[15] **213.20 State Bar Act—Section 6068(b)**
802.69 Standards—Appropriate Sanction—Generally
861.10 Standards—Standard 2.6—Disbarment
1913.49 Rule 955—Compliance—Generally

In determining appropriate discipline to recommend for respondent found culpable of violating statute requiring respect for courts based on respondent's violation of Supreme Court order requiring him to give notice of his prior disciplinary suspension under rule 955, review department noted that respondent's failure to give timely and complete notice of suspension, and his filing of

an affidavit which was untimely and inaccurate, would have warranted a recommendation of disbarment, absent strong mitigating circumstances, in a referral proceeding for violation of rule 955.

[16 a, b] **213.20 State Bar Act—Section 6068(b)**
230.00 State Bar Act—Section 6125
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.00 Rule 4-100(A) [former 8-101(A)]
300.00 Rule 5-100 [former 7-104]
320.00 Rule 5-200 [former 7-105(1)]
420.00 Misappropriation
745.39 Mitigation—Remorse/Restitution—Found but Discounted
822.10 Standards—Misappropriation—Disbarment
831.40 Standards—Moral Turpitude—Disbarment
844.51 Standards—Failure to Communicate/Perform—No Pattern—Disbarment
861.30 Standards—Standard 2.6—Disbarment

Where respondent not only wilfully violated order requiring him to give notice of prior disciplinary suspension, but also misappropriated client funds by unilaterally taking cost advances as attorney fees; grossly neglected his trust fund responsibilities; misled a judge; failed to perform services competently; improperly threatened to bring criminal or administrative charges; practiced law while suspended; failed to participate in State Bar investigations, and breached his earlier disciplinary probation, then despite respondent's remorse, proper public protection would be realized by requiring respondent to demonstrate sustained evidence of rehabilitation in a reinstatement proceeding, with its higher standard of proof than the preponderance of the evidence.

[17 a, b] **165 Adequacy of Hearing Decision**
740.39 Mitigation—Good Character—Found but Discounted
745.39 Mitigation—Remorse/Restitution—Found but Discounted
802.62 Standards—Appropriate Sanction—Effect of Aggravation
802.63 Standards—Appropriate Sanction—Effect of Mitigation
802.69 Standards—Appropriate Sanction—Generally

A recommendation as to the degree of discipline properly results from a balanced consideration of all factors, requiring the State Bar Court to weigh mitigating and aggravating factors. Where respondent had committed serious and wide-ranging misconduct, his sincere expression of remorse and his favorable character references could not be weighed heavily, and had been given greater weight by the hearing judge than warranted by the record.

[18] **106.20 Procedure—Pleadings—Notice of Charges**
120 Procedure—Conduct of Trial
130 Procedure—Procedure on Review
141 Evidence—Relevance
165 Adequacy of Hearing Decision
192 Due Process/Procedural Rights
565 Aggravation—Uncharged Violations—Declined to Find

In determining whether evidence of additional uncharged ethical misconduct should be admitted as aggravating evidence in the discipline phase of the hearing, the hearing judge must balance the desire for additional relevant evidence against the due process requirement of fair notice of all discipline charges. Where there was sufficient evidence in the record to warrant a recommendation of disbarment, it was unnecessary for the review department to resolve a claim that the hearing judge erred in failing to admit aggravating evidence of uncharged misconduct.

[19] **101 Procedure—Jurisdiction**
102.20 Procedure—Improper Prosecutorial Conduct—Delay
107 Procedure—Default/Relief from Default
139 Procedure—Miscellaneous
511 Aggravation—Prior Record—Found
802.21 Standards—Definitions—Prior Record

Where respondent challenged the use of a prior disciplinary matter as evidence in aggravation because he contended the matter had been time-barred, but respondent had defaulted in the earlier proceeding and the prior discipline had been ordered by the Supreme Court over three years earlier, only the Supreme Court could grant the requested relief.

[20] **106.90 Procedure—Pleadings—Other Issues**
131 Procedure—Procedural Issues re Admonitions
135 Procedure—Rules of Procedure
1094 Substantive Issues re Discipline—Admonition

Admonitions are not discipline and may be reopened and proceed anew as a formal disciplinary proceeding if a formal proceeding is brought with two years based on other misconduct. The rules of procedure define the start of a formal proceeding as the issuance of a notice to show cause. (Trans. Rules Proc. of State Bar, rules 415, 550.)

[21] **162.20 Proof—Respondent's Burden**
204.90 Culpability—General Substantive Issues
750.32 Mitigation—Rehabilitation—Found but Discounted
795 Mitigation—Other—Declined to Find
802.30 Standards—Purposes of Sanctions
1719 Probation Cases—Miscellaneous

Respondent's bitterness and disaffection over his prior disciplinary suspension might explain some misconduct toward his clients thereafter, but it could not excuse his misconduct, especially since the suspension and its terms were designed to seek respondent's rehabilitation. Also, respondent's evidence of rehabilitation was depreciated by his inability to comply with his probation conditions, which was relatively recent and occurred after respondent had time to become familiar with his responsibilities.

[22] **101 Procedure—Jurisdiction**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
2502 Reinstatement—Waiting Period
2503 Reinstatement—Showing to Shorten Waiting Period

The required five-year waiting period before a disbarred attorney can apply for reinstatement may be shortened to three years for good cause. By rule, the five-year and three-year periods run from the date of any interim suspension, and Supreme Court precedent has given the same effect to inactive enrollment. (Trans. Rules Proc. of State Bar, rule 662.) The issue whether the waiting period may run from the start of a suspension other than an interim suspension has not been decided, and did not need to be addressed by the review department in recommending disbarment, but could be raised by respondent before a hearing judge if respondent wished to seek reinstatement at the earliest possible time.

ADDITIONAL ANALYSIS

Culpability
Found
213.21 Section 6068(b)

213.41 Section 6068(d)
213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.12 Section 6106—Gross Negligence
230.01 Section 6125
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
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)]
300.01 Rule 5-100 [former 7-104]
320.01 Rule 5-200 [former 7-105(1)]
420.12 Misappropriation—Gross Negligence
420.13 Misappropriation—Wrongful Claim to Funds

Not Found

213.15 Section 6068(a)
213.25 Section 6068(b)
213.45 Section 6068(d)
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)]
280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]
320.05 Rule 5-200 [former 7-105(1)]

Aggravation

Found

521 Multiple Acts

Declined to Find

535.90 Pattern
582.50 Harm to Client

Mitigation

Found but Discounted

720.30 Lack of Harm
725.31 Disability/Illness
725.36 Disability/Illness
725.39 Disability/Illness
745.31 Remorse/Restitution
745.32 Remorse/Restitution

Standards

801.30 Effect as Guidelines
824.10 Commingling/Trust Account Violations

Discipline

1010 Disbarment
1810 Disbarment
1921 Disbarment

Other

175 Discipline—Rule 955
1751 Probation Cases—Probation Revoked
1915.10 Rule 955—Violation Found

OPINION

STOVITZ, J.:

Respondent, Brian S. Rodriguez, was admitted to practice law in California in 1977. In 1990, he was suspended actually for two years and until he makes the required showing under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.) In this consolidated review of two original disciplinary proceedings and a separate probation revocation proceeding, we now review two decisions of a State Bar Court hearing judge each recommending additional suspension.

The State Bar's Office of Trials seeks our review of the hearing judge's decision in the original disciplinary proceedings. While disputing only some of the hearing judge's conclusions, the Office of Trials contends that disbarment, rather than suspension, is the appropriate discipline. Respondent seeks our review in the probation revocation case, urging that we reverse the hearing judge's findings that respondent violated his probation and dismiss that proceeding.

Independently reviewing the records in both proceedings, we have concluded that respondent engaged in misconduct regarded as very serious by the Supreme Court. He wilfully failed to comply with rule 955, California Rules of Court. In three matters, he misappropriated clients' cost advances by unilaterally satisfying his claim for fees and was grossly negligent in supervising trust funds. In four matters, he practiced law while under suspension. In two matters, he threatened criminal or administrative charges to gain a civil advantage. In one matter, he misled a superior court judge as to his inability to attend an earlier hearing. In another matter, he repeatedly failed to perform legal services competently and in two matters, he failed to participate in the State Bar investigation as required by the State Bar Act. Finally, he violated his probation in two respects.

Although we acknowledge the presence of some mitigation, including respondent's remorse and favorable character evidence, respondent's offenses were of the type which warrant disbarment. As we shall discuss, respondent's wilful violation of rule 955, standing alone, would warrant disbarment under guiding decisions. Accordingly, we shall recommend disbarment as urged by the Office of Trials.

I. THE ORIGINAL DISCIPLINARY PROCEEDINGS

A. Culpability.

In 2 consolidated original disciplinary proceedings, respondent was charged with a total of 12 counts of misconduct and found culpable of professional misconduct in 11 of the counts. The parties stipulated to many of the underlying facts in most of the counts and, on review, do not dispute many of the hearing judge's findings. We shall review the counts generally in the order charged and set forth in the hearing judge's decision after stating the following background facts.

Respondent was a sole practitioner. His father was also a lawyer with offices in the same general suite but with a separate practice. Respondent's practice emphasized employment discrimination and wrongful termination matters. At the time of his prior disciplinary suspension in February 1990 (see *post*), respondent had 48 active cases. Many of his clients were executive or professional employees and respondent considered the cases complex. He was without any attorney or paralegal help and often worked 16-hour days and weekends on his cases.

1. Sullivan matter.

In 1988, while representing an executive employed by a transit district, respondent was charged with having failed repeatedly to comply with court orders, failed to appear at scheduled court hearings, misrepresented to the court why he failed to appear at hearings and threatened criminal or administrative charges to gain a civil advantage. (Bus. & Prof. Code, §§ 6068 (b), 6068 (d), 6106; Rules Prof. Conduct, rules 7-104, 7-105.)[1]

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code and all references to rules are to the provisions of the former Rules of Professional Conduct of the State Bar in effect prior to May 26, 1989. References to "present rule" are to the Rules of Professional Conduct effective May 27, 1989, and references to "rule 955" are to the California Rules of Court (see footnote 2, *post*).

Most of the basic findings in this matter rest on stipulated facts. On review, neither party disputes the following basic findings and conclusions of the hearing judge and we adopt them as supported by clear and convincing evidence.

Respondent represented one Sullivan, a transit district executive, in a wrongful discharge action against his public employer. After the district denied Sullivan's claim, respondent filed suit on behalf of Sullivan at the end of 1987 in Alameda County Superior Court. The case was designated as one under the court's program implementing the Trial Court Delay Reduction Act of 1986. Respondent failed to appear for two court hearings in January 1988 in response to defense motions under local court rules, but he appeared at a February 1988 hearing. In June 1988, the superior court directed respondent to file a joint at-issue memorandum. Respondent failed to file the memorandum by its due date or to appear as required. Although respondent appeared at August and October 1988 superior court hearings, he had not filed the memorandum, claiming lack of cooperation from other counsel. When respondent did not appear at a November hearing directing him to show cause why Sullivan's action should not be dismissed, the court dismissed it and denied respondent's later motion to set aside the dismissal. Respondent grounded his motion upon the failure of opposing counsel to have returned the at-issue memorandum to him. He also represented to the superior court that he was unable to appear at the November court hearing because he had had a car fire which had occurred as he was leaving another courthouse in which he claimed to have had a court appearance in a family law matter.

In November 1988, to gain an advantage in Sullivan's civil case, respondent wrote counsel for the transit district, stating that if the suit could not be settled, "appropriate action" would be taken before the district attorney and other named public agencies to bring to the attention of voters alleged unethical and illegal conduct of the transit district's board. Respondent never filed such charges and had no intent to do so if the district settled the Sullivan case. Five days later, respondent wrote another letter to defense counsel reaffirming earlier threats to generate publicity by bringing action before public agencies unless the case settled.

According to respondent, he appealed successfully the superior court's dismissal order and the action was later settled.

The hearing judge concluded that respondent's actions did not violate sections 6068 (a) and 6103 either in the Sullivan matter or in any of the other matters charged. (See, e.g., *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609; *Baker* v. *State Bar* (1989) 49 Cal.3d 809, 815.) The judge concluded that respondent's failure to make court appearances in Sullivan's matter did not violate section 6068 (b) since there was a lack of clear and convincing evidence that that conduct involved bad faith or was disciplinable. However, the hearing judge found that respondent violated section 6068 (d) and rule 7-105 because his representations to the civil court in December 1988 about his failure to appear in November 1988 were deceptive. The hearing judge declined to conclude that this conduct violated section 6106 because he concluded that respondent's misrepresentations were not material to the issues before the superior court and that while "misleading, deceptive, and false," respondent's representations were not "truly dishonest." Finally, for writing the two threatening letters, the hearing judge concluded that respondent violated rule 7-104.

The deputy trial counsel does not dispute any of the findings or conclusions in this matter. Respondent disputes only those conclusions that he deceived the civil court in violation of section 6068 (d) and rule 7-105.

[1] As applied to the facts of this matter, section 6068 (d) and rule 7-105 sanction the same conduct: failing to employ such means only as are consistent with truth and seeking to mislead a judicial officer by artifice or falsity. In seeking to excuse his failure to attend an earlier hearing, respondent made two statements to the superior court judge in December 1988: that he was late because he had experienced a car fire and that he had originally gone to a courthouse in another city and had been in court before another judge on a family law matter. The hearing judge appears to have concluded that respondent's statement as to his car fire was deceptive, but we do not agree. While there appears not to have been any actual car fire, respondent testified without dispute that his car was billowing smoke which he traced to

the leak of oil onto hot engine surfaces. We do not believe the difference in degree between the car problems respondent actually suffered and those he described to the superior court transgressed either section 6068 (d) or rule 7-105. Instead, we see the real problem revealed by the colloquy between respondent and the superior court judge in December 1988 as to respondent's explanation of car trouble to be not one of deceit but one of adequacy; that is, whether the steps respondent took once he experienced car trouble were an adequate excuse for him not to have appeared in court. This aspect of respondent's conduct was not addressed by the charges, and therefore cannot form the basis of any culpability finding.

[2] We agree with the hearing judge, however, that respondent's misstatement to the superior court judge that he was in court before another judge in another city on a family law matter just before his car trouble was deceptive and we conclude it was dishonest as well. We believe that the hearing judge interpreted the facts too generously when he concluded that these statements of respondent were literally true. Respondent testified below that he had no court appearance before another judge. Although he went to the courthouse in the other city, he did so to pick up some family law forms and he may have also called at the family services office in that courthouse. He testified that his representation to the judge was a "factual error." We also find it materially dishonest because it had to be intended to carry more weight than the truth would have carried with the judge from whom respondent was seeking an excuse for not having appeared. (See *Marquette* v. *State Bar* (1988) 44 Cal.3d 253, 262; *Bach* v. *State Bar* (1987) 43 Cal.3d 848, 855.) Therefore we conclude that respondent's deception violated section 6106 as an act of dishonesty as well as section 6068 (d) and rule 7-105.

2. Williams matter.

As supplemented by the record, the hearing judge's undisputed findings and conclusions in this matter may be summarized as follows. In 1988, one Williams, manager of two retail outlets of a vision care chain, hired respondent to represent her in a wrongful termination action. In September 1988, respondent wrote a lengthy demand letter to the chain's president, alleging a number of violations by the chain of health or safety laws or regulations about which Williams had earlier complained to chain management. In this letter respondent threatened to present administrative charges to state and local agencies if the chain's president did not respond. In November 1988, respondent wrote to the chain's counsel. Respondent repeated to that counsel his earlier threat of administrative investigation unless a "reasonable and viable counteroffer" was presented within five days. The hearing judge concluded that these letters constituted violations of rule 7-104.

[3] We adopt the judge's findings and conclusions in this matter and we also conclude that the violations were wilful within the meaning of section 6077 and rule 1-100. It has long been settled that wilfulness with regard to a rule of professional conduct violation does not require proof of an evil intent or bad purpose, but merely proof that the attorney intended to do that which the rule prohibits. (*Gadda* v. *State Bar* (1990) 50 Cal.3d 344, 355 [rule 2-101]; *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 976 [rule 8-101]; *Abeles* v. *State Bar* (1973) 9 Cal.3d 603, 610-611 [former rule 12].) Here the proof was ample to show that respondent acted purposefully.

3. Failure to participate in two State Bar investigations.

As in the preceding count, the findings and conclusions of the hearing judge are not disputed. In January and February 1989, respondent failed to reply to two letters addressed to him from a State Bar investigator concerning the Williams matter. Both letters cited respondent to his statutory duty to cooperate and participate in such an investigation. (§ 6068 (i).) In March 1989, respondent failed to reply to the same investigator's letter concerning the Sullivan matter. This letter also cited respondent to section 6068 (i). From these findings, the judge concluded that respondent wilfully violated section 6068 (i). We adopt these findings and conclusions together with the additional finding that all three letters which respondent failed to answer requested or invited a reply.

4. Bryant matter.

There are only relatively minor disputes among the parties concerning the hearing judge's findings and conclusions of respondent's culpability. In about November 1988, one Bryant, a buyer of supplies for a public transit district, hired respondent to represent her in a claim of discrimination against the district after it allegedly failed to follow employment posting procedures for a senior buyer position and promoted another to that position.

Bryant and respondent entered into a contingent fee contract. Between November 1988 and June 1989, Bryant paid respondent $3,500 in advanced costs called for by the contract. The record is clear that respondent deposited in his trust account about $1,000 of Bryant's $3,500 cost advance. The record is not clear whether any of the remaining $2,500 was so deposited. However, respondent did not use any of the $3,500 for costs, but used it all for attorney fees. Moreover, between November 1988 and his February 1990 suspension, respondent failed to file any claim or action for Bryant and the only legal work he performed was the preparation of a draft of a claim which he sent to Bryant in November 1989.

Respondent's two-year minimum actual suspension was effective February 5, 1990. He had until March 7, 1990, to notify Bryant by certified mail of his suspension as required by rule 955.[2] He notified Bryant on April 4, 1990. Sometime after April 4, respondent refunded $3,000 to Bryant, but kept $500 for investigative and secretarial expenses. The hearing judge found that respondent "sincerely believed" he was entitled to keep the $500, but did not have a reasonable basis for doing so.

The hearing judge concluded that respondent did not improperly withdraw from employment but that he did violate section 6068 (b) by failing to give Bryant timely notice of his suspension as required by rule 955, California Rules of Court (hereafter, rule 955). The judge found respondent culpable of failing to perform services competently as required by former rule 6-101 and present rule 3-110(A) by recklessly failing to take sufficient steps to advance Bryant's claim despite receiving a substantial cost advance during the more than one year between the time Bryant retained him and the start of his prior suspension. Based on a lack of clear and convincing evidence, the hearing judge concluded that respondent did not violate the rules requiring the deposit of cost advances in a trust account. Finally, the judge concluded that respondent misappropriated $500 of Bryant's cost advance (rule 8-101(A); present rule 4-100(A)) and through gross neglect of his duty to oversee entrusted funds also violated section 6106.

[4] The only dispute respondent offers on review in this matter is that he is not culpable of incompetent representation. His objection is not well taken. In the more than one year between his agreement to represent Bryant and his suspension, he did meet with Bryant and his investigator and reviewed facts pertinent to Bryant's case but he prepared only a draft of a claim. He testified that he did not believe Bryant had a strong case and more evidence was needed to prevail. Bryant testified that respondent never told her that he needed more evidence in order to proceed. Bryant did recall respondent saying that more evidence would result in a larger recovery. The hearing judge heard the testimony of both Bryant and respondent and reviewed the documentary evidence. He resolved this issue against respondent. We affirm. In representing Bryant, respondent had a choice: proceed diligently in advancing her legitimate claims or give his best advice to his client that she had no meritorious claims promptly after so concluding, withdrawing if necessary, on proper notice, if the client insisted on pursuing her claim. (See present rule 3-700.) He could not simply let excessive time pass, lead his client to believe he would advance her claim and neither do so nor take appropriate action to withdraw so that she might consult other counsel. (See, e.g., *Bernstein* v. *State Bar* (1990) 50 Cal.3d 221, 232.)

2. As pertinent, rule 955 required respondent to notify clients, courts and opposing counsel by certified mail of his 1990 suspension within 30 days of its effective date, and of the clients' entitlement to their papers and property and to file with the Supreme Court within 40 days of the start of his suspension an affidavit that he sent the required notices.

[5a, 6] The deputy trial counsel accepts the findings of the judge in the Bryant matter, but would also find that respondent had no reasonable entitlement to the $500 of Bryant's cost advance he kept and that respondent failed to maintain that cost advance in trust. We adopt these requested supplemental findings. However, the deputy trial counsel would also have us conclude that respondent acted dishonestly in misappropriating Bryant's funds in violation of section 6106. We hold that on this record, the hearing judge's conclusions were appropriate. (See *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465.) Respondent believed he was entitled to Bryant's funds, albeit that his claim was unreasonable and unsubstantiated. (See *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 332; *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1099; cf. *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 166-169.) Moreover, since the hearing judge concluded that respondent misappropriated $500 of Bryant's cost advance under rule 8-101(A) and was grossly negligent in supervising these trust funds in violation of section 6106, it is unnecessary to amend the legal conclusions in this count to establish that those sections were violated. We note again that respondent has not challenged the hearing judge's findings and conclusions relative to the Bryant cost advance.

5. Davalos matter.

The hearing judge found no culpability in this matter and the deputy trial counsel has not disputed those findings and conclusions. We summarize them briefly. Davalos, a bus driver for a public transit district, hired respondent in 1987 to defend him after being cited following an accident while driving a district bus. Respondent represented Davalos on the citation matter. In 1988, solely as a favor, respondent wrote several letters for Davalos concerning an employment issue and a suit filed against him and the district arising out of the accident. As of his February 1990 suspension, respondent was not representing Davalos in any matters.

Based on the hearing judge's assessment of the credibility of witnesses, the judge concluded that respondent was not culpable of charges that he failed to act competently, improperly withdrew from employment or failed to notify Davalos of his February 1990 suspension. On our review of the record, we adopt the hearing judge's findings and conclusions.

6. Schillinger matter.

The parties dispute only a small portion of the judge's decision in this matter. As supplemented by the record, we adopt the following findings. One Schillinger had been a police department captain. At age 55, he was hired as a security official of a California bank. He became a vice president and "chief special agent" of the bank. Eight years later, in June 1985, his job duties were consolidated with those of another bank officer and his position was eliminated. He was offered two months paid leave, six months severance pay, outplacement counseling and an additional two months leave permitting him retirement benefits. Shortly thereafter, he was hired by a residential community as its director of public safety.

Schillinger had hired other counsel to sue the bank for wrongful termination as a result of age discrimination. In March 1988, he retained respondent to take over his representation. Schillinger agreed to a contingent fee for respondent's services and a $10,000 advance for costs. At this time, a motion for summary judgment filed by the bank was pending in San Francisco Superior Court. In April 1988 the motion was granted on the grounds that the National Bank Act (12 U.S.C. § 24, et seq.) authorized the bank to terminate the jobs of bank officers such as Schillinger, as at-will employees, and that that federal law pre-empted Schillinger's state claims.

In August 1988, respondent appealed on behalf of Schillinger from the summary judgment, briefed the issue and, one month before his February 1990 suspension, argued it before the appellate court. In April 1990, the appellate court affirmed the trial court's judgment.

Respondent did not notify Schillinger timely of his suspension as required by rule 955. In March 1990, after Schillinger had learned from another that respondent had been suspended, Schillinger requested an accounting from respondent of costs advanced. Respondent did not reply. As we shall discuss, *post*,

two years later respondent repaid Schillinger $10,687. Receipts respondent had given Schillinger earlier showed that respondent had spent only about $1,300 for costs. Schillinger was able to hire new counsel and he ultimately settled his suit against the bank.

The hearing judge concluded that respondent's failure to timely give notice of his suspension violated section 6068 (b). That conclusion is not disputed and we adopt it. With respect to respondent's handling of Schillinger's $10,000 cost advance, the judge concluded that respondent misappropriated all but $1,300 of that advance but his misappropriation was one in violation of present rule 4-100(A), not section 6106. The judge did conclude that respondent committed moral turpitude in violation of section 6106 based on his gross negligence in handling his contingent fee contract with Schillinger and in not seeking to amend that contract to provide for fees for the work he did for Schillinger on the summary judgment appeal. The hearing judge concluded that respondent violated present rule 4-100(B)(4) by not promptly paying Schillinger the cost advance funds he was entitled to receive, but that respondent did not violate rule 4-100(B)(3) because he did not fail to render Schillinger an appropriate accounting.

At trial, respondent defended the charge of misappropriation of Schillinger's cost advance, by testifying that when he lost the summary judgment motion and agreed to appeal, Schillinger agreed that the $10,000 cost advance, less what respondent had already used for costs, would be his attorney fee for the appeal, based on an hourly fee of $150. Schillinger denied that he had so agreed, pointing to his understanding of his contingent fee agreement with respondent. That agreement did not specifically provide for fees for an appeal and it was never amended in writing.

Respondent's only attack on review on the hearing judge's decision in this matter is his argument that, although he may have mistakenly thought himself entitled to keep most of Schillinger's cost advance, that conduct did not involve moral turpitude. This argument rests on a mistaken understanding of the hearing judge's decision. The decision below did not find respondent culpable of violating section 6106 because of a dishonest belief of entitlement to funds, but rather because of gross neglect in securing his client's trust funds.

[5b] The deputy trial counsel's only dispute with the findings centers around the contention that respondent had no reasonable belief in his entitlement to $8,700 of Schillinger's cost advance. As in the Bryant matter, the deputy trial counsel also urges that we find respondent's use of Schillinger's funds to be dishonest. We adopt the one change in the findings urged by the deputy trial counsel, concerning the status of respondent's trust account balance, but, in our view, and consistent with our holding in the Bryant matter, *ante*, there is no reason to change the hearing judge's conclusions which did include respondent's misappropriation under present rule 4-100(A) and his gross neglect violating section 6106.

7. Szoboszlay matter.

The parties have disputed only some of the findings and conclusions of respondent's culpability in this matter. We adopt the following findings and conclusions as amply supported by the record. In July 1988, one Szoboszlay, a bank officer, hired respondent to represent her in a worker's compensation case and in an action against the bank based on alleged sex discrimination and harassment. Respondent entered into an oral contingent fee agreement with Szoboszlay for representation in her civil case against the bank and, in October 1988, Szoboszlay advanced respondent $3,000 to be used for costs. Respondent deposited this sum in his trust account and used $1,446.39 for expenses, including investigation and filing fees.

Following investigation of Szoboszlay's case, respondent prepared a civil complaint, but it was not filed in superior court until March 5, 1990, a month after his suspension started.[3] Respondent did not notify Szoboszlay in writing of his suspension until

3. Respondent signed and dated Szoboszlay's complaint and an accompanying civil court cover sheet on February 1, 1990. He testified that the delay in filing them was due to a backlog of typing in his office.

April 7, 1990, one month after he was required to do so by rule 955. In May 1990, Szoboszlay requested an accounting from respondent of her $3,000 costs advance. Four days later, considering that he was discharged, respondent submitted a lien claim for quantum meruit attorney fees of $15,000 and refused to refund the $1,553.61 of the $3,000 which respondent had not used for costs. He claimed this sum for attorney fees despite Szoboszlay's objection and his lack of entitlement to them under his contingent fee agreement.

The hearing judge concluded that respondent wilfully violated section 6068 (b) by failure to timely give notice of his suspension. Respondent was also found culpable of violation of present rule 4-100(A) and rule 4-100(B)(4) by failing to use $1,553.61 of the cost advance for its proper purpose and failing to pay it promptly to Szoboszlay. He also violated rule 4-100(B)(3) by not rendering an appropriate accounting to Szoboszlay of her advanced costs. Following his conclusion in the Bryant matter, *ante*, the hearing judge concluded that respondent grossly neglected the handling of Szoboszlay's funds in violation of section 6106,[4] but he did not violate section 6125 by filing Szoboszlay's complaint after the effective date of his suspension.

Respondent disputes only the hearing judge's conclusion of moral turpitude by gross neglect in handling Szoboszlay's funds. Respondent's claim seems based on the same rationale as in the Bryant and Schillinger matters and we reject it for the same reason as it misinterprets the hearing judge's rationale for his conclusion.

The deputy trial counsel requests supplemental findings in three respects. We adopt the first and third requests directed at respondent's handling of Szoboszlay's cost advance. However, since the requested supplemental finding as to the filing of Szoboszlay's complaint after respondent's suspension is more in the nature of a recital of evidence rather than a finding of fact, we decline to adopt that requested supplement. **[5c]** For the same reasons as in the Bryant and Schillinger matters, we decline to adopt the deputy trial counsel's claim that respondent's handling of Szoboszlay's funds was dishonest, noting that, as in those matters, the hearing judge did conclude that respondent was culpable of violating rule 8-101(A) or present rule 4-100(A) and also section 6106.

[7] In this matter, the deputy trial counsel also urges us to conclude that respondent violated section 6125 by engaging in the unauthorized practice of law. The deputy trial counsel's point is well taken. As the hearing judge observed on page 25 of his decision, respondent's filing of the complaint after he was suspended "appeared to be the practice of law." Yet the judge exonerated respondent of the charges of violation of section 6125 mainly on the grounds that respondent did not intend to practice while under suspension and was only trying to help Szoboszlay. Respondent's position was that he had completed the complaint before the suspension's effective date, but it had been delayed in being filed by press of business in the office. Szoboszlay's testimony on this point, which was deemed credible, was to the effect that respondent was aware that he filed her complaint after his suspension but that he claimed he had "bar association" permission to do it. No evidence was introduced that the Supreme Court or this court had given respondent any relief from his suspension order. While we properly give great deference to the hearing judge's findings resolving testimonial matters, we are unable to consider that respondent's explanation, even if believed, constitutes an excuse. The objective facts which occurred here show that respondent violated section 6125 by knowingly permitting a complaint bearing his name as counsel to be filed after the effective date of his suspension. (Cf. *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229.)

8. Failures to comply with rule 955 and additional violations of section 6125.

In five additional counts of this proceeding, involving, respectively, clients Potter, Gutierrez,

4. In explaining his conclusions of respondent's violation of section 6106 in the Szoboszlay matter, the hearing judge compared the matter to the Bryant and Potter matters. Reviewing the record, we interpret the judge's comparison to Potter to instead mean a reference to the Schillinger matter. In any case, the difference is insignificant.

Costin, Peerson and one general count, the hearing judge concluded that respondent violated section 6068 (b) by his failure to comply timely with the Supreme Court's February 1990 order under rule 955. Four of these counts involved the failure to give notice to proper parties in specific cases in which respondent represented clients. The fifth such count charged respondent with committing an act of moral turpitude in violation of section 6106 by filing a false affidavit with the Supreme Court as to his compliance with rule 955. **[8]** On review, respondent does not object to the hearing judge's findings in four of these matters that he violated section 6068 (b) by not complying timely with rule 955. He takes issue only with the State Bar's urging of each rule 955 violation as a separate act. Since we deem respondent's claim as one going to the degree of discipline to recommend, we shall defer consideration of it until we consider the issue of discipline.

[9a] With regard to the four specific counts of failure to give timely notice as required by rule 955, we need not detail the findings in each matter. Respondent acknowledged in his testimony below that his program for rule 955 compliance was "poorly organized." He did not take any steps to deal with his suspension order until his father confronted him with it on about February 23, 1990, 18 days after its effective date and less than 2 weeks before his rule 955 notices were due to be mailed. Although he had only 48 open or active cases at that time, he did not send out the rule 955 notices all at once, but rather in "waves" over the entire month of March and into early April. Moreover, after he sent them, he learned from his counsel that they had to be sent certified mail so he re-mailed them. He conceded that opposing counsel in three of the matters did not receive notice. We therefore conclude that there is ample support for the judge's conclusions with respect to respondent's violation of section 6068 (b).

[9b] Respondent's April 10, 1990, rule 955 affidavit filed in the Supreme Court was almost a month overdue and incorrectly stated that all courts and opposing counsel had been notified of his suspension. On this record, we agree with the hearing judge that respondent did not intentionally misrepresent facts to the Supreme Court as proscribed by section 6106 but rather was culpable of violating section 6068 (b) by his gross neglect in not complying diligently with the order. We do acknowledge, as the hearing judge was aware in the Bryant, Schillinger and Szboszlay matters, that an attorney's practice of gross neglect in the handling of client matters or client funds has been held to equal moral turpitude under section 6106. Yet we believe that respondent's culpability is adequately addressed by the hearing judge's conclusion that he violated section 6068 (b). (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

[10] In one of the matters discussed here, involving Peerson, the hearing judge concluded that respondent also practiced law while suspended in violation of section 6125. We agree with the hearing judge, noting that neither party disputes these conclusions. Respondent's position below was that, although he knew he was suspended, he sought only to aid Peerson as a paralegal at a critical time in Peerson's superior court lawsuit. However, respondent drafted very detailed points and authorities specific to Peerson's case directly for Peerson's use. After his suspension, respondent was ethically allowed to research any point of law or draft any legal document so long as done for the independent review of another active member of the State Bar in good standing who would take responsibility for it to the client. (See *Crawford* v. *State Bar* (1960) 54 Cal.2d 659, 667-668.) When respondent undertook this work directly for Peerson, however, he violated section 6125, regardless of his laudable motive. (See *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 603-604.)

[11a] In the Potter matter, the hearing judge found no violation of section 6125. The deputy trial counsel disagrees, contending that respondent violated the statute by sending a counteroffer in settlement to opposing counsel the day after his suspension became effective. Although the hearing judge found that respondent had caused such a letter to be drafted just before his suspension, it was not sent until the day after suspension. The hearing judge also found that respondent notified opposing counsel three days later of his suspension. From these findings, the judge concluded that respondent engaged in misconduct for sending the counteroffer to opposing counsel after suspension, but that that misconduct was better addressed under section 6068 (b). We disagree and agree instead with the deputy trial counsel. Section

6068 (b) adequately addressed respondent's failures to comply with the provisions of rule 955 of the California Rules of Court. However, once his suspension went into effect, section 6125 prohibited him from engaging in any law practice or even holding himself out to opposing counsel as entitled to practice. (See *Morgan* v. *State Bar*, *supra*, 51 Cal.3d at pp. 603-604.)

[11b] The Costin matter was similar to Potter in that the hearing judge declined to conclude that respondent violated section 6125 by causing his secretary to communicate with opposing counsel after his suspension. The deputy trial counsel argues otherwise and we agree with the deputy trial counsel. The hearing judge found that while representing his client, Costin, in a worker's compensation matter, respondent received a settlement offer. Apparently coincidentally, the offer was set to expire the day respondent's suspension became effective, February 5, 1990. On that day, February 5, respondent replied to opposing counsel's offer by hand-delivered letter. The next day, respondent instructed his secretary to phone opposing counsel and to relay several instructions concerning the settlement. Ten days after respondent was suspended, he instructed his secretary to place another call to opposing counsel, to convey the message that respondent accepted counsel's offer and to request that counsel forward a compromise and release. In the face of the evidence and findings, the hearing judge concluded that respondent did not violate section 6125 even though he used his secretary as a "subterfuge." We disagree and hold that it was as much a violation as if respondent had personally conducted settlement discussions with opposing counsel after suspension from practice.

B. Mitigating and aggravating evidence.

In mitigation, respondent testified to the "head-in-the-sand" attitude he had taken about his earlier suspension. He expressed remorse that he had let down so many clients involved in the disciplinary proceedings and attributed his earlier lack of cooperation with the State Bar to a big ego, which he has since balanced by involvement in church and parenting activities. He testified to a sincere change in his life and attitude and that he has learned new skills as an editor for a legal publication.

Respondent's father testified in support of his son. As we noted, it was respondent's father who forced respondent to face the responsibilities of his 1990 suspension. The senior Rodriguez testified to the remorse respondent demonstrated and to his current sense of responsibility and rehabilitation. He attributed respondent's earlier problems to both stress and ego.

Respondent presented character reference letters from his minister, his father and four other attorneys. These references had a varying knowledge of the findings in respondent's two disciplinary proceedings, but all were highly favorable to his being allowed to continue to practice. The references cited his remorse; most attributed his problems to lack of adequate support and management skills and discussed his growth in recent years.

The principal evidence in aggravation was respondent's 1990 suspension. Respondent did not participate in that prior disciplinary proceeding. He was found to have committed misconduct in two client matters.[5] In a third matter, he was found to have failed to participate in 1986 in the State Bar investigation of one of the two matters.

In one of the two client matters, a wrongful discharge matter removed to federal court, respondent did not oppose defense motions to dismiss or for summary judgment and concealed from his client the dismissal of the action in 1984. For a six-month period in 1985, respondent failed to answer numerous requests of his client for information. When the client learned that his case had been dismissed, he asked for his files. Respondent gave him some but not all of them.

5. Before us, respondent complains that one of these matters was barred since it flowed from resumption of proceedings after the two-year period specified in rule 415, Rules of Procedure of the State Bar. We shall deal, *post*, with respondent's claim. At this point we note that the Supreme Court's order of suspension has been final for over three years.

In the other client matter, respondent provided legal services in probate of an estate. For a two-year period (1980-1982), he failed to respond to requests of his client for information about the probate. He again failed to communicate with his client for another two-year period (1982-1984). During that latter period, the client consulted another attorney and finally the State Bar before respondent resumed contact with the client and moved forward. The matter was not set for trial until 1985, over five years after respondent was hired.

The Supreme Court adopted the State Bar's recommendation of a three-year suspension, stayed on conditions of a two-year actual suspension and until respondent showed his rehabilitation, fitness to practice and learning 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"). Respondent has remained on this actual suspension continuously since February 5, 1990.

[12a] We now discuss respondent's motion presented on review for leave to produce additional evidence concerning mitigation. Accompanying his brief on review, respondent requested us to allow him to present in evidence copies of three checks written by his father in March 1992 (in the Bryant, Schillinger and Szoboszlay matters) representing repayment by respondent and a letter from a State Bar investigator as to a complaint brought by Schillinger. Finally respondent asks us to judicially notice the State Bar Client Security Fund's file in the Schillinger matter which was opened after Schillinger filed an application for reimbursement from the fund. The deputy trial counsel opposes respondent's motion, noting that as to the checks, the same motion was presented to and denied by the hearing judge and none of the proffered evidence was relevant to establishing mitigation.

[12b] Restitution made under pressure in a disciplinary proceeding has been held entitled to little or no weight in mitigation of discipline. (See, e.g., *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 778.) However, the question of whether restitution has been completed is important to deciding whether it should be required as a condition of probation or suspension, if that degree of discipline is chosen (see, e.g., *Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 684-685); and if disbarment is deemed the appropriate recommendation, to the question of whether respondent is obligated to make restitution as an issue later bearing on rehabilitation for reinstatement. The deputy trial counsel has not challenged the proffered evidence of restitution on grounds other than relevance. We have determined that respondent's motion should be granted as to the admission in evidence of the three checks. We will admit them as respondent's exhibits next-in-order. We deny respondent's motion in all other respects.

[12c] Although rule 570 of the Transitional Rules of Procedure of the State Bar provides for admissibility of certain Client Security Fund documents in the trial of a disciplinary proceeding, we have determined that at this review stage, respondent's other proffered evidence is not relevant to the issues in this proceeding and we decline to admit this proffered evidence.

II. THE PROBATION REVOCATION PROCEEDING

Respondent disputes that he is culpable of wilful violations of his probation. However, the essential facts on which the hearing judge based his findings are largely undisputed. They focus on two aspects of his probation duties: required contact with his assigned probation monitor referee and filing of a required quarterly probation report.

A. Failure to contact probation monitor referee.

Respondent's probation terms required that he promptly review the terms and conditions of his probation with his assigned probation monitor referee ("referee"), furnish requested reports to the referee and cooperate fully with the referee, meeting with him in person at least once every three months. The amended notice to show cause charged respondent with having failed to make himself available to review, and with not having reviewed, his probation conditions with the referee.

The hearing judge found that within about two months after his probation started, respondent met

with the first referee assigned to monitor his probation, George Poole, and reviewed with him his conditions of probation. Poole directed respondent to schedule future quarterly meetings with him and to be punctual regarding reports and meetings. Although the hearing judge found that respondent needed to be reminded by Poole twice to schedule the required meetings, this aspect of probation violation concerns respondent's failure to meet with another referee, Bruce Anderson, assigned by the State Bar Court[6] in March 1991 to replace Poole. At the same time, the State Bar Court clerk's office wrote to respondent at an address ("Alameda address") other than his address of record, advising him that the State Bar Court would communicate with him only at his address of record and if he wished to change that address, he had to notify the State Bar's member records office. The newly-assigned referee, Anderson, wrote to respondent twice, in March and April 1991, at his address of State Bar record to attempt to contact him. In May 1991, Anderson reported that respondent had not contacted him. Sometime in May 1991, respondent telephoned Anderson and left a message to return his call. Anderson returned the call but did not reach respondent.

On May 17, 1991, respondent filed his quarterly report due April 10, 1991. In it, he stated that he had "established contact" with Anderson. He testified that by so stating, he meant that he had mailed Anderson a copy of his probation report. A few days later, Anderson wrote to respondent at his Alameda address that Anderson did not consider that respondent had made contact with him and instructed respondent to call Anderson's office to set up a personal meeting.

Anderson reported to the State Bar Court clerk's office in June, August and October 1991 that respondent had still not contacted him. Respondent testified that he placed calls to Anderson in July, October and December 1991, leaving messages each time to return respondent's calls. In December 1991, respondent wrote Anderson that he was ready and willing to meet with him. Later that month, respondent reached Anderson by phone and a meeting was held in January 1992.

The hearing judge concluded that respondent wilfully violated his probation duty to meet with his referee. He received actual notice of Anderson's substitution and of the need to schedule a meeting with him no later than May 15, 1991. The judge concluded that respondent's sporadic telephonic messages to Anderson over many months did not fulfill adequately his duty as a probationer.

[13] Respondent contends that he made adequate attempts to reach his referee who knew at all times where respondent could be reached. In his brief, respondent focuses on the early 1991 chronology to depict a scenario in which he did all that was necessary in good faith to bridge the transition between referees. However, respondent ignores that it was clearly *his* responsibility to arrange for a meeting with Anderson and that the delay which passed after March of 1991 until such a meeting occurred was substantial. The hearing judge pointed this out in his decision and made it clear that he did not find culpable respondent's failure to meet with Anderson shortly after his assignment to monitor respondent's probation. The hearing judge's observations are well-taken. Moreover, if respondent did experience difficulty in setting up a meeting with Anderson, he never reported that fact to the State Bar Court clerk's office to seek its aid in contacting Anderson. Under these circumstances, we must conclude, as did the hearing judge, that respondent wilfully breached his probation duties.[7]

B. Failure to file quarterly probation report.

Respondent's probation also required him to file reports by the tenth day of January, April, July and

6. During the times described, disciplinary probation was administered and monitored by the State Bar Court. Those functions have recently been assigned to the State Bar's Office of the Chief Trial Counsel.

7. The examiner asks us to supplement or modify the hearing judge's findings. While most of the examiner's suggested changes might be warranted, they are not necessary to our adoption of the hearing judge's essential findings and conclusions that respondent failed to communicate as required with his probation monitor referee.

October of each year of his probation, covering the preceding quarter-year and attesting to compliance with the conditions of his probation. The amended notice to show cause charged that respondent failed to file the report due January 10, 1992. As mentioned *ante*, respondent filed a 1991 report late and the record also shows that the State Bar Court clerk's office reminded respondent during 1991 of his duty to file timely reports and of the compliance dates. There is no dispute that respondent filed his report due January 10, 1992, on February 10, 1992,[8] and after receiving a letter from Anderson dated February 4 that his report had been due January 10.

[14a] Respondent's sole stated reason for filing his January 1992 report late was that he was confused by his first meeting with Anderson on January 10, 1992. On that day (the last day for filing of the probation report covering the fourth quarter of 1991), respondent asked Anderson when his next report was due. Assuming respondent had filed his January report, Anderson replied that his next report was due by April 10, 1992. On January 15, 1992, five days after his January report was due, respondent wrote Anderson stating in part, "As you confirmed, the next... report... is due on or before April 10, 1992." When Anderson learned that respondent had not filed his January report, he wrote to respondent to tell him that he needed to file that report as soon as possible. Respondent's position below and before us was that he assumed from his meeting with Anderson on January 10 that he could dispense with the January report and he thus claims to have been misled.

[14b] The hearing judge had the chance to evaluate the testimony of respondent and Anderson. He found Anderson credible but not respondent. We agree with the hearing judge's discussion of his conclusions that respondent failed to file timely his January 1992 report which discussion emphasized the knowledge respondent had not only of his duties to file reports timely but exactly when those reports were due. We agree with the hearing judge that it was unreasonable for respondent to believe that Anderson excused him from a clear requirement of his probation terms. We therefore uphold the hearing judge's conclusion that respondent breached his probation duties.

III. THE APPROPRIATE DISCIPLINE TO RECOMMEND

We must now recommend the appropriate aggregate discipline based on the record in the original disciplinary and the probation revocation proceedings.

[15] At the outset, we note that in five of the matters, the hearing judge appropriately concluded that respondent violated section 6068 (b) by failing to comply with rule 955. As was found, some parties required to be notified of respondent's suspension never were and others who were notified were not given timely notice as required by rule 955(a). Respondent's affidavit required by rule 955(c) was not only untimely but inaccurate. Respondent admitted that his notification method was poorly designed. Were this a rule 955 referral proceeding instead of an original proceeding, under Supreme Court decisions we recently followed in other cases, these failures of respondent, standing alone, would cause us to recommend disbarment based on respondent's rule 955 violations, if there were no strong mitigating circumstances militating against such recommendation. (*Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131; *Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1187; *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439; *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382; *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322.)

[16a] Also, in this proceeding, respondent committed far more misconduct than wilfully violating rule 955. His other misconduct was very wide-ranging. It involved his misappropriation in three matters in wilful violation of rule 8-101(A) or successor rule 4-100(A) in which he unilaterally took as

8. The hearing judge's decision incorrectly referred to the year 1991 instead of 1992 in making this finding. (Decision in case number 91-P-07029, p. 9.)

attorney fees a total of about $13,000 in cost advances from clients. In those same matters, he engaged in acts of moral turpitude because of his gross neglect of his responsibilities toward proper handling of trust funds. In one matter, he misled a superior court judge as to the reasons for his failure to appear for an earlier hearing. He failed to perform services competently in another matter. In two matters, he threatened criminal or administrative charges in wilful violation of rule 7-104. In four others, he practiced law while suspended in violation of section 6125. He failed to participate in the State Bar's investigation into two of the charges and wilfully breached his earlier probation in two respects. Respondent's misconduct in just the current proceedings spanned four years of his practice.

Looking initially at the standards as guidelines (e.g., *In re Young* (1989) 49 Cal.3d 257, 267-268), any of respondent's violations of sections 6106 or 6125, standing alone, could warrant either disbarment or suspension. (Stds. 2.3 and 2.6.) Similarly, any of respondent's wilful trust account rule violations could warrant a minimum three-month actual suspension. (Std. 2.2(b).)

[17a] Since a recommendation as to the degree of discipline properly results from a balanced consideration of all factors (std. 1.6(b); e.g., *Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, 1114-1115; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931), we must weigh mitigating and aggravating circumstances.

The hearing judge assigned as mitigating circumstances a strong emotional difficulty respondent experienced as he had to face the hardship of his 1990 suspension. Also deemed mitigating were respondent's demonstration of good character and genuine display of remorse and commitment to improved professional practices. The judge described respondent's mitigation as "compelling." As aggravating circumstances, the hearing judge identified respondent's prior record of discipline and that his misconduct involved multiple acts, although found not to be a pattern of misconduct. The judge did not find that most clients suffered significant harm to warrant aggravation of discipline.

The deputy trial counsel contends that the hearing judge refused to allow the introduction of uncharged evidence of misconduct involving respondent's alleged other trust account violations and that the mitigating circumstances relied on by the hearing judge were not supported by the record.

[18] With regard to the deputy trial counsel's claim of the judge's improper refusal to allow proffered aggravating evidence, we note that a balancing of interests was involved. This balancing was between the desire for additional relevant evidence on the one hand against Supreme Court decisions which require fair notice of disciplinary charges as a principle of due process, on the other hand. (Compare, e.g., *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 36 with *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928-929.) Here the judge considered this balance, but determined that the proffered evidence was too unrelated to the charged matters to risk due process error if such proffered evidence was admitted, even though it was offered in the degree-of-discipline phase of the proceedings. As our weighing of all existing evidence pertinent to this proceeding will show, *post*, we need not resolve the deputy trial counsel's claim in this proceeding. (Compare *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 400-403.)

[19] Respondent urges error in considering as aggravating his prior suspension for two years and until he proves his eligibility to return to good standing under standard 1.4(c)(ii). He claims that that prior suspension was based on one matter which was time-barred.[9] **[20 - see fn. 9]** Had respondent participated in his prior proceedings or sought relief from

9. **[20]** One of the matters involved in the prior suspension was the subject of an earlier admonition imposed on June 3, 1986. Admonitions are not discipline and may be reopened and proceed anew as a formal disciplinary proceeding, if ". . . within two years, a formal proceeding is brought against the member, based on other alleged misconduct. . . ." (Trans. Rules Proc. of State Bar, rule 415.) The deputy trial counsel contends that the Office of Trial Counsel met the two-year requirement on the ground that it reached a decision to file the notice to show cause within the two-year period. However, the rules of procedure define the start of a formal proceeding as the *issuance* of a notice to show cause. (Trans. Rules Proc. of State Bar, rule 550.) That notice issued on June 30, 1988, nearly a month after the two-year period since the giving of the admonition.

default, he could have raised this issue timely before the State Bar. However, since respondent's prior two-year suspension was imposed over three years ago by order of the Supreme Court, only that Court can grant relief. We express no opinion here whether any such relief is appropriate. However, even if, arguendo, we were to give less weight to respondent's prior discipline on account of its being based partly on a time-barred complaint, this would not cause us to change our recommendation of discipline in the proceedings now before us.

[17b] When balancing mitigating and aggravating factors, we have concluded that the judge gave greater weight to the mitigating ones than warranted by the record. Although we have no doubt as to the sincerity of respondent's expression of remorse or the strong belief his character references placed in him, we cannot weigh those factors heavily in the balance of the serious and wide-ranging misconduct he committed.

[21] Respondent did not present specific evidence of any of the problems of psychological, medical or family pressures which would be entitled to more significant mitigating weight. His bitterness and disaffection over his 1990 suspension may account for some of his culpability with regard to dealings with some of his clients, but we cannot view any resulting misconduct as excused by respondent's problems of coping with his suspension, especially since that suspension and its terms were designed to seek respondent's rehabilitation. Additionally, the evidence which respondent has offered as to his rehabilitation is depreciated by the findings as to his failure to comply with his probationary duties. Although these failures, standing alone, were not the most serious probation offenses we have adjudicated, they were relatively recent and occurred after respondent had ample time to become familiar with his duties. Moreover, with regard to the question of harm, while most of respondent's clients were able to settle or advance their cases with new counsel, one client's case was barred by the limitations period and three clients had to wait two years for respondent's belated refund of cost advances which he had unilaterally taken for fees.

The hearing judge noted a lack of guiding decisions based on facts comparable to the range and breadth of respondent's misconduct and the surrounding circumstances. Neither party has cited us to decisions deemed guiding to support their respective positions. We have identified several decisions of general similarity to the present case, in addition to the rule 955 cases discussed *ante*.

In *Cannon* v. *State Bar*, *supra*, 51 Cal.3d 1103, the attorney had no prior record of discipline, but was admitted only six years before his first act of misconduct. He was found culpable of five matters of misconduct involving failure to perform services coupled with refusal to refund unearned fees and failure to communicate with his clients. Although considering these multiple acts as not involving a pattern of misconduct, the Supreme Court disbarred the attorney noting that the volunteer State Bar Court had not deemed mitigating respondent's evidence of law practice and family problems.

In *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, by a four-to-three decision, the Supreme Court suspended the attorney for five years, stayed the suspension and placed her on probation on conditions including a two-year actual suspension and until she satisfied standard 1.4(c)(ii). Middleton had a prior suspension for misconduct arising in the year of her admission and the Supreme Court's opinion found her culpable in three matters: two of failure to perform services competently and one of communicating directly with an adverse party represented by counsel. In addition, she failed to participate in a State Bar investigation and did not appear at trial. There was no discussion of mitigating circumstances, but there were also fewer matters involved than we review here. The three dissenting justices would have disbarred Middleton based in part on their conclusion that Middleton's suspension was inadequate protection of the public.

In *Ainsworth* v. *State Bar* (1988) 46 Cal.3d 1218, an attorney with no prior record of discipline was found culpable in eight matters representing a wide range of professional misconduct and arising between five and ten years after his admission to practice law. The misconduct found involved making misrepresentations to judges and clients, harassing a client for his own gain, disregarding a client's confidences, taking an adverse interest against a client, splitting attorney fees with one not allowed to

practice law, collecting an illegal fee, practicing law while suspended and issuing checks without sufficient funds. In mitigation, Ainsworth offered positive character evidence, presented evidence of illness, expressed remorse, and made restitution to clients. In aggravation, it was noted he had not participated in the State Bar investigation. The Court disbarred Ainsworth, concluding that the collective severity of his misconduct outweighed the force of mitigation.

Finally, we believe that the disbarment case of *Marquette* v. *State Bar*, *supra*, 44 Cal.3d 253 is also guiding here. Marquette was admitted in 1971 and was privately reproved in 1975 and publicly reproved three years later. The disbarment case rested on three matters of misconduct involving, collectively, perjury to obtain execution of a lease, the knowing issuance of checks without sufficient funds which were subsequently paid, failure to pay a judgment against him, misappropriation of a $1,350 check and threatening the fiancée of his client with criminal charges to gain a civil advantage. Although fewer matters were involved in *Marquette*, the Court's opinion showed he demonstrated less insight into his offenses than did respondent.

[16b] While respondent showed more remorse than Marquette appeared to demonstrate, he also showed that his prior suspension and probation were ineffective either to stem his misconduct or to allow him to demonstrate that he can comply with court orders. Currently, as a condition of his prior suspension, before resuming practice respondent is required to make a showing based on a preponderance of the evidence of rehabilitation, fitness to practice and present learning and ability in the law. In our view and guided by the Supreme Court opinions we have reviewed, *ante*, the proper protection of the public would be realized by his demonstration of sustained evidence of rehabilitation in a reinstatement proceeding with its attendant greater showing than would be required under standard 1.4(c)(ii).[10] **[22 - see fn. 10]**

IV. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Brian S. Rodriguez, be disbarred from the practice of law in this state. Since he has been suspended continuously since February 5, 1990, we do not recommend that he be again required to comply with the provisions of rule 955, California Rules of Court. We recommend that costs be awarded the State Bar, pursuant to Business and Professions Code section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

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10. **[22]** Respondent may apply for reinstatement five years after disbarment. (Rule 662(a), Trans. Rules Proc. of State Bar.) Upon good cause shown, rule 662(b) allows respondent to apply three years after disbarment to shorten time to seek reinstatement. Under the rule, the five-year and three-year periods run from the time of any interim suspension and the Supreme Court has given the same effect to inactive enrollment. The issue of whether the five-year period may run from the start of respondent's 1990 non-interim suspension has not been decided and we need not address the question. However, if the Supreme Court adopts our recommendation and if respondent wishes to seek reinstatement at the earliest possible time, he may raise this issue before a hearing judge. (See *In the Matter of Grueneich*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 444, fn. 7.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT N

A Member of the State Bar

No. 91-C-03459

Filed August 3, 1993

[Editor's note: Review granted (S046753); State Bar Court Review Department opinion superseded by *In re Brown* (1995) 12 Cal. 4th 205. The State Bar Court Review Department opinion previously published at pp. 502 - 508 has been deleted.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT STEVEN KAPLAN

A Member of the State Bar

Nos. 88-O-14835, 89-O-13084

Filed August 20, 1993

SUMMARY

As a result of negligent office practices, respondent was charged with ten counts of misconduct and was found culpable of some of the charges in nine of the counts. The misconduct included five instances of failing to communicate, failing to file substitution of attorney forms promptly and/or forward client files in seven matters, failing to perform services in three matters, failing to endorse and return settlement drafts of former clients promptly in two instances and one instance of failing to pay court-ordered sanctions. All charges involving moral turpitude were rejected. Finding that respondent's testimony that his former office manager was responsible for most of the problems resulting in disciplinary charges was not believable, the hearing judge concluded that this testimony was not candid and this constituted a serious factor in aggravation. Primarily because of the finding of lack of candor, the hearing judge recommended a three-year stayed suspension, a three-year probation period, and one year of actual suspension. (Peter R. Krichman, Judge Pro Tempore.)

Respondent requested review, contending that the finding that his testimony at the hearing lacked candor was legally insupportable, that culpability should not have been found on certain charges, and that the recommended discipline was grossly excessive. The review department sustained all the essential culpability findings of the hearing judge except one charge involving a one-month delay in endorsing a misplaced settlement check. On the question of respondent's candor, the review department noted that an eyewitness had corroborated respondent's account of his former office manager's behavior, and concluded that respondent's testimony, although unusual, was plausible and uncontradicted. The review department therefore declined to adopt the hearing judge's finding that the testimony lacked candor. Without that aggravating factor, the Office of Trials conceded that less discipline was indicated. After reviewing comparable cases and the applicable standards, which provided for a minimum three-month actual suspension, the review department recommended a two-year stayed suspension and a two-year probation period on conditions including a three-month actual suspension, a law office management plan and a law office management course.

COUNSEL FOR PARTIES

For Office of Trials: Allen Blumenthal, Karen B. Amarawansa

For Respondent: David A. Clare

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] **214.30 State Bar Act—Section 6068(m)**

Where the overall number of phone calls made by a client to respondent may not have been reasonable, but they reflected the client's increasing frustration at her inability to speak with respondent, the hearing judge properly found respondent culpable of failing to respond to the client's reasonable inquiries.

[2 a, b] **162.19 Proof—State Bar's Burden—Other/General**
162.20 Proof—Respondent's Burden
204.90 Culpability—General Substantive Issues
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]

An attorney is responsible for the reasonable supervision of the attorney's staff. Where a client repeatedly demanded her file from respondent's office over a six-month period, this was sufficient to establish respondent's lack of reasonable supervision. Respondent's ignorance of the client's demands and lack of prior notice of his staff's failure to inform him of client communications did not absolve respondent from culpability absent additional evidence demonstrating his reasonable supervision of his staff.

[3] **162.20 Proof—Respondent's Burden**
204.90 Culpability—General Substantive Issues
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]

Where respondent received two letters from client's new counsel after respondent claimed to be confused as to whether client was discharging him, respondent's confusion did not excuse his delay in contacting successor counsel and forwarding client's file.

[4 a, b] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where respondent's signature was needed to negotiate a settlement draft, and respondent's former client insisted that her current counsel's messenger retain possession of the draft and not leave it with respondent or his staff, and the draft was tendered to respondent at his office and elsewhere but he declined to make himself available to endorse it, respondent was obligated to act promptly to release the client's funds by endorsing the check, he had constructive possession of the funds, and his unreasonable refusal to complete the endorsement in a timely manner constituted an improper withholding of the settlement funds.

[5] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous

Where a court file was moved into evidence without objection or limitation, any objection to the admissibility of a proof of service contained in such file was waived.

[6] **142 Evidence—Hearsay**
147 Evidence—Presumptions
163 Proof of Wilfulness
220.00 State Bar Act—Section 6103, clause 1

The purpose of a proof of service is to establish notice of an order or other document, and it is the kind of document relied upon in the conduct of serious affairs. Where a proof of service of a sanctions order on respondent was in evidence, and there was no indication in the record of any misconduct by respondent's staff concerning receipt of the order, respondent was presumed to have been served with the court order. His receipt of the order and his admission that he did not satisfy it established a violation of the statute requiring attorneys to obey court orders.

[7] **106.30 Procedure—Pleadings—Duplicative Charges**
213.20 State Bar Act—Section 6068(b)
220.00 State Bar Act—Section 6103, clause 1
Where an attorney failed to pay court-ordered sanctions, and was charged with violating both the statute requiring respect for courts and the statute requiring obedience to court orders, the misconduct was more specifically addressed under the statute requiring obedience to court orders and that charge was therefore to be preferred.

[8] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where a settlement draft was misplaced by respondent's temporary clerical employee for a little over a month, there was no indication that the client informed respondent of immediate need of the settlement funds, and there was no effort by successor counsel to alert respondent that the draft had not been returned, respondent's conduct did not rise to the level of negligent supervision of staff and the resulting delay in respondent's endorsement of the draft did not constitute improper withholding of requested client funds.

[9 a-d] **165 Adequacy of Hearing Decision**
213.90 State Bar Act—Section 6068(i)
615 Aggravation—Lack of Candor—Bar—Declined to Find
Lack of candor toward the State Bar during disciplinary investigation or proceedings, including presenting intentionally misleading testimony, fabricating evidence, or attempting to mislead the court through material omissions, is an aggravating circumstance. However, a respondent's honest, if mistaken belief in his or her innocence, and resulting in failure to acquiesce in the State Bar Court's findings, is not in and of itself aggravating. Lack of candor cannot be found based merely on a respondent's different memory of events from that of complaining former clients. Where respondent's testimony concerning his former office manager's conduct in hiding or destroying letters and messages was uncontroverted and not implausible, and was corroborated by an eyewitness, hearing judge's finding that such testimony lacked candor was not adopted by review department.

[10 a-c] **174 Discipline—Office Management/Trust Account Auditing**
582.32 Aggravation—Harm to Client—Found but Discounted
750.10 Mitigation—Rehabilitation—Found
801.45 Standards—Deviation From—Not Justified
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
863.10 Standards—Standard 2.6—Suspension
901.30 Standards—Miscellaneous Violations—Suspension
1092 Substantive Issues re Discipline—Excessiveness
Where respondent's misconduct involved negligent law office management over an extended period of time, resulting in delay and disservice to a number of clients but no act of moral turpitude or serious misconduct in any individual matter, and respondent had since changed his office practices, a one-year actual suspension was excessive in the absence of serious aggravation. However, where no persuasive reason had been offered to go below the minimum three-month actual suspension called for by the standards, a one-year stayed suspension, two years probation, and a three-month actual suspension, with law office management requirements, constituted sufficient discipline.

ADDITIONAL ANALYSIS

Culpability

Found

213.21 Section 6068(b)
214.31 Section 6068(m)
220.01 Section 6103, clause 1
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)]

Not Found

214.35 Section 6068(m)
220.35 Section 6104
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(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

Found

521 Multiple Acts

Mitigation

Found

710.10 No Prior Record
725.12 Disability/Illness
745.10 Remorse/Restitution
760.12 Personal/Financial Problems
791 Other

Standards

801.30 Effect as Guidelines
801.47 Deviation From—Necessity to Explain

Discipline

1013.08 Stayed Suspension—2 Years
1015.03 Actual Suspension—3 Months
1017.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management

Other

1091 Substantive Issues re Discipline—Proportionality

OPINION

PEARLMAN, P.J.:

This case involves negligent law office management, particularly in supervising staff, which resulted in numerous instances of minor misconduct. Respondent was admitted to practice in 1979 and runs his own office specializing in plaintiff's tort litigation. At the time of the events in question he had an office manager and several secretaries working for him in his practice. The amended ten-count notice to show cause charged respondent with misconduct concerning ten clients. At the hearing, count 3 of the notice was dismissed upon the motion of the Office of Trials. The hearing judge found culpability of some of the charges on each of the remaining nine counts, including failing to communicate in five matters, failing to sign substitution of attorney forms promptly and/or forward client files in seven matters, failing to perform services in three matters, failing to endorse and return settlement drafts of former clients promptly in two instances and failing to pay court-ordered sanctions in violation of Business and Professions Code section 6068 (b).[1] The hearing judge also rejected a number of charges including all charges of acts of moral turpitude in violation of section 6106.

Respondent testified at the hearing that his former office manager, a longtime, trusted employee, had screened all his calls and mail. Unbeknownst to him she had hidden from him letters and phone messages from certain clients who called frequently or requested their files, and substitution of attorney forms and file requests from the new counsel of former clients. When respondent discovered the scope of her misconduct he demoted the employee and took away her authority to screen incoming communications and by August 1990, she had resigned. New office procedures were in place by March 1992, when the culpability portion of the hearing was held. Respondent's counsel analogized to other cases involving negligent supervision and urged stayed suspension as the appropriate discipline. The Office of Trials sought three to six months actual suspension. The hearing judge found respondent's testimony that his former office manager was responsible for most of the problems not believable and further found lack of candor at the hearing to constitute a serious factor in aggravation. Primarily because of the finding of lack of candor, the hearing judge recommended that respondent be suspended from practice for three years, that the suspension be stayed, and that a three-year probation period be imposed on conditions including one year of actual suspension.

On review, respondent disputes the recommended discipline as grossly excessive and the conclusion that he displayed lack of candor at the hearing as legally insupportable particularly in light of the fact that the hearing judge failed to address the credibility of a corroborating witness. Respondent admits negligence in supervising his staff which resulted in culpability in seven counts, but points out that he waived his fees to all of the affected clients. He also challenges on review culpability on five charges (twice failing to forward files and substitution of counsel forms in counts 1 and 2, two delays in signing settlement drafts of former clients in counts 6 and 9 and failing to pay court-ordered sanctions in count 7). He contends that these charges either have no evidence to sustain them, are contrary to respondent's own uncontradicted testimony or do not rise to the level of a willful violation.

The Office of Trials recognizes that the finding of lack of candor was the key reason for the one-year actual suspension recommendation and defends the hearing judge's decision in its entirety. The deputy trial counsel contends that the hearing judge's assessment of respondent's credibility is entitled to great deference and the judge's reliance on documentary evidence in sustaining a number of the violations was proper in that there was no hearsay objection or other limitation on the use of the documents.

Upon our independent review, we uphold all of the essential findings except culpability on count 9 and the finding in aggravation of lack of candor.

1. Unless otherwise noted, all references herein to sections are to the sections of the Business and Professions Code.

Based on the Standards for Attorney Sanctions for Professional Misconduct[2] and precedent in comparable prior cases, we recommend three months actual suspension as a condition of two years stayed suspension and two years probation. We also recommend, inter alia, that respondent take a law office management course and provide an acceptable law office management plan, be required to comply with rule 955, California Rules of Court, and take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners.

THE PROCEEDINGS BELOW

Respondent was originally served with a six-count notice to show cause in case number 88-O-14835 on March 16, 1990. Although he did not respond in timely fashion, his answer was filed prior to the entry of his default. A second, four-count notice to show cause was filed in case number 89-O-13084 on June 15, 1990, and, after he answered, the deputy trial counsel moved to consolidate the two proceedings which motion was granted by the assigned judge on September 20, 1990. An amended notice to show cause was thereafter filed in the consolidated proceedings on January 18, 1991, which were transferred for trial to a judge pro tempore. Although respondent has only challenged factual findings in five of the counts in the amended notice to show cause in the consolidated proceedings, all nine are summarized here by count and the name of the client.

Count 1 (Webster)

Count 1 charged respondent with wilful violations of section 6068 (m) and of former rules 2-111(A)(2) and 6-101(A)(2) of the Rules of Professional Conduct.[3] Respondent had been retained in April 1986 to pursue a personal injury suit on behalf of David Webster. Respondent filed the lawsuit in April 1987, and obtained medical information concerning his client in August 1987, but did not serve the action on the defendants. In February 1988, Webster retained new counsel and the counsel wrote to respondent on February 22, 1988, enclosing a substitution of attorney form, acknowledging respondent's lien and requesting Webster's file. He wrote again on May 10, 1988, and July 8, 1988, enclosing another substitution of counsel form in the July letter. Respondent's office received the letters but the counsel did not receive an immediate response. Respondent executed and returned the February substitution of counsel form on August 27, 1988, six months after the initial letter.

Respondent testified that he was unaware of the change of counsel by the client until shortly before he signed and returned the substitution in August and that his office manager, Karen Hooks, hid the letters and only showed him the July letter sometime after he completed a two-week trial in July 1988. Respondent severely reprimanded Hooks for this occurrence. The hearing judge did not find this explanation credible, but found that the State Bar did not prove by clear and convincing evidence that respondent failed to perform legal services competently in wilful violation of former rule 6-101(A)(2) or that he failed to communicate with Webster in violation of section 6068 (m). He did find that respondent had insufficient excuse for failure to deliver the client's file promptly to subsequent counsel in violation of former rule 2-111(A)(2).

Count 2 (Craig)

Susan Craig retained respondent initially in October 1987 to file suit on her behalf as a result of an automobile accident. Respondent filed a personal injury action within the applicable time limits. Craig was involved in a second accident in April 1988 and respondent was asked to represent her interests in that matter as well. In March 1989, Craig retained new counsel to represent her in these actions and the

2. All references herein to "standards" are to the Standards for Attorney Sanctions for Professional Misconduct set forth in division V of the Transitional Rules of Procedure of the State Bar.

3. The former Rules of Professional Conduct were in effect from January 1, 1975, through May 26, 1989. Unless otherwise noted, all references herein to "former rules" are to the rules in effect during this time and all references to "rules" or "current rules" are to the Rules of Professional Conduct that became effective on May 27, 1989.

counsel wrote to respondent on March 15, 1989, advising respondent of Craig's decision, enclosing a substitution form executed by Craig, requesting respondent to sign the form and to forward Craig's file to him, and promising to honor any lien respondent might have. Thereafter respondent was contacted by a chiropractor, who told respondent that Craig still considered respondent her attorney. Respondent wrote to Craig on April 24, 1989, asking her to advise him if she wished to continue with his services. He sent this letter to the wrong address for Craig. Craig's new counsel wrote to respondent on April 27, 1989, and May 16, 1989, seeking respondent's cooperation. After no response was received, new counsel filed a formal complaint with the State Bar on May 19, 1989. Respondent's office contacted new counsel on July 5, 1989, and indicated that the substitution form and files would be delivered to new counsel's office by July 7. When the documents did not arrive and respondent's office did not return his calls, Craig's new counsel prepared a motion for a court order substituting himself as counsel, and seeking sanctions against respondent. Respondent signed and returned the substitution form and files on July 28, 1989. The motion was nevertheless filed with the court on July 31, 1989, and sanctions of $600 were ordered to be paid to counsel by respondent.

In count 2, respondent was again charged with wilful violations of sections 6068 (m) and former rules 2-111(A)(2) and 6-101(A)(2). In addition, he was charged with violating current rules 3-700(A)(2) and 3-700(D)(1). The hearing judge found respondent culpable of wilful violations of former rule 2-111(A)(2) and rules 3-700(A)(2) and 3-700(D)(1) as a result of his failure to transmit promptly the client's files and the executed substitution of attorney to her subsequent attorney. However, the court indicated that it treated these rule violations as a single offense for purposes of discipline. Respondent was not found culpable of violating section 6068 (m) or former rule 6-101(A)(2) because no evidence was presented to establish that he in any way was incompetent in representing the client.

Count 4 (Meirovitz)

Count 4 also charged respondent with violating section 6068 (m) and former rules 2-111(A)(2) and 6-101(A)(2). Respondent represented a teenager involved in an automobile accident. He admits that he failed to return numerous phone calls from the teenager's father, Dr. David Meirovitz, over a six-month period (February to July 1988). After Dr. Meirovitz, as guardian and parent, retained new counsel for his son's case, new counsel sent notice of the substitution on July 15, 1988, enclosed a substitution form, and asked that the file be delivered to him. This letter and a follow-up letter dated August 18, 1988, were sent to respondent's former office address. Respondent and a former employee testified that a copy of the Meirovitz file was sent to the client's insurance agent in July 1988, and another copy of the file given to Dr. Meirovitz several months later. There was no cover letter, receipt or other document indicating that the file had been copied. Dr. Meirovitz filed a complaint with the Orange County Bar Association on December 19, 1988, in which he alleged that respondent failed to communicate with him, file suit in a timely manner or release his son's file to the new counsel. The bar association contacted respondent and asked him to respond to the allegation. He promised to do so but did not. Finally, on March 27, 1989, a member of the bar association board of directors wrote to respondent and demanded that respondent deliver the file to Dr. Meirovitz and respond to the complaint within seven days. Respondent delivered the file and answered the complaint on April 1, 1989.

Respondent was found culpable of violating section 6068 (m) and of violating former rule 2-111(A)(2) as a result of his failure to transmit the file to Dr. Meirovitz or to his new attorney for more than eight months. No culpability was found of a wilful violation of former rule 6-101(A)(2). Neither party challenges these conclusions on review, and we adopt them.

Count 5 (Mantle)

Respondent was hired by Anthony Mantle on January 29, 1987, as successor counsel in a wrongful death case. Respondent wrote to Mantle's prior counsel on February 4, 1987, advising him of Mantle's decision, enclosing a substitution of counsel form, and asking that Mantle's file be forwarded to him. The prior counsel executed a substitution of counsel

form on January 31, 1987, which was never filed. Mantle reached respondent in February 1987 and respondent told him he had spoken to the prior counsel and was having trouble obtaining Mantle's file. He assured Mantle that the case would go forward and the prior attorney could be forced to relinquish the file. Respondent wrote to the prior counsel in August 22, 1988, because counsel had failed to forward the file.

After August 1988, Mantle had trouble reaching respondent. He had not been advised of respondent's office move in March 1987, and learned of the new address in January 1989. Mantle's letters dated October 31, 1988, and December 6, 1988, were sent to respondent's old office. It is undisputed that no action was taken to prosecute the Mantle case by respondent for two years. Mantle filed a complaint with the State Bar in June 1989. Respondent testified that he had advised Mantle in a conversation in August 1988 that in light of his inability to secure Mantle's file, he could not continue to represent Mantle. Mantle denied that this alleged conversation took place or that he had been advised that respondent was withdrawing from the case. The hearing judge found Mantle's testimony to be more credible and consistent with his subsequent attempts to contact respondent.

Respondent was also charged in this count of violating section 6068 (m) and former rules 2-111(A)(2) and 6-101(A)(2). In addition, he was charged with violating section 6106. He was found culpable of violating section 6068 (m) and former rule 6-101(A)(2), but not former rule 2-111(A)(2) or section 6106. These conclusions are not challenged on review, and we adopt them.

Count 6 (Kennedy)

Respondent was hired to represent Sheila Kennedy in a personal injury matter in 1988 and was replaced by new counsel in mid-February 1989. Respondent does not dispute that he failed to forward a client file and execute a substitution form first requested on February 24, 1989. Successor counsel filed suit on Kennedy's behalf on April 4, 1989, to protect against the running of the statute of limitations[4] and settled the case for $25,000 without the file prior to July 24, 1989. The settlement draft was issued in the names of Kennedy (client), Goldstein (successor counsel) and respondent. On July 31, 1989, respondent agreed to sign the draft and directed counsel to schedule with his staff a convenient time to endorse the check. The counsel first arranged for a messenger to visit respondent's office to present the check for endorsement on August 4; then, at the request of respondent's office manager, it was changed to August 7, 1989. The client insisted that the check not leave the messenger's presence. When the messenger arrived at the designated time, respondent was in a deposition and unavailable. The messenger refused to leave the check with respondent's staff to be endorsed later and left the office.

The successor counsel called respondent's office later and, upon learning that respondent was then unavailable, advised an employee that he was willing to come to respondent's office that evening or meet respondent at a nearby courthouse or at respondent's office the next morning to have respondent sign the check. The staff member declined those suggestions and said that counsel should send the draft for respondent to sign and return, a procedure the client would not permit. Successor counsel wrote to respondent on August 8, 1989, in which he summarized the history of his representation and asked respondent to contact him regarding endorsement of the draft. He sent copies of the letters to the State Bar and the Orange County Bar Association. Respondent wrote to successor counsel on September 6, 1989, asserted that he had tried to reach counsel by telephone several times and offered to have his employee

4. Respondent testified that he was not aware of counsel's letter to him dated February 24, 1989, until much later, nor did he see any subsequent correspondence from counsel until receiving counsel's July 24, 1989, letter advising him that Kennedy's case had been settled. Consistent with that testimony, the hearing judge found that respondent had not taken any action to protect Kennedy's claim prior to the expiration of the statute of limitations on April 7, 1989, and thus had provided incompetent legal services in willful violation of former rule 6-101(A)(2). Respondent does not challenge this finding on review.

or an independent messenger service pick up the draft, bring it to respondent for endorsement and return it to the counsel. He denied that he or his office had been uncooperative and blamed successor counsel for insisting that the draft could not leave the messenger's sight. The draft was finally signed on September 15, 1989, with the assistance of the State Bar's investigator.

Count 6 charged violation of section 6068 (m), former rules 2-111(A)(2) and 6-101(A)(2) and current rules 3-110(A), 3-700(D)(1) and 4-100(B)(4). The hearing judge found respondent culpable of a wilful violation of current rule 4-100(B)(4) and of former rule 2-111(A)(2) and current rule 3-700(D)(1) as a result of his failure to forward the file. He was also found culpable of wilfully violating former rule 6-101(A)(2) for failure to file the civil action within the applicable statute of limitations. He was not found culpable of violating current rule 3-110(A) since his misconduct predated the effective date of that rule. Nor was he found culpable of violating section 6068 (m) since the gravamen of this count was his failure to transmit the file and cooperate with the endorsement of the settlement draft which were separate bases for culpability.

Count 7 (Fontes)

This count charged respondent with failing to communicate with his client, Karen Fontes, and, after she retained new counsel, failing to forward her file and execute a substitution of attorney form until August 30, 1988, two months after written notice of the client's decision from successor counsel and one month after opposing counsel was told by respondent's staff that he was no longer representing Fontes. He does not dispute these findings on review.

While respondent was representing Fontes, a dispute arose over discovery. Respondent did not comply with the discovery requests and he, along with Fontes's new attorney, was served with a motion to compel discovery and award sanctions filed September 15, 1988. Respondent was also served with notice of a continuance of the hearing on the motion and with the ruling of December 7, 1988, finding respondent and new counsel jointly liable for $450 in court-ordered sanctions. Respondent has not paid any portion of the sanction and testified that he was unaware of the sanction order until he spoke to a State Bar investigator.

Count 7 charged respondent with wilful violations of sections 6068 (b), 6068 (m) and 6103 and former rules 2-111(A)(2) and 6-101(A)(2). Respondent was found culpable of violating section 6068 (m) for failure to respond to reasonable status inquiries and section 6068 (b) for failure to pay sanctions ordered by the court. He was also found culpable of violating former rule 2-111(A)(2) as a result of his failure to promptly execute the substitution of attorney form and deliver the file to the client or her new counsel. He was not found to have violated former rule 6-101(A)(2).

Count 8 (Ayers)

Count 8 charged respondent with wilful violations of sections 6068 (b), 6068 (m) and 6103 and former rules 2-111(A)(2) and 6-101(A)(2). The trial judge found respondent culpable of a wilful violation of former rule 2-111(A)(2) for delay in completing the substitution of attorney and for failure to deliver the file to the client. He was also found culpable of failure to communicate adequately with the client in violation of section 6068 (m). In addition, the hearing judge found him culpable of wilful violation of section 6068 (b) for failing to comply with a court order to return the file to his client. The hearing judge declined to find culpability of violating section 6103 based on the same misconduct on the grounds that it would be duplicative. Finally, the hearing judge found that respondent did violate former rule 6-101(A)(2) in this instance by failing to serve the summons and complaint within three years of filing the action as required by Code of Civil Procedure sections 583.210 and 583.250.

Respondent does not now dispute that he failed to communicate with his client, Ardee Ayers. After she decided to discharge him in January 1989, she visited his office with a substitution of attorney form and asked the receptionist to have respondent sign it and return it with her file. She was told to return in a week. When she did, she was told that respondent had to meet with her first before he would sign the substitution or return her file. She refused and there-

after on September 5, 1989, filed a motion for substitution of counsel. Respondent delivered an executed substitution form on October 2, 1989; the next day, the court ordered him to provide the client with her file. Ayers learned in November 1989 that respondent had not served the summons and complaint on the defendants in her personal injury action within the three-year statute, and her action was dismissed by motion in January 1990.[5]

Respondent testified at the hearing that he had executed the substitution of attorney form in February 1989 and given Ayers her file. The judge did not accept respondent's version of events, finding that respondent's file contained correspondence relating to the Ayers case dated after February 1989, that respondent executed a second substitution form, which would be unnecessary if a form had already been signed, and that Ayers's motion for a court-ordered substitution would likewise have been unnecessary if she had already secured the substitution and her file. We see no reason on this record to disturb the hearing judge's findings and conclusions, which respondent has not challenged on review.

Count 9 (Burgess)

This count charged respondent with wilful violations of sections 6068 (m) and 6104 and of former rules 2-111(A)(2), 6-101(A)(2) and 8-101(B)(1) and current rules 4-100(B)(1) and 4-100(B)(4). Respondent was found culpable of a wilful violation of former rule 2-111(A)(2) as a result of his failure to forward the file promptly to subsequent counsel. He was also found culpable of violating current rule 4-100(B)(4) due to his failure to endorse and return the settlement draft promptly. He was not found culpable of violating former rule 8-101(B)(1) or current rule 4-100(B)(1). Nor was he found culpable of violating former rule 6-101(A)(2) or section 6068 (m). The gravamen of his failure to communicate was his failure to forward the file and endorse and return the settlement draft, each of which was the subject of culpability findings under other provisions. Finally, the court did not find respondent culpable of violating section 6104 which prohibits an attorney from appearing for a party without authority.

Respondent does not challenge the conclusion that he failed to supervise his staff when two written requests for respondent to execute a substitution form and forward Burgess's file dated January 30, 1989, and April 27, 1989, went unanswered. Respondent executed a substitution form on June 7, 1989. Thereafter, Burgess's new counsel settled the case and sent respondent the settlement draft for his endorsement. The draft and accompanying letter dated August 2, 1989, arrived in respondent's office in early August, but was not signed by respondent until September 15, 1989, because, according to respondent, a summer file clerk had put the letter and draft in a shopping bag, along with other mail, and placed it in a cabinet. The draft was returned six weeks later with a letter of apology to the successor counsel. Respondent contests the finding that he wilfully failed to return the settlement draft promptly.

Count 10 (Pickerell)

Judith Pickerell retained respondent in October 1987 to pursue her claim arising from an automobile accident with an uninsured motorist. Respondent arranged, among other things, to have Pickerell's car repaired at a repair shop known to respondent. When the repairs proved inadequate, respondent made a claim on the repair shop's insurance company.[6]

5. The hearing judge noted that the record disclosed with respect to the dismissed action that the policy limits on the defendant's insurance were $15,000 and there were outstanding liens in excess of $11,000 excluding any attorneys' fees against Ayers's interest in the lawsuit.

6. In conjunction with negotiating with the repair shop, respondent received a check to cover a part of Pickerell's claimed expenses. Respondent returned it to the shop because it was not signed. When a signed check was returned to respondent, he was advised that because of business reversals, there were insufficient funds in the account to cover the check. There was disputed testimony as to whether respondent had advised Pickerell of the receipt of the check and the problems with attempting to negotiate it. Although she elicited testimony at the hearing concerning this matter, the examiner did not pursue allegations of financial improprieties concerning the check.

In August 1988, Pickerell indicated that she intended to discharge respondent for lack of services and failing to return her phone calls. Despite this, respondent continued his representation and Pickerell provided additional information to respondent's office through February 1989. In July 1989, Pickerell again notified respondent that she was discharging him, complaining that he did not return her calls or adequately protect her interests. She subsequently settled her own claim with her insurance company. Pickerell's telephone records reflected 118 calls to respondent over a 2-year period with 25 of those calls lasting over 5 minutes and 2 over 10 minutes. Respondent sent only 2 letters to Pickerell over the same period.

This final count charged respondent with wilful violations of sections 6068 (m) and 6106 and of former rules 6-101(A)(2) and 8-101(B)(1) and current rules 3-500 and 4-100(B)(4). Respondent was not found culpable of violating rule 3-500 or section 6106. He also was found not to have violated current rule 4-100(B)(4), former rule 8-101(B)(4) or former rule 6-101(A)(2). **[1]** The hearing judge did conclude, however, that although the overall number of client calls to respondent may not have been reasonable, they reflected her increased frustration in being unable to speak with him. On this rationale, he found that respondent had failed to respond to his client's reasonable inquiries in violation of section 6068 (m). This conclusion has not been challenged on review, and we adopt it.

Evidence in Mitigation and Aggravation

Respondent and his present office manager, Candace McElduff, testified concerning the improvements made in his office systems since the State Bar complaints came to light. More experienced secretaries have been hired, there are staff meetings every six weeks, calls and correspondence are not screened as they were in the past and files and substitution of attorney requests are fulfilled within three days where possible. Respondent did not assert liens for fees due from any of the clients involved in seven of the cases which he filed. (Std. 1.2(e)(vii).) He also testified that his ex-wife, who suffers from severe mental illness, filed for divorce in 1985 and the final decree was issued in January 1989. He testified that the dissolution action was severely disruptive to his practice because she threatened his life and repeatedly harassed his office staff. The judge did not find that respondent's marital difficulties were directly responsible for his misconduct, but did accord them some weight in mitigation. (Std. 1.2(e)(iv); *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1364; *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318.) Respondent's unblemished record of nine years without discipline was also given some weight in mitigation as well. (See, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 498 [eight years without prior disciplinary record considered in mitigation].)

In aggravation, the judge found that there were multiple acts of misconduct by respondent. (Std. 1.2(b)(ii).) Further, while finding that respondent's conduct caused his clients frustration and delay, only one client (Ayers) lost her cause of action due to respondent's misconduct. Finally, the judge determined that respondent displayed a lack of candor during the hearing, finding in weighing the evidence on each count, that respondent's testimony that his office manager was principally to blame for his misconduct was unbelievable. (Std. 1.2(b)(v); see *Franklin* v. *State Bar* (1986) 41 Cal.3d 700, 710; *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128.)

Hearing Judge's Discipline Recommendation

In reaching the recommended discipline of three years suspension, stayed, and a three-year probation term including as a condition a one-year actual suspension, the judge reviewed the applicable standards and the cases presented by the parties. Respondent was found culpable of violating rule 4-100(B)(4) in two matters as a result of failure to promptly endorse and return settlement drafts. Standard 2.2(b) calls for a minimum of a three-month actual suspension for a violation which does not result in misappropriation. Respondent was also found culpable of failure to communicate in five matters and failure to perform services competently in three matters. Under standard 2.4(b) culpability thereof calls for reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client. Respondent was found culpable in two counts of violating section 6068 (b). Standard

2.6 provides that culpability shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. In addition, respondent was found culpable of violating former rule 2-111(A)(2) in seven matters which standard 2.10 provides shall call for reproval or suspension according to the gravity of the offense or harm to the victim.

The judge noted that the standards serve as guidelines which need not be rigidly applied, but considered the cases presented by the respondent distinguishable primarily because of the higher number of clients involved here (nine), the lack of comparable mitigating evidence in this record, and the aggravation due to respondent's lack of candor. The hearing judge relied on four cases which he saw as providing a more accurate comparison: *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074 (a default case resulting in five years probation, two years actual suspension for abandoning four clients resulting in great harm to each, and failing to cooperate with State Bar; no prior record for 1972 admittee); *Martin* v. *State Bar* (1991) 52 Cal.3d 1055 (five years probation, two years actual suspension for abandoning five clients, issuing insufficient funds checks and making misrepresentations to two clients, by 1978 admittee with no prior record); *Young* v. *State Bar* (1990) 50 Cal.3d 1204 (three years probation and two years actual suspension for 1980 admittee who abandoned clients in seven matters); and *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131 (three years probation, one year actual suspension for attorney with two priors, for a single matter involving multiple misrepresentations and failure to perform services resulting in the loss of the client's cause of action).

ISSUES ON REVIEW

Respondent challenges only those adverse findings which he characterizes as being contrary to undisputed or uncontroverted evidence. On the issue of discipline, he characterizes the misconduct found as minor and resulting from respondent's failure to supervise his staff adequately. He contends the hearing judge did not accord the mitigating evidence sufficient weight and challenges the finding of lack of candor as unsupported by the record below. He has not changed his position from his position at the hearing, arguing for discipline of a stayed suspension with no actual suspension or, at most, 30 days actual suspension.

Count 1 (Webster)

With respect to count 1, respondent contends that he should not be held liable for failing to forward the client file and substitution of counsel form from February until late August 1988 because the request had been hidden from him until then and he had no reason to doubt the trustworthiness and efficiency of his office manager prior to this point.

The hearing judge did not believe respondent's description of his former office manager's misdeeds of hiding correspondence in the telephone closet, her car trunk, and her desk drawer, and tearing up phone messages as her way of screening his telephone calls. Respondent points out that his testimony was confirmed by one of his other employees, Candace McElduff, who came to work for respondent in December 1989. While McElduff's observations were limited by the fact that her employment postdates much of the mischief allegedly caused by the office manager, McElduff did testify that she witnessed Hooks follow a practice of destroying and hiding telephone messages from December of 1989 when McElduff was hired until Hooks was relieved of her duties as office manager in June or July of 1990. She also testified that she did not inform respondent of this practice because Hooks threatened to fire her and see to it that she never got another job in the legal field in Orange County if she told respondent. The hearing judge did not indicate in his decision that he made any credibility assessment of McElduff's testimony.

Respondent testified that after he learned that the July 7, 1988, letter had been withheld from him, he severely reprimanded Hooks but took no other steps to ensure a similar incident would not happen again. He remained unchanged in his belief in his office manager's general performance and abilities.

[2a] Respondent recognizes that he is responsible for the reasonable supervision of his staff. (*Spindell* v. *State Bar* (1975) 13 Cal.3d 253, 259-

260.) He also recognizes that he had the obligation to provide his client with her papers and records promptly upon request. He argues that until he had actual knowledge of her repeated requests or was on notice of his office manager's failure to provide similar information to him in the past he was not culpable of misconduct.

[2b] We disagree that the record exculpates respondent. It is true that "Attorneys cannot be held responsible for every detail of office operations." (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795; accord, *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857.) However, we consider the State Bar to have met its burden by showing the repeated demands of the client over a six-month period which were received by respondent's office. In *Sanchez* v. *State Bar* (1976) 18 Cal.3d 280, 284, Sanchez similarly sought to disavow culpability because of his secretary's failure to inform him a motion had been denied. The Supreme Court rejected the argument noting that Sanchez was responsible for the supervision of his staff and reasonable attention on his part would have disclosed the improprieties. (*Ibid.*) Given the evidence presented by the State Bar, the hearing judge was similarly justified in finding that respondent was culpable of violating former rule 2-111(A)(2) for failing to forward the client file and substitution of counsel form in a timely fashion absent production of evidence by respondent demonstrating reasonable supervision of this staff. (Cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.) Indeed, respondent's own changed office practices in 1992 help demonstrate the laxity of his prior supervision. More evidence would have to be produced by respondent than was presented on the record below to overcome the evidence that respondent was not reasonable in his supervision of staff during this period.

Count 2 (Craig)

[3] As to respondent's failure to respond to new counsel's requests for the client's file and an executed substitution form in count 2, respondent does not contend that he did not know of these three requests, which were sent to him March 15, April 27, and May 16, 1989. Rather, he insists that he was confused by other information which led him to believe that the client was not really discharging him. He wrote one letter to the client, but he remained confused when she did not reply. Although the letter was mistakenly sent to the wrong address, respondent received two letters from Craig's new attorney *after* he had sent the letter to Craig. Respondent did not contact the new attorney until July 1989. Respondent's confusion does not excuse his violation of rule 2-111(A)(2).

Respondent attacks the findings of culpability regarding his failure to endorse and return settlement drafts of former clients promptly in two other instances.

Count 6 (Kennedy)

[4a] On count 6, attorney Goldstein testified at the hearing that it was the client, Kennedy, who insisted that the check not be taken out of sight of the messenger by respondent or his staff because she did not trust respondent. Because she had extensive medical bills, she wanted the draft to be negotiated quickly. Goldstein attempted to accommodate his client with the least disruption to respondent, arranging in advance with respondent's staff for a convenient time when respondent would be available, and changing the date, and later, the time at the request of respondent's staff. After the messenger was unsuccessful in obtaining respondent's signature, Goldstein indicated he was willing to travel to respondent's office or a nearby courthouse the next morning to meet respondent for his endorsement, but was rebuffed. It was after these attempts that respondent made his offer to send an employee or an independent messenger service to pick up the check, have it endorsed and return it to Goldstein, conditions which Kennedy, due to her mistrust, was unwilling to accept. When Goldstein got the State Bar involved, a solution was fashioned.

[4b] Respondent argues that this situation did not constitute a withholding of client funds by respondent under rule 4-100(B)(4). Respondent says by definition, he never had possession of the funds at issue. The Office of Trials argues, and the hearing judge concluded, that respondent's unreasonable action which delayed and impeded his endorsement of the client's settlement draft significantly delayed

the client's receipt of the funds. The draft could not be negotiated without respondent's signature. The delay had the effect of withholding the funds when the client was entitled to receive them promptly. Respondent was obligated to act promptly to release those fund by endorsing the draft. We construe the check as constructively in respondent's possession due to its tender to him at his office and its non-negotiability without his endorsement. We also defer to the hearing judge's credibility determination and his resulting finding that respondent unreasonably refused to complete the endorsement in a timely manner.

Count 7 (Fontes)

As to the final contention concerning the failure to pay a court-ordered sanction, respondent states that he was unaware of the motion and order for sanctions and relies on our decision in *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 367. In *Whitehead* we agreed with the hearing judge that the Office of Trials had not established Whitehead's personal knowledge of the sanction order because an associate who handled the case had not included the sanction order and related papers in the file reviewed by Whitehead. **[5]** Here the court file in the case was moved into evidence, without objection or limitation. In the file is the proof of service indicating service on respondent of the order for sanctions against him and successor counsel jointly. Because respondent did not object to the court file when it was offered into evidence, it is well settled that any objection on that point has been waived.

[6] The purpose of a proof of service is to establish notice of the order or other documents on whom it is served, and thus it is the kind of document relied upon in the conduct of serious affairs. There is no indication in the record of any improper conduct by respondent's staff on this count. Therefore respondent is presumed to have received the order (Evid. Code, § 641) and his admitted failure to satisfy it constitutes a violation of section 6103, as charged. (See *Read* v. *State Bar* (1991) 53 Cal.3d 394, 406.) **[7]** Although the hearing judge found the section 6103 charge to be duplicative of the section 6068 (b) charge, the violation of a court order is more specifically addressed under section 6103 and that charge is therefore to be preferred. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

Count 9 (Burgess)

[8] As to the second alleged delay in endorsing a client settlement draft, in count 9, the actions of a young summer file clerk in misplacing a settlement draft of a former client do not appear to rise to the level of neglect in supervising his staff by respondent. Unlike the Kennedy case, there was no evidence that the client informed respondent of immediate need of the funds. There is no indication in the record that any follow-up correspondence was sent to respondent to alert him or his office that the draft had not been endorsed and returned. It was another member of respondent's staff who discovered the error and found the draft. Just over a month passed between the time the check was received and its endorsement. Therefore, we do not find this conduct to be a violation of rule 4-100(B)(4).

Lack of Candor as Aggravating Circumstance

[9a] Under standard 1.2(b)(vi), lack of candor toward the State Bar during disciplinary investigation or proceedings is an aggravating circumstance. Attorneys are under a duty to be cooperative with the State Bar. (Bus. & Prof. Code, § 6068 (i).) Presenting intentionally misleading testimony before the State Bar Court is regarded as a serious factor in aggravation. (*Franklin* v. *State Bar*, *supra*, 41 Cal.3d at p. 710.) Such acts as fabricating evidence and testifying to its genuineness at the hearing are considered particularly egregious. (*Borré* v. *State Bar* (1991) 52 Cal.3d 1047, 1053.) "[F]raudulent and contrived misrepresentations to the State Bar may perhaps constitute a greater offense than misappropriation." (*Chang* v. *State Bar*, *supra*, 49 Cal.3d at p. 128.) It is not necessary to find that the attorney lied to conclude that he or she lacked the requisite candor. (*Franklin* v. *State Bar*, *supra*, 41 Cal.3d at p. 708 & fn. 4.) Attempts to mislead the court about the facts in an underlying disciplinary allegation through material omissions of fact are aggravating as well. (*Id.* at p. 709.)

[9b] However, the Supreme Court has recognized that a respondent may have an honest, if mistaken belief in his innocence. (*Van Sloten* v. *State*

Bar (1989) 48 Cal.3d 921, 932.) He is entitled to dispute the findings of the State Bar Court and his failure to acquiesce is not in and of itself an aggravating factor. (*Beery* v. *State Bar* (1987) 43 Cal.3d 802, 816.) The Court has stated in reinstatement and moral character proceedings that an applicant's refusal to recant prior professions of innocence cannot be held against him on assessing his moral character, nor can he be forced to adopt a guise of a fraudulent penitent in order to be admitted to practice. (*Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 747; *Hightower* v. *State Bar* (1983) 34 Cal.3d 150, 157; *Hall* v. *Committee of Bar Examiners* (1979) 25 Cal.3d 730, 743-745.)

[9c] A hearing judge is not justified in finding lack of candor merely based on respondent's different memory of events from that of complaining former clients. (Cf. *In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.) The deputy trial counsel acknowledges that not every adverse finding against a respondent should lead to the conclusion that an attorney lacked candor, but contends that the number of instances in which respondent's recitation or explanation of events was found by the judge to be unbelievable supports the finding of a lack of candor.

[9d] The hearing judge's findings resolving issues of testimonial credibility are entitled to great weight. (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429; *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 328.) Nonetheless, the key issue here is whether respondent lacked candor in blaming his staff for many of the problems, primarily in his testimony that Hooks, a longtime trusted employee, hid or destroyed letters and messages so that he did not receive them. No prosecution witness testified to any knowledge on this issue. Respondent's testimony with regard to Hooks's bizarre conduct was corroborated by an eyewitness and while unusual was not implausible. We therefore do not adopt the finding of lack of candor. (Cf. *Edmondson* v. *State Bar* (1981) 29 Cal.3d 339; *Davidson* v. *State Bar* (1976) 17 Cal.3d 570; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 725-726, 730.)

RECOMMENDED DISCIPLINE

[10a] This proceeding involves negligent law office management over an extended period of time. A number of clients were delayed and disserved by respondent's inaction although no serious misconduct was found in any individual matter.

In urging either no actual suspension or at most 30 days suspension, respondent relies principally on *Colangelo* v. *State Bar* (1991) 53 Cal.3d 1255 (1-year stayed suspension, 18 months probation and no actual suspension); *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116 (3 years stayed suspension, 3 years probation and 30 days actual suspension); and *Wells* v. *State Bar* (1984) 36 Cal.3d 199 (2 years stayed suspension, 2 years probation and 30 days actual suspension). He also relies on *Waysman* v. *State Bar* (1986) 41 Cal.3d 452 and *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, both of which resulted in no actual suspension.

Colangelo was a deputy state public defender at the time of the State Bar proceedings which involved misconduct in his prior private practice. In four matters he was found to have withdrawn from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of his clients, wilfully failed to perform services in a competent manner, wilfully failed to communicate reasonably with clients, and failed to promptly return unearned advanced fees. (*Colangelo* v. *State Bar*, *supra*, 53 Cal.3d 1255.)

Colangelo's case was unique in that he defaulted in the State Bar proceedings before a hearing judge and no review was sought before this review department before the Supreme Court accepted his petition for review. This occurred just prior to adoption by the Supreme Court of new rules of court requiring exhaustion of review rights before the State Bar Court before seeking Supreme Court review. (See Cal. Rules of Court, rule 952(e), as amended eff. Dec. 1, 1990.) The State Bar defended the recommendation of stayed suspension which the respondent attacked as unwarranted. A majority of the Supreme Court adopted the recommendation although it characterized the result as appearing

lenient, but recognized that the misconduct was in part attributable to Colangelo's suffering from a form of epilepsy. It also noted his career change and the assurances of the office of the State Public Defender that clients would be protected in the event of a relapse. (*Colangelo* v. *State Bar*, *supra*, 53 Cal.3d at p. 1267.) Two dissenting justices would have ordered 60 days suspension due to substantial harm to three clients. There is far less client harm here, but more instances of misconduct.

Chefsky v. *State Bar*, *supra*, 36 Cal.3d 116 involved a hearing department recommendation from a volunteer panel of one year of actual suspension for multiple statutory and rule violations with regard to five clients. The misconduct was far more serious than we have here. It involved misrepresentations in court and misappropriated funds, as well as failure to perform services and/or failure to communicate with several clients, and withdrawing from representation without taking steps to prevent prejudice to his clients. There, however, the Supreme Court found more mitigation than is present in this record. All the violations occurred during a relatively short time period, the behavior was characterized as aberrant in a nearly 20-year career with no disciplinary record and was mitigated by the attorney's illness, office relocation and loss of his full-time secretary. Nonetheless, two dissenters would have imposed greater discipline—one would have imposed the recommended one year of actual suspension and the other would have suspended Chefsky for 90 days. Given the findings of misappropriation and false statements to a court, under the current standards and more recent case law, a respondent committing similar acts today would clearly face greater discipline than Chefsky received.

In *Wells* v. *State Bar*, *supra*, 36 Cal.3d 199, the attorney and the State Bar stipulated to facts and discipline including 30 days actual suspension for misconduct of duties to communicate and perform services diligently. The Court would have imposed a reproval but for two prior instances of discipline in 1975 and 1978. The dissent pointed out Wells's repeated failure to discharge his ethical obligations and would have ordered three months suspension for the current misconduct. In light of the fact that one of Wells's priors involved fraudulent concealment of misappropriation, a respondent in a similar situation could clearly expect far greater discipline today in light of the standards and more recent case law.

Waysman v. *State Bar*, *supra*, 41 Cal.3d 452 and *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785 were also decided prior to the adoption of the standards which generally urge greater discipline than previously imposed. However, as we noted with regard to the issue of negligent misrepresentation in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, in both *Waysman* and *Palomo*, the Supreme Court accepted the principle that if misconduct occurs due to the attorney's laxity rather than intent to defraud, and if the lack of intent is reinforced by the attorney's having taken remedial steps immediately upon discovery of the problem, far less discipline is appropriate than if the misconduct were intentional.

In *In the Matter of Bouyer*, *supra*, 1 Cal. State Bar Ct. Rptr. 404, respondent was found culpable of multiple counts of misconduct stemming from negligent office management over a period of one year. There, we concluded that in lieu of disbarment for intentional misappropriation the far lesser sanction of six months suspension was sufficient because the misappropriation resulted from negligent supervision which had been mitigated by subsequent institution of office practices designed to remedy the problem. In that case, as in *Waysman* and *Palomo*, serious trust account violations had occurred through lax supervision and restitution was commenced but not entirely completed at the time of the disciplinary proceeding. Here, no trust account violations were found or any need for restitution. Indeed, respondent waived any fees in most of the cases.

[10b] Although the precedent cited by respondent is not persuasive, we also do not consider the cases cited by the hearing judge and Office of Trials analogous. No act of moral turpitude was found here as it was in *Bledsoe* v. *State Bar*, *supra*, 52 Cal.3d 1074 where, among other things, affirmative misrepresentations were made to clients regarding the status of their cases. Nor do we have a case like *Young* v. *State Bar*, *supra*, 50 Cal.3d 1204, where the attorney demonstrated contempt for the practice of law by abandoning his clients and moving to Florida. Nor

does this case resemble *Martin* v. *State Bar*, *supra*, 52 Cal.3d 1055, which involved both client misrepresentations which were found to be acts of moral turpitude in violation of section 6106 and issuance of checks on insufficient funds. The deputy trial counsel conceded at oral argument that absent the lack of candor, far less discipline would be justified here.

We therefore look to other cases which we deem to involve more similar misconduct to that which occurred here. In *Sanchez* v. *State Bar*, *supra*, 18 Cal.3d 280 the Supreme Court ordered three months suspension of an attorney for two counts in which he was found culpable of gross negligence in failing to supervise employees who signed his name to legal documents without his authorization and gross negligence in failing to establish an internal calendaring system resulting in the dismissal of two clients' cases. Here, too, one case was dismissed and one would have been untimely but for the saving action of successor counsel without respondent's knowledge. *Sanchez* was also a pre-standards decision and would likely result in greater discipline today. Nonetheless, Sanchez's gross negligence was also found to have risen to the level that it permitted the unauthorized practice of law by his subordinates, a serious situation not involved here.

In *In the Matter of Whitehead*, *supra*, 1 Cal. State Bar Ct. Rptr. 354 the misconduct found by the hearing judge included commingling in one matter and failure to supervise associates and respond to letters in a second matter. Literal application of the standards would have resulted in a minimum of three months suspension which the Supreme Court has declined to apply rigidly. (*Id.* at p. 371, citing *Howard* v. *State Bar* (1990) 51 Cal.3d 215.) Indeed, for an isolated instance of a similar violation it had imposed a public reproval. (*Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092.) The hearing judge in *Whitehead* likewise considered three months suspension inappropriate under the circumstances and recommended no actual suspension in light of mitigating evidence. On review, we also found Whitehead culpable for failure to perform services competently and took into account a prior private reproval discounted by the hearing judge as being too remote. After consideration of relevant precedent, we recommended, and the Supreme Court subsequently adopted, 45 days actual suspension.

In *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, the Supreme Court suspended the attorney's license for nine months for misconduct in three client matters. Although more serious charges of misappropriation in one matter were dismissed by the Court, it found the attorney failed to perform legal services and communicate with two clients, with the loss of the client's cause of action in one instance, failed to return their files upon request, and retained an estate tax case that was beyond his competence to handle, resulting in delays and the accumulation of sizeable interest and penalties. The attorney's hurried move during part of the period of misconduct and the chaotic state of his staff were contributing factors. In contrast with the present case, the attorney's misconduct caused considerable harm to one client, he did not cooperate with the State Bar's investigation, and he had a prior record of discipline, although minor and remote in time.

Here, the various applicable standards call for a range of discipline from reproval to suspension or disbarment depending on the gravity of the offense or harm to the victim with a minimum of three months suspension called for under standard 2.2(b). Standard 1.6(a) calls for imposition of the most severe of the different applicable sanctions which, in this proceeding, would be a minimum of three months suspension irrespective of mitigating circumstances. While we are not bound to apply the standards in talismanic fashion, the Supreme Court expects reasons to be given for departing from them. (*Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1061, fn. 2.)

[10c] We agree with the hearing judge that on this record of numerous violations over an extended period of time no persuasive reason has been offered to go below the minimum of three months suspension called for by the standards. We conclude that taking all factors into account, including lack of harm to all but one client and respondent's changed office practices, actual suspension of respondent for ninety days as urged below by the deputy trial counsel is sufficient, as a condition of two years stayed suspension and two years probation on the essential conditions set forth below including development of a law office management plan (or proof of an existing one) that meets with the approval of the probation monitor. We therefore modify the recommendation of the hearing judge accordingly, reducing the rec-

ommended stayed suspension to two years, and substituting three months of actual suspension for the one-year suspension set forth in paragraph 1 of his decision but retaining paragraphs 2-10 thereof with the substitution of two years instead of three years of probation in paragraph 10. We add to paragraph 8 a requirement that within one year respondent shall also provide satisfactory evidence of completion of a course on law office management which meets with the approval of his probation monitor.

We also recommend, as did the judge below, a requirement that respondent timely comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court and that respondent be directed to take and pass the California Professional Responsibility Examination (CPRE) given by the State Bar Committee of Bar Examiners within one (1) year from the date the order of the Supreme Court in this matter becomes effective. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891 & fn. 8; *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn. 9.)

Finally, we recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JEFFREY FRIEDMAN

A Member of the State Bar

No. 92-N-11469

Filed September 14, 1993

SUMMARY

Respondent defaulted in two disciplinary cases. As a result of the second case, respondent received a five-month actual suspension and was required to comply with rule 955 of the California Rules of Court. Although he properly advised his clients of his suspension, he did not file the affidavit required by rule 955 until two weeks after it was due. Because of compelling mitigating circumstances, the likelihood that respondent would remain suspended for a considerable period due to three separate orders, and the lack of any public protection concerns, the hearing judge declined to impose any additional discipline for respondent's wilful violation. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar requested review, seeking the actual suspension of respondent for six months, consecutive to any other discipline. The review department concluded that the hearing judge correctly found compelling mitigation, but that for the purpose of maintaining high professional standards and the integrity of the legal profession, some discipline was required. Given the minimal delay in respondent's compliance with rule 955 and the other mitigating evidence, a thirty-day suspension was sufficient discipline.

COUNSEL FOR PARTIES

For Office of Trials: Bruce H. Robinson

For Respondent: Jeffrey Friedman, in pro. per.

HEADNOTES

[1 a, b] 513.90 Aggravation—Prior Record—Found but Discounted
806.59 Standards—Disbarment After Two Priors

Where respondent's two prior discipline cases occurred during the same four-month period when respondent's practice disintegrated, the two matters were considered as essentially a single matter in determining appropriate 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] **515 Aggravation—Prior Record—Declined to Find**
695 Aggravation—Other—Declined to Find
802.21 Standards—Definitions—Prior Record
While a suspension for failure to pass the Professional Responsibility Examination may be considered in determining appropriate discipline, it is not prior discipline under the Standards for Attorney Sanctions for Professional Misconduct.

[3] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
136 Procedure—Rules of Practice
194 Statutes Outside State Bar Act
Because section 1013 of the Code of Civil Procedure applies by rule in State Bar Court proceedings, service of a hearing department decision by mail to an address within California extends by five days the 30-day period for filing a request for review. (Rule 450, Trans. Rules Proc. of State Bar; rule 1111(b), Provisional Rules of Practice.)

[4 a, b] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
715.10 Mitigation—Good Faith—Found
1913.11 Rule 955—Wilfulness—Definition
1913.24 Rule 955—Delay—Filing Affidavit
1913.90 Rule 955—Other Substantive Issues
Respondent's carelessness and confusion concerning the requirements of rule 955 did not obviate culpability of wilful failure to file a rule 955 affidavit timely, where respondent did not seek relief based on good cause for his late filing. All that is necessary for a wilful violation of rule 955 is a general purpose or willingness to commit the act or make the omission. However, respondent's credible evidence of carelessness was properly considered in considering respondent's good faith attempts at timely compliance.

[5] **159 Evidence—Miscellaneous**
1913.24 Rule 955—Delay—Filing Affidavit
1913.90 Rule 955—Other Substantive Issues
The fact that an attorney's untimely affidavit under rule 955 is accepted for filing is not evidence of the attorney's compliance with the rule.

[6] **791 Mitigation—Other—Found**
863.30 Standards—Standard 2.6—Suspension
1913.70 Rule 955—Lesser Sanction than Disbarment
A respondent's substantial compliance with rule 955 is mitigating evidence which can influence the determination whether to impose discipline less than disbarment, the generally imposed sanction for a wilful violation of the rule.

[7 a-c] **791 Mitigation—Other—Found**
801.49 Standards—Deviation From—Generally
863.30 Standards—Standard 2.6—Suspension
1913.24 Rule 955—Delay—Filing Affidavit
1913.70 Rule 955—Lesser Sanction than Disbarment
Where respondent had awakened to his responsibilities to the discipline system and participated in rule 955 proceeding, had produced evidence that he posed less risk to clients than suggested by

his prior disciplinary record, gave proper notice in compliance with rule 955(a), and filed the required affidavit only 14 days late and before referral order was issued or formal disciplinary proceedings initiated, respondent's very brief failure to comply with rule 955 warranted a very modest sanction. However, even given the wide range of discipline available for a rule 955 violation, it would require an extraordinary case where no discipline of any form was merited. Considering the emphasis placed by the Supreme Court on strict compliance with rule 955, as well as considerations of attorney discipline, maintenance of the standards of the profession, and respondent's rehabilitation, some discipline was required. A 30-day suspension would serve to underline to respondent the seriousness of his duty to comply with all aspects of court orders.

[8 a, b] **175 Discipline—Rule 955**
801.30 Standards—Effect as Guidelines
801.41 Standards—Deviation From—Justified
801.47 Standards—Deviation From—Necessity to Explain
805.59 Standards—Effect of Prior Discipline
1913.90 Rule 955—Other Substantive Issues

Any reasons for deviations from the standards or case law should be set forth clearly. A rigid application in rule 955 cases of the standard requiring that the degree of discipline should be greater than that imposed in any prior proceeding would result in a minimum actual suspension of 90 days in every rule 955 violation proceeding where there was prior discipline, since rule 955 obligations are not required for actual suspensions under 90 days. The standards should not be applied in such talismanic fashion, particularly where there is not a common thread or course of conduct through past and present misconduct to justify increased discipline.

[9] **715.10 Mitigation—Good Faith—Found**
745.10 Mitigation—Remorse/Restitution—Found
791 Mitigation—Other—Found
805.59 Standards—Effect of Prior Discipline
1092 Substantive Issues re Discipline—Excessiveness
1913.24 Rule 955—Delay—Filing Affidavit
1913.70 Rule 955—Lesser Sanction than Disbarment

Where respondent had filed his required rule 955 affidavit prior to the initiation of rule 955 proceedings by referral order, had met the notice requirements of the rule timely, had taken responsibility for his own errors, and, because of other discipline, might remain on actual suspension for over two years, a six-month actual suspension for respondent's untimely filing of his rule 955 affidavit would be excessive.

ADDITIONAL ANALYSIS

Mitigation
Found
720.10 Lack of Harm
735.10 Candor—Bar
Discipline
1924.01 Actual Suspension—1 Month
Probation Conditions
1926 Standard 1.4(c)(ii)
Other
1915.30 Rule 955—Violation Found But Substantial Compliance

OPINION

STOVITZ, J.:

This is the first case we have reviewed of a wilful violation of rule 955 of the California Rules of Court (rule 955) justifying only a very modest degree of discipline. The hearing judge found that respondent, Jeffrey Friedman, wilfully violated rule 955(c) solely by filing his required affidavit of compliance two weeks late. In light of compelling mitigating circumstances and the lack of any public protection concerns, and noting that respondent was likely to be suspended for a considerable period of time due to three separate orders, the hearing judge declined to impose any additional discipline for respondent's wilful violation.

Contending that mitigation was improperly considered and weighed, the Office of Trials has asked for our review, urging a six-month actual suspension consecutive to any other discipline. We conclude that this case does present the compelling mitigation identified by the hearing judge. However, we conclude that for the purpose of maintaining high professional standards and the integrity of the legal profession, some discipline is required. Given the minimal delay in respondent's compliance with rule 955 and other mitigating evidence, a 30-day suspension is sufficient discipline and we shall so recommend.

I. BACKGROUND FACTS

Effective June 22, 1991, the Supreme Court suspended respondent for six months, stayed the execution of that suspension and placed him on probation for one year. He received an actual suspension of one month and until he made restitution. For convenience, we shall refer to this suspension as *Friedman I.*

On December 12, 1991, the Supreme Court suspended respondent based on an entirely different disciplinary proceeding which we shall call *Friedman II.* This order suspended respondent from the practice of law in California for two years, stayed execution of that suspension, and placed him on probation for three years on conditions which included his actual suspension for five months, consecutive to the period of actual suspension previously ordered in *Friedman I* and until he made restitution to two clients. *Friedman II* also directed respondent to comply with and perform the acts specified in subdivisions (a) and (c) of rule 955, within 30 and 40 days, respectively, after the effective date, January 11, 1992.[1] Respondent had until February 20, 1992, to file his affidavit of rule 955 compliance.

Respondent admitted that he received a copy of the Supreme Court's order in *Friedman II*, but he testified that he did not read it closely as he claimed to not know of the proceeding and thought it was another copy of the suspension order in *Friedman I.* As he testified, "I merely put [the order in *Friedman II*] in the top right-hand drawer where all my Bar communications were of [sic] my desk and let it sit there."

By letter dated February 25, 1992, the State Bar Court Probation Department notified the Presiding Judge of this court that respondent had been notified of the provisions of the Supreme Court's December 12, 1991, order, and that he had failed to file an affidavit in compliance with rule 955. The probation department sent a copy of this letter to respondent. Respondent did not seek relief from this court for his untimely filing. On March 9, 1992, this court issued an order referring the matter for a hearing as to whether respondent wilfully failed to comply with rule 955 per the December 12, 1991, order and if so, for a recommendation as to the discipline to be imposed.

On March 5, 1992, prior to this court's referral order, respondent filed the required affidavit with the State Bar. It was executed on February 29, 1992. In it, respondent attested that he complied with rule

1. As pertinent here, rule 955(a) required respondent to notify clients, courts and opposing counsel by registered or certified mail in any pending matter of his suspension, to deliver to pending clients their papers or property and to file an affidavit with this court attesting to his compliance. (See *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 327, fn. 1.)

955(a) in a timely manner and that the filing of the instant affidavit was not timely because he "was confused as to the requirement."

The hearing below was held on October 1, 1992. The hearing judge found that respondent had notice of the Supreme Court's order in *Friedman II* and wilfully failed to comply with rule 955 by failing to file the required affidavit by February 20, 1992. After weighing the aggravating and mitigating evidence, the hearing judge concluded that although disbarment is the usual discipline imposed for wilful violation of an order requiring compliance with rule 955, the facts and circumstances did not warrant the harsh discipline of disbarment or additional actual suspension. The hearing judge cited respondent's substantial compliance with rule 955 by timely notifying his one California client and the court in that client's pending case of his suspension; his full cooperation with the State Bar, and, in addition to the continuing suspension in *Friedman II*, two separate orders of suspension from practice on other grounds.[2] The hearing judge concluded that respondent's concurrent suspensions would protect the public, and she noted that because of respondent's strained financial situation, he would be unlikely in the near future to be able to afford to take the Professional Responsibility Examination, make restitution to his clients, and pay his outstanding State Bar membership fees, thus curing the suspensions.[3] The discipline from the prior proceedings had, in the judge's view, impressed on respondent the gravity of his misconduct and the necessity of his continued rehabilitation. Therefore, she concluded that no additional discipline needed to be imposed in the case, and consistent with that conclusion, did not award costs.

II. MITIGATING AND AGGRAVATING CIRCUMSTANCES

In aggravation, the hearing judge noted that respondent was admitted to practice in California on January 12, 1976, and had been disciplined twice—an aggravating circumstance under standard 1.2(b)(i). Both of the cases proceeded by default.[4]

In *Friedman I*, respondent abandoned two clients, failed to perform legal services competently for them, failed to return unearned fees from one of the clients, and failed to keep his address current with membership records. In *Friedman II*, respondent abandoned two additional clients, and in each instance, failed to perform legal services competently, failed to communicate significant legal developments, and failed to return unearned fees. In *Friedman II* he failed to cooperate with the State Bar by not answering four letters from the State Bar's investigator. **[1a]** The two discipline cases occurred during the same four-month period from October 1988 until early 1989, when respondent's law practice disintegrated and he closed his office. Because of this time proximity, the hearing judge in *Friedman II* considered the two matters as if they had been prosecuted as one in determining the appropriate discipline.

Effective July 16, 1992, we suspended respondent for failure to take and pass the Professional Responsibility Examination within one year as ordered in *Friedman I*. At the hearing below, the hearing judge rejected the deputy trial counsel's argument that respondent's failure to take the examination within the prescribed time constituted an aggravating circumstance. We agree with the hear-

2. Respondent was suspended from practice on July 16, 1992, for failure to take and pass the Professional Responsibility Examination. We take judicial notice that he has also been suspended since August 10, 1992, for failure to pay State Bar membership fees.

3. Under the Supreme Court order in *Friedman II*, if respondent's suspension for failure to pay restitution should exceed two years, he would be required to prove at a hearing pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, division V, Transitional Rules of Procedure of the State Bar ("standards"), his rehabilitation, fitness to practice law, and learning and ability in the general law.

4. At the hearing below, respondent argued his lack of notice of the second proceeding constituted mitigating evidence. He testified that he had sent his change of address to the membership records department of the State Bar, but his notice was rejected because it was not submitted on the office's standard postcard. After learning of the second proceeding from service of the proposed Supreme Court order sent to his correct address, respondent attempted to have the default set aside in the second proceeding, but his petition for review was denied by the Supreme Court. (S022391, order filed December 12, 1991.)

ing judge. **[2]** We have stated that while a suspension for failure to pass the Professional Responsibility Examination may be considered in determining the appropriate discipline, it is not prior discipline under the standards. (*In the Matter of Babero*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 331.)

In mitigation, the hearing judge noted that respondent had substantially complied with rule 955, having met the requirements of rule 955(a) prior to the deadline, and, once notified of his omission under rule 955(c), filed his affidavit with the State Bar before any discipline proceedings were initiated or the referral order was filed. She found that respondent had recognized his mistakes, was working on rectifying his misconduct and showed a good faith effort, all mitigating factors. No clients were harmed by respondent's failure to file his affidavit timely and he was candid and cooperative with the State Bar during the proceedings.

III. DISCUSSION

On review, the deputy trial counsel argues that the hearing judge's interpretation of law regarding rule 955 violations in light of the evidence is erroneous and her recommended discipline is inadequate. The deputy trial counsel disputes the concept that "substantial compliance" with rule 955 may excuse imposition of any discipline for failure to comply with all the requirements of the rule. He contends that the circumstances of respondent's failure to file timely the affidavit do not mandate disbarment, but do warrant imposition of a six-month actual suspension.

[3] In his brief, respondent asserts that the Office of Trials' request for review was untimely. His assertion is erroneous. Rule 450 of the Transitional Rules of Procedure provides that a written request for review must be filed within 30 days after service of the hearing judge's decision. Rule 1111(b) of the Provisional Rules of Practice of the State Bar Court incorporates the provisions of Code of Civil Procedure section 1013, which extends the 30-day period for filing 5 days for purposes of service within California. The hearing judge's decision was served October 27, 1992, and the Office of Trials' request for review filed December 1, 1992, met the prescribed time deadlines.

Respondent reiterates his contention that his failure to file his rule 955 affidavit on time was a result of carelessness, misunderstanding and confusion and was thus not a purposeful or wilful act. He asks that the recommendation not to impose discipline be upheld.

[4a] On the factual findings in the case, the deputy trial counsel asserts that there is absolutely no evidence in the record that respondent's late filing was a result of carelessness. We have reviewed respondent's testimony that he did not carefully read the Supreme Court's order when he received it and was busy at the time with his Nevada practice and the details of his own bankruptcy proceeding. Respondent also averred in his affidavit filed in compliance with rule 955 that he was confused as to the requirements of the rule, yet we note that respondent did not seek relief, based on any good cause, for his untimely filing. On this record, the hearing judge concluded correctly that any confusion on respondent's part did not obviate a wilful failure to comply with the affidavit requirement. All that is necessary for a wilful violation of rule 955 is a general purpose or willingness to commit the act, or make the omission referred to. (*Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 258, citing *Durbin* v. *State Bar* (1979) 23 Cal.3d 461, 467.) **[5]** That respondent's untimely rule 955 affidavit was accepted for filing is not evidence of his compliance with that rule. **[4b]** However, the hearing judge did find respondent's professed carelessness to be credible in considering his good faith attempts at timely compliance and we find no reason in this record to reverse her credibility finding.

[6] The deputy trial counsel argues that the hearing judge's reliance on respondent's substantial compliance with rule 955 was in error. We disagree. The generally imposed sanction for a wilful violation of rule 955 is disbarment, particularly when the wilful failure was as to the basic notice requirements of rule 955(a). (*Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131; *Powers* v. *State Bar* (1988) 44 Cal.3d 337, 342; *In the Matter of Babero*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 332.) The Supreme Court has considered an attorney's attempts to obey the dictates of the rule as mitigating evidence which influenced the determination whether to impose discipline less than disbarment. In *Durbin* v. *State Bar*,

supra, 23 Cal.3d 461, an attorney notified his client and all other required parties under rule 955(a) within the prescribed time period, but did not file the necessary affidavit with the Supreme Court under rule 955(c). Noting that the attorney's failure was only in reporting his compliance with rule 955(a) and that the purpose of rule 955(c) is to insure compliance with rule 955(a), the Court reduced the recommended discipline from one year actual suspension to six months or until the affidavit was filed, whichever was greater.

In *Shapiro* v. *State Bar*, *supra*, 51 Cal.3d 251, the attorney had also timely notified clients and others of his suspension, but did not file an affidavit conforming to rule 955(c) until five months after it was due. As to his wilful violation of the rule, the Supreme Court rejected his offer of evidence of misdirection by his probation monitor and his confusion about the requirements of the rule as unreasonable. Nevertheless, in weighing discipline, the Court considered the same evidence as demonstrating "a diligent, if ultimately unsuccessful, attempt to comply with the rule." (*Id.* at p. 259.) The Supreme Court noted that "the matter was resolved satisfactorily within several weeks, although by then our referral order had already triggered State Bar disciplinary proceedings." (*Ibid.*) Shapiro presented additional evidence concerning a back injury which was a factor in his misconduct and from which he had recovered. Considering Shapiro's long history of practice and the short period of time his misconduct spanned, the Supreme Court imposed a one-year actual suspension for both the rule 955 and one count of misconduct.

We have considered three rule 955 cases recently, all since the hearing judge's decision in this case, and we have recommended disbarment in each. Their facts are not comparable to this case. In *In the Matter of Babero*, *supra*, 2 Cal. State Bar Ct. Rptr. 322, we concurred with the hearing judge's assessment that the attorney's efforts at compliance were inadequate, his transfer of cases to successor counsel was done in an irresponsible manner, and his declaration filed in an attempt to comply with rule 955(c) contained inaccuracies. The attorney did not make any efforts, however belated, to comply with rule 955. We found what efforts the attorney made in mitigation of his misconduct were not comparable to those demonstrated in the *Shapiro* and *Durbin* cases. Guided by the Supreme Court's decisions, we recommended disbarment.

In *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, the attorney filed a proper affidavit 21 days late, indicating that she had had no clients in the past three years. We noted that had the short delay been the sole issue, disbarment would not have been necessary. (*Id.* at p. 385.) However, the attorney had never participated in any of the disciplinary proceedings filed against her, including the later rule 955 hearing, and had exhibited extreme indifference to successive disciplinary orders. This risky practice of inattention posed a sufficient danger to the public that we recommended disbarment. (*Ibid.*)

In the third case, *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439, we confronted the dilemma of an attorney who, in spite of high personal ethics and devotion to some clients, harmed numerous clients through inattention, neglect, and chronic disorganization. In the consolidated probation revocation and rule 955 proceeding we reviewed, he did not comply with the conditions of his probation, never complied fully with rule 955(a) in advising courts where his clients' actions were pending of his suspension, and filed his required affidavit more than one year after it was due, even after repeated warnings from his probation monitor, the deputy trial counsel, and the hearing judge of the likelihood of disbarment as a consequence. (*Id.* at p. 442.) His participation in disciplinary proceedings had been sporadic at best. Finding nothing in the record to indicate that the attorney had control of the problems which led to his misconduct or that he was on the road to rehabilitation, we concluded that public protection mandated a disbarment recommendation. (*Id.* at pp. 443-444.)

[7a] In this instance, we have a respondent who, unlike Pierce and Grueneich, has awakened to his responsibilities to the discipline system. After having two original discipline cases go by default, he has participated at all stages of this proceeding. The proof he offered in the current rule 955 proceeding as to the prior two default matters showed the hearing

judge and us that respondent was a lesser risk to clients than suggested by the default records. In contrast with the *Babero* case, respondent gave the proper notice in compliance with rule 955(a). His affidavit was late by only 14 days, and was filed even before a referral order or formal disciplinary proceedings were initiated. Moreover, there is no indication in the record that respondent's affidavit was inaccurate. Respondent's very brief failure of compliance is much less serious than in the *Shapiro* and *Durbin* cases, in which the attorneys had met the requirements of rule 955(a), but had failed to file the rule 955(c) affidavit timely or at all. Finally, the hearing judge saw no concern that respondent was generally lax toward his responsibilities either to clients or to the State Bar.

[7b] Given these circumstances, we find this rule 955 case is an appropriate one for imposition of a very modest sanction. In recommending no additional discipline, the hearing judge was undoubtedly influenced by the extremely strong likelihood of respondent remaining on suspension for a considerable period of time as a result of the three separate orders we discussed, *ante*. Yet, we cannot agree with the hearing judge that respondent's willful violation does not merit some discipline. Under rule 955(d), a willful violation of the rule by a suspended member "constitutes cause for disbarment or suspension and for revocation of any pending probation." (Cal. Rules of Court, rule 955(d).) However, even granted that the range of discipline is wide for a rule 955 violation (*Durbin* v. *State Bar*, *supra*, 23 Cal.3d at p. 468) it would, in our view, require an extraordinary case where no discipline of any form was merited. In that regard, we note that but for the reminder respondent received when he had missed the deadline for filing his affidavit, he might have filed it much later or not at all.

[8a] Any reasons for deviation from the standards or case law should be set forth clearly. (*Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) **[1b]** Even if we view respondent's two prior disciplines as essentially a single matter, as did the hearing judge in this case, the standards provide that the degree of discipline should be greater than that imposed in the prior proceeding, unless the prior discipline is remote in time and the violation so minimal that imposition of more severe discipline would be manifestly unjust. (Std. 1.7(a).) Under that standard, respondent's prior misconduct is not so remote in time nor so insignificant to warrant application of the exception. **[8b]** However, we cannot always apply standard 1.7(a) rigidly in each instance, since rule 955 violations will not always follow a respondent's prior discipline. Moreover, since rule 955 obligations are not required as discipline for actual suspensions under 90 days, a strict reading of standard 1.7 would necessitate in every such rule 955 case a minimum actual suspension of 90 days. The standards are not to be followed in a talismanic fashion (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221), particularly where there is not a common thread or course of conduct through the past and present misconduct to justify increased discipline. (*Arm* v. *State Bar* (1990) 50 Cal.3d 763, 780; see also *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.)

[9] Based on *Durbin* v. *State Bar*, *supra*, 23 Cal.3d 461, the Office of Trials urges that respondent be given a six-month prospective actual suspension. Durbin imposed a minimum six-month actual suspension on an attorney who had met the dictates of rule 955(a) but had not filed the affidavit. The *Durbin* case differs from this case in two significant aspects. The attorney in *Durbin* had not filed his affidavit by the time his rule 955 case was before the Supreme Court; respondent's was filed even before our referral order was issued. The Court also found Durbin's excuse for his noncompliance unpersuasive, which laid blame on alleged misdirection from an uncorroborated conversation with a State Bar employee and on a failure to keep records of or remember any of the names of the clients he had represented. (*Id.* at p. 468.) Here, respondent has taken responsibility for his own errors. Finally, the Office of Trials' recommended six-month suspension does not consider respondent's other discipline which may keep him suspended actually for two years with a possibility of being required to comply with standard 1.4(c)(ii).

We were initially concerned that respondent's misreading of the Supreme Court's order was indicative of continued confusion in his practice, which may have been a cause of his prior abandonment of clients. We are, however, persuaded by review of the

record, and encouraged by his participation in this disciplinary matter, his cooperation with the State Bar, and the short delay in his full compliance with all the requirements of rule 955. Respondent's continued suspension on other grounds does not resolve the question of his rehabilitation. He is challenged by his financial difficulties, which effectively bar him from practice in California until he can emerge from bankruptcy, pay restitution, take the Professional Responsibility Examination (PRE) and pay his State Bar membership fees. If respondent fails to pay restitution to his former clients by January 1994, he will be required to show at a hearing pursuant to standard 1.4(c)(ii), his rehabilitation, fitness to practice law, and learning and ability in the general law before being permitted to practice again. Moreover, respondent is on probation pursuant to *Friedman II*, and will continue in that status until January 1995. **[7c]** We conclude that considerations of attorney discipline, maintenance of the standards of the profession and the rehabilitation of respondent, call for some discipline for the wilful violation of the rule, especially considering the emphasis which the Supreme Court has placed on strict compliance with rule 955. Balancing all relevant factors, a 30-day suspension will serve to underline to respondent the seriousness of his duties to comply with all aspects of court orders.

IV. RECOMMENDED DISCIPLINE

For the foregoing reasons, we recommend that Jeffrey Friedman be suspended from the practice of law for 30 days, said suspension to start upon the expiration of either his actual suspension effective January 11, 1992, or upon expiration of his suspension for failure to pass the PRE, whichever previous suspension expires later. We also recommend that if respondent's January 1992 suspension coupled with the suspension imposed by the Supreme Court as a result of our recommendation exceeds two years, that respondent be required to make the showing required by standard 1.4(c)(ii). Since respondent must pass the PRE by separate Supreme Court order, we do not include a separate recommendation for PRE passage. Since he has been under actual suspension continuously since January 11, 1992, we do not recommend that he be again ordered to comply with the provisions of rule 955. We do recommended that costs incurred by the State Bar in the investigation and hearing of this matter be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and that such costs be added to and become part of the membership fee of respondent for the calendar year next following the effective date of the Supreme Court order imposing discipline in this matter.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD TREEN MUDGE

Applicant for Certification as a Probate, Estate Planning, and Trust Law Specialist

No. 92-S-12896

Filed September 15, 1993

SUMMARY

An applicant for certification as a probate, estate planning, and trust law specialist, who was a member in good standing of the State Bar but had a prior record of serious discipline, satisfied the experience and education requirements for certification, and passed the legal specialization examination. Relying solely on the applicant's past discipline record, the Board of Legal Specialization denied him certification without allowing him a hearing to answer questions and present his case. The applicant challenged this action in the State Bar Court, and the hearing judge affirmed the denial. (Hon. Carlos E. Velarde, Hearing Judge.)

Arguing that the hearing judge misinterpreted and misapplied the rules for certification as a legal specialist, the applicant sought review. The review department held that the rules did not permit summary denial of an application filed by a member of the State Bar in good standing solely on the basis of prior discipline. The review department also concluded that the Board of Legal Specialization had violated the applicant's common law right to fair procedure by denying him a meaningful opportunity to be heard in his defense. The review department reversed the hearing judge's decision and remanded the proceeding to the Board of Legal Specialization for further proceedings in which the applicant's discipline record could be considered, but would not pose an absolute bar to certification, and in which the applicant would have an opportunity to present evidence of his rehabilitation.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Applicant: Richard Treen Mudge, 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] **120 Procedure—Conduct of Trial**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
2901 Legal Specialization Proceedings—Procedural Issues

Although Business and Professions Code section 6026.5(f) permits appeals from decisions of the Board of Legal Specialization to the Board of Governors of the State Bar to be treated as confidential, the Board of Governors, in delegating its authority to hear such appeals to the State Bar Court, did not expressly indicate whether it intended to preserve the confidentiality of such appeals. (Trans. Rules Proc. of State Bar, rule 225(a)(1).) Where a legal specialization proceeding was treated as public by the hearing judge, the parties were deemed to have waived any argument that the review department should treat the proceeding as confidential by their failure to raise a timely objection to such treatment.

[2 a, b] **113 Procedure—Discovery**
130 Procedure—Procedure on Review
136 Procedure—Rules of Practice
159 Evidence—Miscellaneous
2990 Legal Specialization Proceedings—Miscellaneous

Where the record of a legal specialization proceeding contained no documents explaining the basis for the denial of specialist certification and where responses by the deputy trial counsel to interrogatories clarified the basis for the denial, augmentation of the record with the interrogatory responses was appropriate. (Prov. Rules of Practice, rule 1304.)

[3] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record

Due to the requirement that the review department undertake an independent review of the record, the review department cannot be bound by a stipulation by the parties attempting to limit the scope of review. Also, the review department has the authority to adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge. (Trans. Rules Proc. of State Bar, rule 453(a).)

[4 a-c] **2921 Legal Specialization Proceedings—Denial of Certification Reversed**
2990 Legal Specialization Proceedings—Miscellaneous

The Board of Legal Specialization has not been given the authority to construe prior discipline as a threshold criterion for specialist certification. Prior discipline is a factor to be considered in examining an application for specialist certification, but does not constitute an absolute bar to certification.

[5] **169 Standard of Proof or Review—Miscellaneous**
192 Due Process/Procedural Rights
2901 Legal Specialization Proceedings—Procedural Issues
2990 Legal Specialization Proceedings—Miscellaneous

An administrative determination by the Board of Legal Specialization regarding an application for certification must comport with due process, and review by the State Bar Court exists in part to test whether due process was afforded.

[6 a, b] **2990 Legal Specialization Proceedings—Miscellaneous**

The State Bar rule which provides that imposition of attorney discipline constitutes cause for the denial, suspension, or revocation of certification or recertification as a specialist applies only to certificate holders, not to applicants for certification.

[7 a, b] **141 Evidence—Relevance**
2990 Legal Specialization Proceedings—Miscellaneous

An attorney's record of prior discipline is a factor to be considered by the Board of Legal Specialization in determining whether the attorney initially meets the standards for specialist certification, and, in appropriate circumstances, may justify a decision to deny initial certification.

[8 a, b] **167 Abuse of Discretion**
192 Due Process/Procedural Rights
2921 Legal Specialization Proceedings—Denial of Certification Reversed
2990 Legal Specialization Proceedings—Miscellaneous

No decision denying specialist certification is permissible unless the applicant for certification receives some meaningful opportunity to be heard in his or her own defense. Where an attorney in good standing applied for certification as a legal specialist 14 years after committing misconduct, 11 years after the resulting suspension order, and 8 years after the completion of the suspension, the Board of Legal Specialization was required to allow the attorney an opportunity to be heard on the attorney's current qualifications.

[9] **192 Due Process/Procedural Rights**
2990 Legal Specialization Proceedings—Miscellaneous

By controlling specialist certification, the Board of Legal Specialization substantially affects not only the professional status of an attorney, but also an important economic interest which is worthy of due process protection.

[10 a-d] **167 Abuse of Discretion**
192 Due Process/Procedural Rights
2921 Legal Specialization Proceedings—Denial of Certification Reversed
2990 Legal Specialization Proceedings—Miscellaneous

Where the Board of Legal Specialization summarily denied an application for legal specialist certification solely on the basis of applicant's prior serious discipline, without considering any evidence or permitting a hearing on applicant's recent conduct and present qualifications, the Board violated its own rules and applicant's common law right to fair procedure. The Board's indication that it might reconsider the denial at a later date, without any enumerated criteria as to when it would do so, underscored the arbitrariness of its position.

[11] **192 Due Process/Procedural Rights**
2990 Legal Specialization Proceedings—Miscellaneous

California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations which have the practical power to affect substantially an important economic interest. A basic and indispensable ingredient of the fair procedure required under the common law is that an individual who will be adversely affected by a decision be afforded some meaningful opportunity to be heard in the individual's defense.

[12] **141 Evidence—Relevance**
167 Abuse of Discretion
192 Due Process/Procedural Rights
2990 Legal Specialization Proceedings—Miscellaneous

Within due process limits, the Board of Legal Specialization has broad discretion in certifying specialists. It may consider any competent evidence rebutting an applicant's showing and may weigh and balance evidence in an appropriate manner. An applicant's prior discipline for very serious misconduct is clearly evidence that should be considered in this process.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

We review the decision by a hearing judge of the State Bar Court to affirm the summary denial by the Board of Legal Specialization ("BLS") of an application for certification as a probate, estate planning, and trust law specialist by Richard Treen Mudge ("applicant").[1] **[1 - see fn. 1]** The BLS had denied Mudge's application solely on the basis of Mudge's prior discipline without permitting any evidence of rehabilitation or a hearing on his present qualifications. At oral argument, counsel for the BLS took the position that the BLS in effect has made lack of prior discipline an additional condition precedent to legal certification on its own initiative—i.e., without express authorization of the Legislature, the Board of Governors of the State Bar ("Board of Governors") or the Supreme Court which retains inherent authority over the regulation of members of the State Bar. We understand the BLS's concern about the very serious misconduct committed by applicant but it has been more than ten years since his discipline was imposed and no opportunity was given him to address the issue of his rehabilitation. Even disbarred attorneys can seek reinstatement on an equal footing with other lawyers five years after they are disbarred.

We conclude that the rules for certification as a legal specialist do not permit summary denial of an application filed by a member of the Bar in current good standing solely on the basis of prior discipline and also conclude that the BLS violated applicant's common law right to fair procedure by denying him a meaningful opportunity to be heard in his defense. Thus, we reverse the hearing judge's decision and remand the proceeding to the BLS for consideration of Mudge's application pursuant to the independent inquiry and review process regarding his current qualifications as required by the rules for legal specialization.

I. FACTS AND PROCEDURAL HISTORY

Applicant was admitted to the State Bar in 1959. He practiced law without misconduct until 1974. During the next four and one-half years, he misappropriated approximately $387,200 from two estates. He also filed a false document with a probate court to avoid the discovery of his misappropriations. Because of extensive mitigating circumstances, he was not disbarred. Instead, his discipline consisted of five years stayed suspension, five years probation, and three years actual suspension. (*In re Mudge* (1982) 33 Cal.3d 152, 154-157.) Currently, applicant is a member in good standing of the State Bar of California.

The BLS has the exclusive authority to certify a California attorney as a specialist in probate, estate planning, and trust law. In June 1989, applicant applied to the BLS for a certificate of specialization in the area of probate, estate planning, and trust law. In addition to satisfying the tasks and experience requirements and the special education requirements for certification, he passed the legal specialization examination. The process of independent inquiry and review concerning his application then began: questionnaires were sent to his references, and his name was published in *California Lawyer*. The process, however, was not completed. No independent inquiry and review committee considered the application; nor was applicant allowed any hearing to answer questions and present his case. Solely on the basis of applicant's record of prior discipline, the BLS's advisory commission recommended that applicant not be certified. Like the advisory commission, the BLS did not allow applicant a hearing. Acting on the purported authority of section 7.b.v of the State

1. **[1]** Although Business and Professions Code section 6026.5 (f) permits appeals from decisions of the BLS to the Board of Governors of the State Bar to be treated as confidential, when the Board of Governors delegated its authority to hear such appeals to the State Bar Court it did not expressly indicate whether it intended to preserve the confidentiality of such hearings. Under rule 225(a)(1) of the Transitional Rules of Procedure of the State Bar, only moral character proceedings and inactive enrollment proceedings under Business and Professions Code section 6007 (b) are expressly designated as confidential. This proceeding was treated as a public proceeding by the hearing judge and by order of this court dated June 17, 1993, the parties were deemed to have waived any argument that the proceedings should now be confidential by failure to raise timely objection thereto.

Bar of California Program for Certifying Legal Specialists ("Program"),[2] the BLS summarily denied certification.

In April 1992, applicant requested a hearing before the State Bar Court pursuant to section VIII.C of the Rules and Regulations of the Program ("Rules and Regulations"). In October 1992, the parties filed a stipulation (1) that no issues of fact were to be decided; (2) that the sole issue of law was whether section 7.b.v of the Program authorized the BLS to deny specialist certification solely on the basis of a prior disciplinary record; and (3) that if section 7.b.v conferred no such authority, the matter was to be remanded to the BLS with instructions to vacate the denial and to remand the matter to the advisory commission for the conclusion of the independent inquiry and review process. The proceeding was submitted on the pleadings to the hearing judge, who filed a public decision affirming the BLS's summary denial of certification. Pursuant to section IX of the Rules and Regulations and to rule 450 of the Transitional Rules of Procedure of the State Bar, applicant sought review on the ground that the hearing judge misinterpreted and misapplied section 7.b.v.

II. AUGMENTATION OF THE RECORD

[2a] The record contains no letters or other documents from the BLS to applicant attesting to its denial of his application for certification. In July 1992, however, the deputy trial counsel signed and served verified responses to interrogatories about the BLS's position. Among other things, these responses clarify the following: (1) the BLS contends that the application should be denied solely on the basis of applicant's prior misconduct, regardless of his current competence; (2) the BLS relies solely upon section 7.b.v of the Program in making this contention; (3) the BLS contends that no independent inquiry and review of the application is necessary, because applicant's prior misconduct makes denial of certification appropriate; (4) the BLS contends that applicant's prior misconduct is a per se bar to certification and that it makes no difference with regard to certification whether applicant is completely rehabilitated; (5) the BLS contends that an applicant for certification as a specialist is held to a higher ethical standard than other members of the bar; and (6) the BLS considers the difference between the two standards is the absence of any discipline for serious criminal and/or ethical misconduct involving the area of law in which an applicant seeks certification.

[2b] In May 1993, applicant requested us to take judicial notice of the preceding information. The deputy trial counsel opposed the request on the grounds that it constituted an improper request for augmentation of the record and that applicant had not shown how the record was incomplete or incorrect. At oral argument, however, the deputy trial counsel stated that she had no objection to the augmentation of the record with the specified information from the interrogatories and responses if such information was necessary to clarify the basis for the BLS's denial of certification. Pursuant to rule 1304 of the Provisional Rules of Practice of the State Bar Court, we grant applicant's request for augmentation.

III. DISCUSSION

[3] Because the law requires us to undertake an independent review of the record (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373,

2. Section 7 of the Program states: "SECTION 7. DENIAL, SUSPENSION AND REVOCATION OF CERTIFICATION OR RECERTIFICATION [¶] a. Certification or recertification may be denied, suspended or revoked by the [BLS] if the program for certification in that field is terminated. [¶] b. The certificate may be denied, suspended or revoked by the [BLS], pursuant to procedures adopted by the [BLS], for any of the causes set forth below: [¶] i. The lawyer does not meet or ceases to meet the standards for certification or recertification as a legal specialist; or [¶] ii. The certificate was issued contrary to the rules and regulations of the [BLS]; or [¶] iii. The certificate was issued to a lawyer who was not eligible to receive a certificate, or who made any material false representation or misstatement of material fact to the [BLS]; or [¶] iv. The certificate holder has failed to abide by the Rules and Regulations of the [BLS] as amended from time to time; or [¶] v. The certificate holder has been disciplined pursuant to the State Bar Act; or [¶] vi. The certificate holder has failed to pay any fee established by the Board of Governors of the State Bar."

382), we cannot be bound by the parties' stipulation attempting to limit our review of the legal issue raised by the record to an interpretation of section 7.b.v of the Program. We also have the authority to adopt conclusions and a decision or recommendation at variance with those of the hearing judge. (*Ibid.*)

A. The BLS Lacks Authority to Make Prior Discipline a Threshold Criterion for Specialist Certification

[4a] At oral argument, the deputy trial counsel raised the argument that prior discipline is a "threshold criterion" for specialist certification. According to her, section 7 of the Program allows the BLS to construe prior discipline as such a criterion.

[4b] We disagree. As the hearing judge recognized, prior discipline is a factor to be considered in examining an application for specialist certification, but does not constitute an absolute bar to certification. (Decision, p. 11, fn. 5.) Neither the Supreme Court, which retains the inherent authority to regulate attorneys, nor the Legislature has indicated that prior discipline is such a bar. (Cf. Bus. & Prof. Code, §§ 6079.1 (b)(2) [appointment as judge of the State Bar Court precluded by any record of discipline], 6079.5 (b)(1) [appointment as Chief Trial Counsel of the State Bar precluded by commission of any disciplinary offenses].)

[4c] The Board of Governors adopted the Program and established the BLS, but did not confer any authority on the BLS to alter the Program. As discussed below, in appropriate circumstances, section 7.b.i of the Program permits the BLS to deny, suspend, or revoke the certification or recertification of an attorney because of discipline. Section 7, however, does not grant such permission regardless of the circumstances. Section 7 does not make discipline a threshold criterion or absolute bar. Nor, as we shall discuss, does section 7 allow the BLS to bypass the common law requirements of fair procedure or the express provisions of the Rules and Regulations. **[5]** Indeed, section G of the Policies Governing the State Bar of California Program for Certifying Legal Specialists ("Policies Governing the Program") recognizes both that the BLS's administrative determination must comport with required due process and that the State Bar Court review process exists in part to test whether required due process was afforded.[3]

B. Interpretation of Section 7 of the Program

[6a] Section 7.b of the Program lists causes which may justify the denial, suspension, and revocation of certification or recertification as a specialist. Section 7.b.i provides: "The lawyer does not meet or ceases to meet the standards for certification or recertification . . . ." Section 7.b.v provides: "The *certificate holder* has been disciplined pursuant to the State Bar Act . . . ." (Emphasis added.)

The deputy trial counsel claims that although section 7.b.v refers only to the "certificate holder," it must also apply to an attorney seeking initial certification as a specialist because section 7 of the Program generally concerns the denial, as well as the suspension and revocation, of specialist certification. Applicant argues that by its specific terms section 7.b.v can apply only to an attorney who is already certified as a specialist and that if the Board of Governors of the State Bar had intended section 7.b.v to encompass an attorney seeking initial certification as a specialist, the term "lawyer" would have been used, as in section 7.b.i, rather than the term "certificate holder."

The hearing judge rejected applicant's argument on the grounds that it would create an inconsistency in the treatment of attorneys. The

3. Section G of the Policies Governing the Program provides in pertinent part: "G. Denial, suspension or revocation [¶] In making its administrative determination whether to grant, deny, suspend or revoke certification or recertification as a legal specialist, the California Board of Legal Specialization *shall afford the individual due process required by law,* in accordance with rules and regulations to be adopted by the board. [¶] . . . [¶] A decision of the Board of Legal Specialization to deny, suspend or revoke certification or recertification shall be subject to review by the State Bar Court, at the request of the applicant, *to satisfy applicable requirements of due process and to determine that substantial evidence exists to support the determination.*" (Emphasis added.)

hearing judge observed that discipline is relevant to both certification and recertification. According to the hearing judge, no differentiation between an applicant and a certificate holder was intended in section 7.b.v.

Applicant does not disagree with the deputy trial counsel and the hearing judge on the issue whether discipline is relevant to initial specialist certification, as well as to recertification and suspension of certification. He has consistently recognized that his disciplinary record may properly be considered by the BLS in determining whether he meets the qualifications for specialist certification. He argues only that summary denial of an application on that basis is not authorized by section 7.b.v.[4]

[6b] Indeed, in their stipulation, the parties exclusively focused on the proper interpretation of the provisions of section 7.b.v. of the Program. We conclude that applicant is correct that section 7.b.v is limited to certificate holders[5] and is thus inapplicable to initial applications for certification. **[7a]** While discipline is a factor to be considered by the BLS in determining whether a lawyer initially meets the standards for specialist certification, the applicable section is section 7.b.i, not 7.b.v.

[7b] In appropriate circumstances, section 7.b.i may justify a decision by the BLS to deny the initial certification of an attorney because he has been the subject of discipline. **[8a]** No such decision, however, is permissible unless the attorney receives some meaningful opportunity to be heard in his own defense. (*Pinsker* v. *Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 545, 555, 561.) The deputy trial counsel has not brought to our attention any legal authority supporting the contention that prior misconduct by itself necessarily precludes specialist certification regardless of evidence that might be offered of rehabilitation since the events in question.

[8b]Here, it has been 14 years since applicant's misconduct. A disbarred attorney can obtain reinstatement in a proceeding commencing 5 years after disbarment if sustained exemplary conduct is demonstrated. (*Tardiff* v. *State Bar* (1981) 27 Cal.3d 395, 403.) No rule categorically precludes reinstated attorneys from seeking certification as a legal specialist. Applicant is in a better position. He is an attorney in current good standing, who due to compelling mitigation demonstrated in 1982, was not disbarred, but instead endured lengthy suspension. It is now 11 years after his suspension was ordered and 8 years after it was completed and his unfettered right to practice was restored. As discussed below, we conclude that the BLS is required by law to allow applicant an opportunity to be heard on his current qualifications.

C. Denial of Fair Procedure

Due to the narrow stipulation presented by the parties, the hearing judge did not consider whether the BLS complied with the requirements of fair procedure in summarily denying certification without letting applicant be heard in his own defense. Nor did the parties address this issue in their initial briefs on review. On May 12, 1993, we directed the clerk's office to send a letter to counsel for the parties asking them to be prepared at oral argument to address the applicability, if any, of *Pinsker* v. *Pacific Coast Society of Orthodontists*, *supra*, 12 Cal.3d 541 and the cases following *Pinsker* regarding the requirements of fair procedure.

4. In his opening brief on review, applicant argued that section 7.b.v of the Program authorized the summary suspension and revocation of specialist certification, but not the summary denial of specialist certification in the first instance. At oral argument, applicant abandoned this argument. He indicated that under *Pinsker* v. *Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, a meaningful opportunity to be heard is also required before the suspension or revocation of specialist certification. In any event, this issue is not presented by the case before us.

5. Although the Program does not define either "lawyer" or "certificate holder" as used in section 7.b of the Program, implementing Rules and Regulations of the bar's Program define "certified specialist" as an "attorney who has been designated a certified specialist by the [BLS], who is an active member of the State Bar, and whose certificate has not been suspended, revoked or lapsed." (State Bar Rules & Regs. Certif. Legal Specialists, Definitions.)

In *Pinsker*, three orthodontist societies denied a dentist's application for membership without affording the dentist an opportunity to present his position about an alleged violation of one of the societies' ethical principles. Although the trial court ruled against the dentist, the Supreme Court concluded that the societies failed to comply with the minimal requirements of fair procedure established by common law principles. (*Pinsker*, *supra*, 12 Cal.3d at pp. 545, 555, 561.)

On May 17, 1993, applicant filed a reply brief to the State Bar's review brief. This reply brief, which was signed on May 3, 1993, did not address *Pinsker* and its progeny, but applicant did claim that he never received an opportunity for an oral interview under section VI.G.4 of the Rules and Regulations. Section VI.G.4 requires an independent inquiry and review committee to request an interview with an applicant if the committee is considering a recommendation to the BLS that the applicant is not qualified. The purpose of the interview is to provide the applicant with a reasonable opportunity to respond to adverse information and to present any additional information which may show that the applicant is qualified. Applicant argued that his rights to due process were violated by the advisory commission and the BLS because he was not afforded the opportunity of a hearing before either of them. Based on the absence of citations to any constitutional sources, we construe his argument as invoking due process in a common law sense rather than a constitutional sense. (See *Pinsker*, *supra*, 12 Cal.3d at p. 550, fn. 7.)

In a response brief filed June 7, 1993, the deputy trial counsel addressed *Pinsker*. She stressed the Supreme Court's holding that if a professional society has refused membership to a person through the application of a reasonable standard, judicial inquiry should end. (*Id.* at p. 558.)[6] **[9 - see fn. 6]** According to assertions of the deputy trial counsel at oral argument which were undocumented in the record before this court, the BLS followed a procedure which would be deemed fair under *Pinsker* because of the following alleged facts: (1) applicant was notified in writing of the BLS's proposed denial of his application and the reasons for the proposed denial; and (2) applicant was afforded, and took, the opportunity to request in writing a reconsideration of the BLS's decision pursuant to section VIII.A of the Rules and Regulations. We do not need to consider whether it would be appropriate to augment the record to obtain such documentation because at oral argument, the deputy trial counsel also reiterated that **[10a]** the BLS's denial of specialist certification of applicant rested solely on his prior disciplinary record without considering any evidence of his conduct for more than a decade since his suspension was ordered.

[10b] In response to questioning from the court, the deputy trial counsel indicated that although the BLS currently considers applicant's prior discipline a threshold barrier to his certification, the BLS would not necessarily consider applicant's prior discipline a lifetime ban on certification. She found a lifetime ban not to be defensible, arguing that at some unspecified time in the future the magnitude of applicant's prior misconduct might dissipate "in their minds," and that the BLS may then find it easier to endorse him. Yet the deputy trial counsel conceded that none of the criteria which the BLS might use to lift the absolute bar which they have erected to certification of an applicant with a prior record of misconduct are enumerated anywhere and that she was hard pressed to say when applicant might be allowed by the BLS to have a hearing if left solely to the initiative of the BLS.

[10c] The nebulousness of the deputy trial counsel's articulation of her client's position underscores the arbitrariness of that position. **[11]** California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations

6. **[9]** At oral argument the deputy trial counsel alternatively asserted the inapplicability of *Pinsker*, arguing that because applicant can do probate, estate planning, and trust work without certification as a specialist, the BLS's denial of certification did not deprive him of any identifiable economic interest. To the contrary, by controlling specialist certification, the BLS substantially affects not only the attorney's professional status, but also an important economic interest—the exact same type of interest recognized as worthy of protection in *Pinsker*. Indeed, in all likelihood the due process language in section G of the Policies Governing the Program was included in an effort to comply with the *Pinsker* decision.

which control important economic interests. (*Pinsker*, *supra*, 12 Cal.3d at pp. 552-554; *Applebaum* v. *Board of Directors* (1980) 104 Cal.App.3d 648, 656, and cases cited therein.) Monopoly power is not necessary; instead, courts have focused on the practical power of an entity to affect substantially an important economic interest. (*Ezekial* v. *Winkley* (1977) 20 Cal.3d 267, 277; *Warfield* v. *Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 659.) A "basic ingredient of the 'fair procedure' required under the common law is that an individual who will be adversely affected by a decision be afforded some meaningful opportunity to be heard in his defense. Every one of the numerous common law precedents in the area establishes that this element is indispensable to a fair procedure." (*Pinsker*, *supra*, 12 Cal.3d at p. 555; see also *Hackethal* v. *California Medical Assn.* (1982) 138 Cal.App.3d 435, 442.) As we noted, *ante*, the State Bar's Policies Governing the Program affirmatively stress the requirement of compliance with due process.

As discussed above, the BLS's action in this instance is unauthorized and contrary to the Board of Governors' rules and the Supreme Court's historic allowance of reinstatement of a disbarred attorney upon a proper showing after five years. Full privileges are restored to reinstated attorneys—no matter how serious the offense which caused the attorney's disbarment. Just as an applicant for reinstatement after disbarment is entitled to a fair hearing to assess whether he or she has made the required showing of sustained exemplary conduct for reinstatement so too is applicant entitled to a fair hearing to give him an opportunity to show his good conduct since returning to practice after completing his lengthy suspension and conditions of probation. To that end, we again note the policies of the State Bar's Program which direct the Program to "Provide broad access to practitioners in the specialty field" and to "Not be arbitrary in the amount or nature of the requirements set." (Policies Governing the Program, §§ D.(1), D.(3).) **[12]** At the same time, within due process requirements, the BLS has broad discretion in certifying specialists and it is free to consider any competent evidence rebutting applicant's showing and to weigh and balance the respective showings in an appropriate manner under applicable Program principles and rules. His prior discipline for very serious misconduct is clearly evidence that should be considered in such process.

IV. CONCLUSION

[10d] Upon our independent review of the record, we conclude that the BLS violated its own rules and applicant's common law right to fair procedure by summarily rejecting his application and denying him a meaningful right to be heard in his defense. Thus, we reverse the hearing judge's decision and remand the current proceeding to the BLS. We instruct the BLS to vacate its prior denial of applicant's certification and to submit his application to the BLS's advisory commission for the completion of the independent inquiry and review process which its governing rules require and for further action consistent with the Rules and Regulations and the governing law. Nothing contained herein is intended to express any opinion as to the outcome of such process.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JERRY D. RUDMAN

Petitioner for Reinstatement

No. 91-R-00004

Filed October 1, 1993

SUMMARY

In 1983, petitioner resigned from the practice of law with disciplinary charges pending following a federal criminal conviction resulting from his participation in a conspiracy to pass counterfeit United States currency. In 1991, petitioner sought reinstatement to the State Bar and the hearing judge found that he met the high standards required for reinstatement. (Hon. Ellen R. Peck, Hearing Judge.)

The Office of Trial Counsel requested review, contending that petitioner was not yet rehabilitated from his prior misconduct and therefore he should not be readmitted to the practice of law. Despite petitioner's single, aberrant drunk driving conviction and minor omissions in his reinstatement petition, the review department concluded petitioner had satisfied the requirements for readmission by proof of rehabilitation in the ten years since the misconduct, during which time petitioner handled millions of dollars in government funding in a fiduciary capacity with complete integrity, and undertook therapy to improve his ability to deal with difficult situations.

COUNSEL FOR PARTIES

For Office of Trials: Janet S. Hunt

For Petitioner: Susan Margolis

HEADNOTES

[1] **135 Procedure—Rules of Procedure**
2504 Reinstatement—Burden of Proof
In order to gain readmission to the State Bar, a petitioner must pass the Professional Responsibility Examination and must demonstrate (1) rehabilitation and present moral qualifications for readmission and (2) present ability and learning in the general law. (Trans. Rules Proc. of State Bar, rule 667.)

[2] **2504 Reinstatement—Burden of Proof**
A petitioner for reinstatement who resigned with disciplinary charges pending must meet the same requirements for readmission as a petitioner who was disbarred.

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] **2504 Reinstatement—Burden of Proof**

Petitioners for reinstatement bear a heavy burden of proving rehabilitation; they must show by the most clear and convincing evidence that efforts made towards rehabilitation have been successful, and must present stronger proof of present honesty and integrity than one seeking admission for the first time whose character has never been in question.

[4] **2504 Reinstatement—Burden of Proof**

The law looks with favor upon the regeneration of erring attorneys and should not place unnecessary burdens upon them. There can be no absolute guarantee that a petitioner for reinstatement will never engage in misconduct again, and the petitioner need not show perfection. All that can be required is a showing of rehabilitation and of present moral fitness.

[5] **125 Procedure—Post-Trial Motions**
159 Evidence—Miscellaneous
169 Standard of Proof or Review—Miscellaneous

The Office of Trial Counsel waived its right to argue on review that certain evidence should not have been admitted when it withdrew its opposition to a post-trial motion before the hearing judge for introduction of the evidence. Accordingly, the review department did not address in detail the Office of Trial Counsel's objections to the evidence.

[6] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted

A reinstatement petitioner's showing of acceptance of responsibility for his misconduct, of extreme remorse, and of efforts and success at developing the skills and relationships necessary to deal appropriately with future problems supported the conclusion that the petitioner demonstrated insight into his misconduct and had taken steps to change his character and behavior. The petitioner's showing of a proper attitude to his misconduct and a steady determination to rehabilitate himself warranted favorable consideration in considering his reinstatement.

[7] **2504 Reinstatement—Burden of Proof**

Reformation is a state of mind which may be difficult to establish affirmatively and may not be disclosed by any certain or unmistakable outward sign. Accordingly, the lack of outward signs such as community involvement does not necessarily demonstrate a lack of rehabilitation. The evidence of rehabilitation must be viewed in its totality.

[8 a, b] **2504 Reinstatement—Burden of Proof**

A reinstatement petitioner's failure to provide lengthy details about his misconduct to his character witnesses did not negate the petitioner's showing that he had learned to communicate with those close to him, where petitioner informed most of the witnesses of his conviction and loss of his law license and there was no evidence that petitioner concealed his misconduct or misled the witnesses.

[9 a, b] **2504 Reinstatement—Burden of Proof**

A petitioner's failure to report certain information in the appropriate locations on the petition for reinstatement did not reflect adversely on the petitioner's showing of rehabilitation and present moral fitness where the omitted information was contained in other parts of the petition and where there was no intent to deceive or conceal derogatory information.

[10] **141 Evidence—Relevance**
2504 Reinstatement—Burden of Proof
A petitioner for reinstatement does not have to establish that the changes that have occurred in his or her post-misconduct life are attributable to psychotherapy before that therapy is entitled to weight on the issue of the petitioner's showing of rehabilitation. Rather, the therapy, as well as the other evidence of rehabilitation, must be viewed and weighed collectively.

[11 a, b] **2504 Reinstatement—Burden of Proof**
Circumstances which indicated that a reinstatement petitioner had withdrawn from participation in the criminal conspiracy which led to his resignation from the bar could not be ignored simply because the petitioner could have taken other steps to end the criminal conduct. The petitioner's failure to turn himself in to law enforcement immediately at the time of his withdrawal did not negate the fact that his criminal involvement was of limited duration, and did not preclude his later effort to show rehabilitation. Such circumstances, as well as all other circumstances of the criminal conduct, had to be considered in deciding whether the petitioner had met the burden of proof in the reinstatement proceeding.

[12] **2504 Reinstatement—Burden of Proof**
Rehabilitation is a process that occurs over a period of time and which is demonstrated by a period of sustained exemplary conduct. A reinstatement petitioner's alleged failure to begin this process during his or her misconduct does not preclude a showing of sustained exemplary conduct over many years after the misconduct.

[13 a, b] **2504 Reinstatement—Burden of Proof**
2510 Reinstatement Granted
In determining whether a petitioner has met the burden of proof in a reinstatement proceeding notwithstanding alleged weaknesses in the showing of rehabilitation and moral fitness, it is essential to compare the facts of the proceeding with the facts of other reported reinstatement cases in which the petitioners were admitted despite such weaknesses. Where a petitioner's showing of rehabilitation included evidence as to the petitioner's remorse, acceptance of full responsibility for the misconduct, candor, honesty and integrity, success in a fiduciary position, and success at meeting financial obligations, it was as strong as the showings of petitioners who had gained reinstatement.

[14] **141 Evidence—Relevance**
2504 Reinstatement—Burden of Proof
The passage of an appreciable period of time constitutes an appropriate consideration in determining whether a petitioner for reinstatement has made sufficient progress towards rehabilitation.

[15] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted
A reinstatement petitioner's recent conviction for driving under the influence did not, by itself, establish a lack of either rehabilitation or present moral fitness, where the conviction was an isolated, uncharacteristic and aberrational incident; the petitioner did not have a chemical dependency problem; the petitioner had taken steps to prevent any further occurrence; and the conviction was petitioner's first DUI offense, was unrelated to the practice of law, and was unrelated to the misconduct which led to petitioner's resignation.

[16] 2504 Reinstatement—Burden of Proof
2510 Reinstatement Granted

In deciding whether a reinstatement petitioner has met the burden of proof, the evidence presented must be viewed in light of the moral shortcomings which resulted in the petitioner's loss of his or her license. Where the petitioner's participation in criminal misconduct had been limited and was mitigated by contributing emotional factors that had long since been brought under control, the review department concluded that the petitioner had made an adequate showing of rehabilitation and present moral fitness when viewed against this backdrop and in light of past comparable reinstatement cases.

ADDITIONAL ANALYSIS

[None.]

OPINION

NORIAN, J.:

In this matter, a hearing judge of the State Bar Court originally recommended that petitioner, Jerry D. Rudman, not be reinstated as a member of the bar, and, upon reconsideration, found that he met the high standards required for reinstatement. In 1983, petitioner resigned from the practice of law with disciplinary charges pending following his 1982 federal conviction that resulted from his participation in a conspiracy to pass counterfeit United States currency. The Office of Trial Counsel requested review of the decision on reconsideration, contending that petitioner is not yet rehabilitated from his prior misconduct and therefore he should not be readmitted to the practice of law. Based upon our independent review of the record, we conclude that petitioner has satisfied the requirements for readmission by proof of rehabilitation in the past 10 years in which colleagues and co-workers testified, among other things, to his responsibilities in a fiduciary capacity handling millions of dollars in government funding with complete integrity.

FACTS

The hearing judge's factual findings[1] reveal the following. Petitioner worked primarily in accounting before entering law school in 1970. After his admission to the State Bar in 1975, petitioner was a solo practitioner until 1978 or 1979, when he began to rent space from another attorney, with whom he thereafter entered into a partnership.

At some point in time, petitioner's income from his law practice began to decrease. Petitioner began drifting away from his friends from whom he could obtain support. Beginning in 1979, petitioner failed to pay his income taxes and by 1981, his total tax liability was about $100,000.[2] By the end of October 1981, when he entered into the counterfeiting conspiracy, petitioner had not paid his mortgage payment for at least three months and his residence was either in or about to be in foreclosure. Petitioner did not tell his wife about their true financial status.

In October 1981, Carmen Misuraca met with John Merenda at Merenda's house. During this meeting, Misuraca asked Merenda about the feasibility of printing counterfeit currency on the printing press Merenda had in his home. In late October 1981, Carmen Misuraca, John Merenda and petitioner met at John Merenda's home. John Merenda knew petitioner from a prior legal transaction. During the meeting and in petitioner's presence Misuraca told Merenda that he and petitioner would take care of any money Merenda made. Misuraca said that he would take money to New York and petitioner would take it to Chicago. At this meeting it was agreed that $1 million in counterfeit currency would be printed and petitioner and Misuraca would take $500,000. Approximately $425,000 in counterfeit currency was printed in late October and early November 1981.

In early November 1981, petitioner and Misuraca went to New York with $280,000 of counterfeit money in their possession. Petitioner and Misuraca met with several people in New York in an attempt to distribute the money. Later on the same day, petitioner met with his friend, Vincent Albano. When Albano arrived petitioner showed Albano two counterfeit bills and told him that he (petitioner) was selling the money. Petitioner did not ask Albano to buy the money. Albano told petitioner to get out of there. Shortly thereafter, petitioner called Albano and went to his house. Petitioner told Albano that he had no money to leave New York. At that point Albano got him an airplane ticket to leave New York. Albano advised the co-conspirators that petitioner had withdrawn from the venture. Petitioner remained

1. Neither party contests the hearing judge's findings of fact. We conclude that the findings are supported by the record and we adopt them. However, we delete the last two sentences of footnote 2 of the October 1992 decision on reconsideration as those sentences appear to have been inadvertently retained from the original July 1992 decision and pertain to matters that the hearing judge resolved in petitioner's favor on reconsideration.

2. Petitioner has paid small monthly payments toward his tax obligations and as of June 1991, he owed approximately $74,000 to the Internal Revenue Service and $6,000 to $7,000 to the California Franchise Tax Board. A stipulation submitted by the parties after oral argument in this matter indicates that petitioner has continued making payments toward his tax obligations.

with Albano in New York for two days and then returned to Los Angeles about November 6, 1981.

Misuraca was arrested and jailed in Los Angeles and petitioner handled Misuraca's bail and release. Petitioner did not know that Misuraca was cooperating with law enforcement authorities. On December 2, 1981, a taped conversation between petitioner and Misuraca was made with the consent of Misuraca. This taped conversation led to petitioner's arrest. The counterfeit currency and the negatives used to print the currency were recovered by law enforcement.

In April 1982 petitioner was convicted of violating 18 United States Code section 472 (attempting to pass counterfeit United States currency) and 18 United States Code section 371 (conspiracy to violate 18 U.S.C. § 472).[3] As these crimes involved moral turpitude per se, the Supreme Court interimly suspended petitioner, effective September 1982, and referred the matter to the State Bar for a report and recommendation as to the discipline to be imposed. (See Bus. & Prof. Code, § 6102.) Prior to the report and recommendation, petitioner resigned from the practice of law, which resignation was accepted by the Supreme Court by order, effective January 16, 1984.

Immediately after his interim suspension, petitioner did not seek employment for a period of time, while he reflected upon his past conduct, his depression, and his future life. In 1982, he performed per diem accounting services. From October 1983 to April 1984, petitioner worked for a company as a senior accountant.

At the time of the State Bar Court hearing, petitioner was the controller at Research and Development Laboratories (RDL). He has been employed by RDL since April 1984. RDL is a research and development firm which employs about 42 scientists and technical employees and receives government funding through defense contracts (about $5-$8 million per year). Petitioner is responsible for financial portions of all contract bids; some contract negotiations; negotiation of bank loans; handling of all financial activity and reporting during administration of defense contracts; and management of all payroll, personnel services and employee benefits within RDL. Petitioner has the absolute trust and confidence of his superiors and colleagues at RDL in the handling of the millions of dollars received by RDL. He is considered a good and hard worker, and is regarded by his superiors as a trusted, loyal and valuable employee.

Petitioner also earned income outside of his salary at RDL as a business management consultant. For the tax years 1987 through 1989, his gross income from this work was $2,000-$3,000 per year.

Petitioner married in 1960 and has four children, three adults and one minor. For two years prior to his counterfeiting activity, petitioner's marriage progressively deteriorated, due to lack of communication and financial problems. The marriage was dissolved in 1983. Following his divorce, petitioner continued to be a good father to his children and paid $800 monthly for child support, which was recently reduced to $300.

Petitioner acknowledged that one of the motivations for his entry into the counterfeiting conspiracy was to help his financial situation. Also at the time of his entry into the conspiracy, petitioner was experiencing tremendous depression because of his deteriorating relationship with his wife, which was also physically draining; he was feeling lethargic about work; he was having great difficulty in communicating with people around him; and he was holding a lot of his problems inside and never telling anyone. Petitioner felt overwhelmed and in despair, did not see any way out, and did not see any purpose in going on with his life. At the present State Bar Court hearing, petitioner testified that he felt that these factors had severely impaired his judgment at the time he joined the criminal conspiracy in 1981.

3. Petitioner was sentenced on each of the two counts to five years and a $5,000 fine. The first ninety days of the sentence was to be served on consecutive weekends and the balance of the sentence, including the fine, was suspended and petitioner was placed on five years probation on conditions which included 1,800 hours of community service. Petitioner complied with his criminal sentence.

Following his counterfeiting arrest and conviction, petitioner obtained psychotherapy for four years, first twice weekly and then on a weekly basis. Petitioner acknowledged that during events surrounding his counterfeiting crime, he failed to deal with problems as they developed and that he failed to communicate his personal feelings with those who were around him. He was embarrassed to ask for financial assistance. Petitioner believes that he has worked very hard to improve his communication skills with family members and friends. He now has a support network of friends with whom he can communicate and look to for other solutions to solving his problems should similar pressures arise. Petitioner's former wife believes petitioner's communication skills with her and their children have improved remarkably since the final years of their marriage.

Numerous witnesses stated that petitioner demonstrated remorse and shame for his criminal activity; that he shouldered full responsibility for his actions; that he did not seek to blame anyone else for his wrongdoing; and that he was appropriately candid about the nature and extent of his conviction. Petitioner stated that the pain of his actions and the pain suffered by those close to him has been with him on a regular basis and will remain with him forever. He regards his conviction as a blemish from which he cannot walk away.

Petitioner presented favorable testimony from a number of character witnesses who represent a fair cross-section of the community in which petitioner lives and works and who have observed him for a long period of time. These witnesses expressed not only their exceptionally high opinion of his good moral character, but also their genuine affection for and trust in petitioner.

Petitioner's conduct since his counterfeiting activity has not, however, been without blemish. In October 1990, petitioner ate dinner at a restaurant, during the course of which he consumed alcoholic beverages. When dinner was over, petitioner drove his car and stopped at the first traffic light. Because he believed that he was too far into the cross-walk, he put his car into reverse and backed into the car stopped behind him, causing property damage to that car. Petitioner was subsequently arrested for driving under the influence (DUI) and his blood alcohol level was between 0.10 and 0.11 percent. In November 1990, petitioner pled guilty to a violation of Vehicle Code section 23152, subdivision (a), a misdemeanor, and was sentenced to three years probation on conditions, including restitution to the victim. Petitioner's insurance company paid the victim's claim.

At the State Bar Court hearing, petitioner described his drinking habits as moderate to none. Prior to the 1990 incident, petitioner had never been convicted of driving under the influence nor had he been involved in any other traffic violation where alcohol was a factor. Petitioner's drinking habits were confirmed by several witnesses who see petitioner regularly in a social setting and by his former wife. Petitioner's friends expressed surprise at this conviction, stating that such behavior was totally out of character for petitioner.

DISCUSSION

[1] In order to gain readmission to the State Bar, a petitioner must pass the Professional Responsibility Examination (PRE) and must demonstrate (1) his rehabilitation and present moral qualifications for readmission and (2) his present ability and learning in the general law. (Rule 667, Trans. Rules Proc. of State Bar.) The Office of Trial Counsel asserts only that petitioner has failed to demonstrate rehabilitation and present moral qualifications for readmission. The hearing judge's findings, which we have adopted, demonstrate that petitioner has established that he passed the PRE and has established his present ability and learning in the general law. We therefore limit our discussion to the issue of whether petitioner has sufficiently demonstrated rehabilitation and present moral qualifications.

[2] Although petitioner resigned with disciplinary charges pending instead of being disbarred, he must meet the same requirements for readmission. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1092, fn. 4; *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 428, fn. 1.) The legal principles governing reinstatement proceedings are well established. **[3]** Petitioner bears a heavy burden of proving his rehabilitation. (*Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 745.) He "must show by the

most clear and convincing evidence that efforts made towards rehabilitation have been successful." (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1092.) Petitioner must present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. (*Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403.) "In determining whether that burden has been met, the evidence of present character must be considered in light of the moral shortcomings which resulted in the imposition of discipline." (*Ibid.*)

[4] However, "The law looks with favor upon the regeneration of erring attorneys and should not place unnecessary burdens upon them." (*Resner* v. *State Bar* (1967) 67 Cal.2d 799, 811.) "There can, of course, be no absolute guarantee that petitioner will never engage in misconduct again. But if such a guarantee were required for reinstatement none could qualify. All we can require is a showing of rehabilitation and of present moral fitness." (*Ibid.*) Petitioner need not show perfection. (*In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 37.)

The petition for reinstatement was filed in January 1991 and the trial of the matter before the hearing judge occurred in September 1991. The hearing judge filed a decision in July 1992 denying the petition for reinstatement on the ground that petitioner had not sustained his burden of proof on the issue of rehabilitation and moral fitness. Petitioner thereafter filed a motion for reconsideration and an application to present additional evidence. In an October 1992 decision, the hearing judge granted the application to present additional evidence, reversed her earlier decision, and recommended petitioner's reinstatement.

The Office of Trial Counsel asserts on review that petitioner did not sustain his burden of proving rehabilitation and present fitness, that the hearing judge erred in granting the application to present additional evidence and in granting reconsideration, and that the hearing judge's original decision denying reinstatement was correct. Essentially, the Office of Trial Counsel's argument involves two issues: the application to present additional evidence/request for reconsideration and the showing of rehabilitation/present moral fitness.

According to the Office of Trial Counsel, the hearing judge erred in reconsidering her original decision because she should not have admitted the additional evidence. The additional evidence consisted of a letter from petitioner's insurance company relating to the claim that was paid as a result of petitioner's 1990 DUI conviction, and portions of petitioner's deposition taken by the Office of Trial Counsel in this proceeding regarding the insurance claim, petitioner's outside income from his tax consulting work, and his tax obligations and repayment plan. The deputy trial counsel asserts that the additional evidence presented was not "new" evidence, but was evidence that was available to petitioner before the original trial, and the transcript was inadmissible under the Evidence Code and Civil Discovery Act.

[5] We need not detail the exact arguments and authorities cited in support of these assertions because we agree with petitioner that the Office of Trial Counsel waived its objections to the introduction of this evidence. Initially, the Office of Trial Counsel opposed the application to present additional evidence on the same grounds as now asserted on review. However, at a status conference between the hearing judge and the parties on August 11, 1992, the deputy trial counsel then assigned to this case withdrew his opposition to the application to present additional evidence and based thereon the hearing judge granted the application and admitted the evidence by order filed August 14, 1992. Thus, the Office of Trial Counsel waived its right to object to the introduction of the evidence.[4]

4. Except for the exact amount of the insurance claim, the additional evidence was apparently obtained by the Office of Trial Counsel during discovery. Presumably, the Office of Trial Counsel would not have withdrawn its opposition to the introduction of the additional evidence if there was a question as to its accuracy. Additionally, the Office of Trial Counsel has not asserted, either before the hearing judge or on review, that the amount of the insurance claim is not accurate. Finally, we note that the deputy trial counsel cited to the deposition transcript in arguing against the request for reconsideration before the hearing judge.

The issue of whether the hearing judge properly reconsidered her original decision pertains to the central issue in this case: the adequacy of petitioner's showing with regard to his rehabilitation and present moral fitness. In arguing that petitioner has not met his burden of proof on this issue, the Office of Trial Counsel asserts: that the evidence petitioner presented indicates the maintenance of a prior lifestyle rather than rehabilitation; that petitioner has not improved his ability to communicate with those close to him; that omissions in his petition for reinstatement indicate careless representations and a lack of good judgment; that petitioner's therapy is entitled to no weight because petitioner did not explain his reasons for seeking therapy and its effect on his post-conviction life; and that petitioner's participation in the counterfeiting scheme lasted longer than petitioner claimed because his efforts at withdrawal were incomplete.

According to the deputy trial counsel, petitioner's post-incarceration activities constitute what is ordinarily expected of a member of society; petitioner offered no evidence of involvement in the community other than his work; and there was no "structure" to petitioner's rehabilitation. In essence, the deputy trial counsel asserts that petitioner is the same person now as he was before his counterfeiting activity. We disagree with this assessment of the record.

[6] Testimony from petitioner and others was presented regarding the financial and emotional problems which contributed to the counterfeiting activity and petitioner's efforts and success at addressing those problems since then. Petitioner testified that he accepts full responsibility for his misconduct; is extremely remorseful; and has worked very hard at developing the skills and relationships necessary to deal appropriately with future problems. The positive changes in petitioner's personality in the 12 years since the counterfeiting activity were attested to by petitioner's character witnesses, including his former wife. The hearing judge concluded that petitioner demonstrated insight into his motivation in entering the counterfeiting activity and has taken steps to change his character and behavior in order to prevent future occurrences. The record supports this conclusion. In short, petitioner has evidenced a proper attitude toward his counterfeiting misconduct and a steady determination to rehabilitate himself. The Supreme Court has viewed similar facts favorably in granting reinstatement. (*In re Gaffney* (1946) 28 Cal.2d 761, 763.)

[7] As we recently noted in *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315, "Reformation is a state of mind which 'may be difficult to establish affirmatively' and 'may not be disclosed by any certain or unmistakable outward sign.'" Accordingly, the lack of certain outward signs does not necessarily demonstrate a lack of rehabilitation. Thus, the absence of such outward signs as "community involvement" does not, as asserted by the deputy trial counsel, indicate that petitioner has returned to his former self. The evidence must be viewed in its totality. Having independently done so, we conclude, as did the hearing judge, that petitioner has gained insight into the causes of his counterfeiting activity and has modified his behavior.

[8a] The Office of Trial Counsel next argues that petitioner has not improved his ability to communicate with those close to him. In support of this contention, the deputy trial counsel claims that petitioner did not "spontaneously disclose" the facts underlying his counterfeiting conviction to the character witnesses that testified for petitioner in this proceeding. We agree with petitioner that this argument results from a strained reading of the record. Although petitioner apparently did not provide lengthy details about his misconduct to some of the witnesses, he informed most of them about his conviction and the loss of his law license. There is no evidence that petitioner concealed his misconduct from any of these witnesses in order to gain some advantage or benefit or that, when the witnesses were told, petitioner misled them regarding the details of the misconduct.

[8b] Furthermore, to accept the deputy trial counsel's argument we would have to assume that the character witnesses represented most, if not all, of petitioner's closest friends. The record is otherwise. The 10 witnesses represented a cross-section of petitioner's personal and professional life. The deputy trial counsel seems to argue that immediately upon meeting someone, whether professionally or person-

ally, petitioner should have provided that person with a copy of the factual stipulation entered in the counterfeiting proceeding and his failure to do so demonstrates that petitioner has not improved his communication skills. We disagree. The hearing judge found that petitioner has learned to communicate meaningfully with those close to him and the deputy trial counsel has not directed our attention to anything in the record that would cause us to modify this finding.

[9a] The Office of Trial Counsel next argues that petitioner's failure to indicate the restitution ordered as a result of his DUI conviction and failure to report his self-employment from his independent consulting business in the appropriate locations on the petition for reinstatement demonstrates petitioner's lack of good judgment.[5] The petition asked for a list of all restitution ordered by any court, to which petitioner answered "none." However, petitioner listed his DUI conviction in response to another petition question and attached to the petition a copy of the criminal court sentencing order that required restitution. Petitioner also did not list his self-employment in the section of the petition requesting employment information, but he attached to the petition copies of his 1987-1989 tax returns which showed that petitioner earned income from self-employment.

According to petitioner, he did not list the restitution because he did not believe that it was the type of restitution that was meant by the question because his insurance company paid the claim before the DUI conviction. Petitioner did not list his self-employment because he did not realize that it should have been listed separately and he included his tax returns which showed his outside work. On reconsideration, the hearing judge found that petitioner's explanations were credible, that there was no intent to deceive the court and that the inaccuracies in the petition were not material to the key issues in this proceeding.

In *Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 748, the petitioner disclosed a civil lawsuit in which he was a defendant in his petition for reinstatement, but omitted a third party claim, apparently with the same case number, that he filed against his malpractice insurance carrier to force it to defend him in the main action. The Court noted that Calaway's failure to provide details of the third party action was based on his not unreasonable assumption that the State Bar would review the entire case file if it thought the matter significant. (*Ibid.*) The Court reinstated Calaway, finding persuasive the hearing panel's finding that while the petition could have been more detailed, there was no intent to deceive or to conceal derogatory information.

In *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 33-34, we concluded that the petitioner's failure to disclose two lawsuits to which he was a party reflected adversely on the standard necessary for reinstatement. The failure to disclose any portion of the litigation left "it to chance whether the bar's investigation process would uncover the two suits." (*Ibid.*)

Here, like *Calaway*, there was no intent to deceive or conceal derogatory information, and unlike *Giddens*, the State Bar had ample opportunity to investigate the information.[6] **[9b]** Since the omitted information was contained in other parts of the petition and there was no intent to deceive or conceal, we conclude that the inaccuracies in the petition do not reflect adversely on petitioner's rehabilitation and present moral fitness.

[10] Following his counterfeiting conviction, petitioner obtained psychotherapy for four years, first twice weekly, then on a weekly basis. The deputy trial counsel argues that petitioner's therapy should be given no weight on the issue of his rehabilitation because petitioner did not explain the reasons he sought therapy or its effect on his post-conviction

5. We assume solely for the sake of argument that a demonstrated lack of good judgment, without more, indicates a lack of rehabilitation and/or moral fitness.

6. The deputy trial counsel asserts on review that "It should not be necessary for the State Bar to have to scrutinize all attached documentation with a fine tooth comb to see if the information on the petition is correct." Public protection and the adversarial nature of these proceedings require adequate scrutiny of the petition and its attachments, together with the presentation to the State Bar Court by competent evidence of any adverse information that it may reveal regarding the petitioner.

life. The deputy trial counsel does not cite any authority in support of this argument. Furthermore, petitioner did explain, though briefly, that therapy had provided him with insight into his personality and that he had worked very hard at improving his communication skills. Petitioner also presented evidence regarding the changes that have occurred in him since the 1982 conviction. We are not aware of any authority that requires petitioner to have established that the changes that have occurred in his post-conviction life are attributable to his therapy before that therapy is entitled to weight. Rather, the therapy, as well as the other evidence of rehabilitation, must be viewed and weighed collectively. The deputy trial counsel has not directed our attention to anything in the record that indicates that the hearing judge gave this evidence any undue weight.

[11a] Finally, the deputy trial counsel argues that petitioner's involvement in the counterfeiting conspiracy lasted longer than the 10 days claimed by petitioner because his withdrawal from the conspiracy was improper. According to the Office of Trial Counsel, petitioner should have immediately turned himself in to law enforcement authorities and disclosed the activities of his co-conspirators, and by failing to do so, petitioner engaged in a "conspiracy of silence" until his indictment in February 1982. The deputy trial counsel asserts that rehabilitation requires exemplary conduct and that petitioner's failure to turn himself in and inform on his co-conspirators falls short of exemplary conduct. The logic of this argument is not clear. **[12]** Rehabilitation is a process that occurs over a period of time and which is demonstrated by a period of sustained exemplary conduct. The deputy trial counsel has offered no authority or analysis that shows that petitioner's alleged failure to begin this process during his criminal conduct precludes him from demonstrating sustained exemplary conduct over many years after his criminal conduct.

[11b] Whether petitioner's involvement lasted ten days or, as asserted by the deputy trial counsel, five months, it was of limited duration. (Compare *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 399 [misconduct continued for three or four years after disbarment].) Furthermore, while still in New York, petitioner experienced an anxiety attack and withdrew from active participation in the conspiracy. We cannot ignore this circumstance of the criminal conduct simply because petitioner could have taken other steps. We must consider this circumstance, as well as all other circumstances of the criminal conduct, in deciding whether petitioner has met his burden in this proceeding. (*Id.* at p. 403.)

[13a] In summary, the deputy trial counsel points to alleged weaknesses in petitioner's showing of rehabilitation and present moral fitness in arguing that petitioner has not met his burden in this proceeding. However, as we recently noted in *In the Matter of Miller*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 437, past petitioners have obtained reinstatement despite alleged weaknesses in their showings. It is therefore essential to compare the facts of this case with the facts of other reported reinstatement cases in determining whether petitioner has met his burden. (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 320.)

In *Resner* v. *State Bar*, *supra*, 67 Cal.2d 799, the petitioner was disbarred in 1960 for mishandling sums received on behalf of three clients in settlement of their claims. Subsequently, Resner paid each of the clients in full. At the time of his disbarment, Resner also had pending another disciplinary matter involving misappropriation from another client. At the time of the reinstatement hearing, Resner was repaying this client in payments. Resner suffered from severe emotional problems during his misconduct. Following his disbarment, Resner was engaged in real estate development and did legal research for various attorneys. Numerous attorneys testified on Resner's behalf at the reinstatement hearing and recommended his reinstatement.

The State Bar recommended that Resner not be reinstated on account of several alleged weaknesses in Resner's showing of rehabilitation. The Supreme Court reinstated Resner, rejecting most of the alleged weaknesses. However, the Court did find that Resner had filed improper verified general denials in civil litigation in which he was a party. Nevertheless, the Court concluded this conduct, though properly criticized and condemned, did not show a lack of good moral character and that a reading of the entire record indicated that Resner had sustained his burden of

proof. The Court also did not find persuasive the State Bar's assertion that Resner should not have been readmitted because he had substantially greater financial obligations than when he was disbarred, and those obligations would create pressures at some future date with disastrous consequences.

In *Allen* v. *State Bar* (1962) 58 Cal.2d 912, the former attorney was disbarred in 1957 after having been convicted of two counts of soliciting others to commit perjury. Thereafter, Allen's guilty plea was set aside on the recommendation of a probation officer and the complaint against him was dismissed. After his disbarment, Allen worked at various jobs, including some legal research for another attorney. Numerous witnesses, including a probation officer, a businessman and several attorneys, testified on Allen's behalf at the reinstatement hearing as to their belief in his honesty, integrity, and rehabilitation. The State Bar recommended against Allen's reinstatement because he engaged in activities that bordered upon, if they did not constitute, the practice of law. Allen had questioned a witness at an administrative hearing regarding his employer and later corrected and filed a brief in the matter. The Court concluded that this conduct did not warrant denial of the petition. Allen also made minor errors in his income tax returns and petition for reinstatement, but the errors were minor and there was no evidence that they were made with an intent to deceive.

In *Werner* v. *State Bar* (1954) 42 Cal.2d 187, the Supreme Court reinstated Werner even though he also made unwarranted denials in verified pleading in civil actions brought against him after his disbarment. Werner was charged with two counts of soliciting a bribe. He was acquitted on one count and the conviction on the other count was reversed on appeal on the ground of insufficient evidence. Nevertheless, Werner was disbarred in 1944 based on the record of the criminal case. After his disbarment, Werner worked for a railroad for several years and as a research clerk and appraiser for an attorney for a year. Numerous witnesses testified on Werner's behalf at the reinstatement hearing, attesting to his good moral character. The Supreme Court concluded that Werner had stated a sufficient case in support of his claim of rehabilitation as he had the recommendation of persons best in a position to judge his moral character and had conducted himself after his disbarment in his employment and within his community in a manner entitling him to a declaration of rehabilitation.

In *In the Matter of Miller*, *supra*, 2 Cal. State Bar Rptr. 423, we recommended the reinstatement of a petitioner who had resigned in 1985 with disciplinary charges pending. As executor of a probate estate, Miller had misappropriated over $86,000 from the estate between 1976 and 1982. After his resignation, Miller had worked as a paralegal for his son; made complete restitution of the misappropriated amounts plus interest, surcharges, fees, and costs; done some pro bono and volunteer work; and occupied fiduciary positions by administering another estate and remaining co-trustee of a trust. Miller presented favorable character evidence from five witnesses and four reference letters. Miller engaged in questionable conduct after his resignation by evasively informing his clients that he was retiring from the practice of law instead of resigning, and by continuing to work in his son's law office even though he questioned his son's continued improper use of the firm name, "Miller & Miller." However, there was no evidence that Miller held himself out as entitled to practice law and efforts were made to ensure that clients were not misled into believing that Miller was practicing law. We criticized this conduct, noting that it called into question Miller's showing of rehabilitation and moral fitness. Nevertheless, the hearing judge had found Miller to be rehabilitated and we concluded that the questionable conduct alone did not establish a lack of rehabilitation and moral fitness, in light of his overall showing.

[13b] In the present case, ten witnesses testified on petitioner's behalf, including a vice president and a scientist at RDL, two accountants that have performed consulting work with RDL, three businessmen that have employed petitioner to do consulting work, two attorneys, and petitioner's former wife. Several of these witnesses have personal as well as professional relationships with petitioner. Some have known petitioner since before his counterfeiting activity, and some met him after. All of the witnesses were aware of the circumstances of petitioner's criminal activity and expressed their opinions that he is of good moral character. These witnesses also testified

as to their observation of petitioner's remorse and shame for his misconduct, his acceptance of full responsibility for the misconduct, his candor about the nature and extent of the misconduct, and his honesty and integrity. Petitioner has gained the trust and confidence of his superiors and colleagues at RDL, and has successfully occupied a fiduciary position as controller of RDL. Petitioner has also maintained financial and moral support for his children, has gained a measure of financial stability, and has made regular payments to reduce his tax obligations. Overall, we find petitioner's showing of rehabilitation and present moral fitness to be as strong as the showings of Resner, Allen, Werner, and Miller.

A considerable period of time has also passed since petitioner's 1981 criminal conduct. **[14]** "'The passage of an appreciable period of time' constitutes 'an appropriate consideration' in determining whether a petitioner has made sufficient progress towards rehabilitation." (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 316, quoting *Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1095.) "Where the evidence is uncontradicted . . . and shows exemplary conduct extending over a period of from eight to ten years without even the suggestion of wrongdoing, it would seem that rehabilitation has been established." (*Werner* v. *State Bar*, *supra*, 42 Cal.2d at p. 198 (conc. opn. of Carter, J.).)

[15] This raises the issue in the present case of petitioner's recent DUI conviction. The hearing judge found that the DUI conviction was an isolated, uncharacteristic and aberrational incident; that petitioner does not have a chemical dependency problem; and that he has taken steps to prevent any further occurrence. The record supports these conclusions and the deputy trial counsel does not argue otherwise. We also note that the DUI conviction was petitioner's first, it was unrelated to the practice of law, and it was unrelated to the misconduct which led to petitioner's resignation. As a first offense, the conviction would not have warranted State Bar discipline. (*In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 266, fn. 6.) Given the circumstances, we conclude that the conviction by itself does not establish either a lack of rehabilitation or present moral fitness. (Cf. *Hallinan* v. *Committee of Bar Examiners* (1966) 65 Cal.2d 447, 459.)

[16] As indicated above, in deciding whether petitioner has met his burden in this matter, we must view the evidence presented in light of the moral shortcomings which resulted in his resignation. (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403.) Petitioner's participation in the counterfeiting conspiracy was limited and was mitigated by the emotional factors that contributed to the misconduct, which were found to have been long since brought under control by petitioner. Viewed against this backdrop and in light of past comparable reinstatement cases, we believe petitioner has made an adequate showing of his rehabilitation and present moral fitness.

CONCLUSION

We conclude that there is no reason to disturb the hearing judge's conclusion that petitioner has met the requirements for reinstatement. We therefore recommend to the Supreme Court that petitioner be reinstated as a member of the State Bar upon his paying the necessary fees and taking the required oath.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GARTH F. HEINER

A Member of the State Bar

Nos. 84-O-14336, 88-O-12250

Filed October 6, 1993

SUMMARY

In 1988, following a disbarment recommendation by a referee of the former State Bar Court, respondent was placed on involuntary inactive enrollment. In 1990, on review of the disbarment recommendation and another consolidated matter, the review department upheld some culpability findings but remanded for a rehearing on other charges; it also recommended that respondent be given credit for the period of inactive enrollment against the ultimate discipline imposed. On remand, the hearing judge dismissed some charges but found respondent culpable on others of misconduct including client neglect, retention of unearned fees, and acts of dishonesty. The judge recommended respondent's disbarment. (Daniel L. Rothman, Judge Pro Tempore.)

The Office of Trials requested review, reiterating its argument, which the review department had rejected on the earlier review, that respondent should not be given credit for his time on inactive enrollment against the waiting period to apply for reinstatement. The review department adopted the hearing judge's findings, conclusions, and disbarment recommendation, and reiterated its earlier holding recommending that respondent receive credit for the inactive enrollment.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: No appearance

HEADNOTES

[1] **119 Procedure—Other Pretrial Matters**
120 Procedure—Conduct of Trial
136 Procedure—Rules of Practice
139 Procedure—Miscellaneous
169 Standard of Proof or Review—Miscellaneous

Pretrial statements are an important tool in conducting an efficient multi-count trial. Unexcused failure to comply with an order requiring a pretrial statement (see rule 1222, Prov. Rules of

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.

Practice) should not be treated lightly. However, where counsel failed to make appropriate motions during trial resulting from the other party's failure to file a pretrial statement, no issue was preserved for appeal.

[2 a, b] **139 Procedure—Miscellaneous**
169 Standard of Proof or Review—Miscellaneous
199 General Issues—Miscellaneous

The law of the case doctrine is one of policy and does not preclude the relitigation of issues already determined in a prior appeal. However, strong reasons should be put forward for seeking to relitigate an issue already fully litigated and decided on a prior appeal. Where a party sought reconsideration, on a second appeal, of the review department's determination of an issue on an earlier appeal in the same proceeding, without offering any justification for its failure to seek reconsideration earlier, and relying on no new case law or statute, the review department had no cognizable reason to reconsider its prior conclusion.

[3] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
106.20 Procedure—Pleadings—Notice of Charges
106.40 Procedure—Pleadings—Amendment
120 Procedure—Conduct of Trial
204.90 Culpability—General Substantive Issues
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

Where respondent was not charged with failure to return an unearned advance fee, no finding of culpability for such misconduct could be entered absent an amendment of the charges. Where evidence was insufficient to support such charge, motion to amend was properly denied as an idle act. However, where, despite a clear directive as to the need to amend and an opportunity to move for such amendment in advance of trial, deputy trial counsel waited until after evidence was in to move to amend to conform to proof, motion to amend could also have been denied simply for inexcusable delay in seeking amendment.

[4] **120 Procedure—Conduct of Trial**
148 Evidence—Witnesses
165 Adequacy of Hearing Decision

The fact that no live witness appeared for the prosecution in a proceeding did not preclude the hearing judge from making a credibility determination based on prior recorded trial testimony which was subject to cross-examination.

[5 a-f] **101 Procedure—Jurisdiction**
135 Procedure—Rules of Procedure
179 Discipline Conditions—Miscellaneous
193 Constitutional Issues
199 General Issues—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous
2290 Section 6007(c)(2) Proceedings—Miscellaneous
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
2502 Reinstatement—Waiting Period

Both the Legislature, by statute, and the Supreme Court, by case law, have recognized that the Supreme Court has inherent authority over regulation of the practice of law. The Supreme Court has not felt constrained by lack of authorizing legislation to exercise this inherent power, and has concerned itself with comparable treatment of respondents in comparable situations. Accordingly,

Supreme Court case law constituted appropriate authority for review department recommendation that a disbarred respondent be permitted to credit time spent on inactive enrollment toward waiting period to apply for reinstatement, just as an interimly suspended attorney-felon can do by rule (rule 662, Trans. Rules Proc. of State Bar).

[6 a-c] **135 Procedure—Rules of Procedure**
179 Discipline Conditions—Miscellaneous
199 General Issues—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous
1549 Conviction Matters—Interim Suspension—Miscellaneous
2290 Section 6007(c)(2) Proceedings—Miscellaneous
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
2502 Reinstatement—Waiting Period

By rule, convicted felons are always entitled to credit for time spent on interim suspension against the waiting period for seeking reinstatement. (Rule 662, Trans. Rules Proc. of State Bar.) Inactive enrollment has the same effect as interim suspension in banning the practice of law pending a final order of discipline, and is similarly designed to protect the public during the pendency of a disciplinary case against the malfeasant attorney. Giving credit for interim suspension against the waiting period for reinstatement reflects the decision that five years removal from practice is a sufficient minimum opportunity for rehabilitation, even if the time period precedes the order of disbarment. No policy interest would be served by treating inactively enrolled attorneys differently from interimly suspended attorneys in this regard.

[7 a, b] **116 Procedure—Requirement of Expedited Proceeding**
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
2210.40 Section 6007(c)(2) Proceedings—Underlying Proceeding Expedited
2290 Section 6007(c)(2) Proceedings—Miscellaneous
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
2349 Other Section 6007 Proceedings—Petitions to Terminate—Miscellaneous
2502 Reinstatement—Waiting Period

Because of due process concerns, time spent on involuntary inactive enrollment pending disciplinary proceedings is limited to one year absent proof of delay by respondent or respondent's counsel or other circumstances justifying lack of compliance. (See rules 799, 799.8, Trans. Rules Proc. of State Bar.) Where review department had ruled on earlier appeal that respondent would receive credit against final discipline for time spent on involuntary inactive enrollment, and respondent had not sought to terminate inactive enrollment during pendency of proceedings on remand and second appeal, respondent would be prejudiced if period of over five years spent on inactive enrollment were not credited against waiting period to apply for reinstatement.

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

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)]
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Not Found

277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]

Aggravation

Found

541 Bad Faith, Dishonesty
561 Uncharged Violations

Mitigation

Found but Discounted

710.33 No Prior Record
725.36 Disability/Illness
740.31 Good Character
760.34 Personal/Financial Problems

Standards

822.10 Misappropriation—Disbarment

Discipline

1010 Disbarment

Other

175 Discipline—Rule 955

OPINION:

PEARLMAN, P.J:

The Office of Trials' request for review from the decision of the hearing judge recommending disbarment in this expedited proceeding raises for a second time an issue that was decided by this court against that office on respondent's appeal from a prior decision in this very same proceeding.

The issue we decided at respondent's request in 1990 was whether respondent should get credit for time spent on inactive enrollment against the final discipline ordered in this case, thus putting him on equal footing with interimly suspended felons. We granted respondent's request on the authority of two recent Supreme Court orders in similar cases, including one which had resulted from a recommendation of this review department.

The law has not changed in the interim. Nonetheless, because of the Office of Trials' request for review, this court has been compelled to review de novo the entire proceedings on remand, including 10 volumes of transcripts, in order to determine whether or not to adopt the hearing judge's disbarment recommendation to the Supreme Court, in addition to readdressing a question which we thought we had put to rest in our earlier decision. All of this has occurred while respondent remained on inactive enrollment for a total of five years, which, while of undeniable benefit to the public, is of almost certain unconstitutionality under *Conway v. State Bar* (1989) 47 Cal.3d 1107, 1120-1122 absent delay attributable to the respondent or voluntary acquiescence by the respondent.[1]

Upon de novo review we adopt the recommendation of disbarment and reject as meritless the argument of the Office of Trials that we should reconsider and deny credit for time spent on inactive enrollment on the ground that the law does not authorize such credit and that respondent would not be prejudiced by belated reversal on this issue of constitutional dimensions.

BACKGROUND

These two proceedings were consolidated on review when they first came before us on a disbarment recommendation in *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, following two separate hearings before a volunteer referee of the State Bar Court. We concluded that respondent had not had a fair trial on certain counts in case number 84-O-14336 and remanded the consolidated matters for further proceedings including retrial of certain specified counts in case number 84-O-14336 that turned on the credibility of conflicting testimony of witnesses. We also directed the hearing judge on remand to recommend appropriate discipline for both matters combined.

At the time of our earlier review we also considered the fact that respondent had been placed on involuntary inactive enrollment effective May 14, 1988, under Business and Professions Code section 6007 (c)[2] and continued in that status. Respondent asked us to give him credit against the ultimate discipline imposed for time spent on inactive enrollment by analogy to *In re Young* (1989) 49 Cal.3d 257. In determining that credit would be appropriate we noted that in *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, opn. filed on

1. A large portion of the extraordinary time consumed to date in this proceeding is clearly not attributable to respondent, including the fact that the proceedings had to be remanded for a new trial, but a significant portion of the delay is attributable to him. For example, completion of the trial in the original hearing proceeding was delayed 14 months largely due to continuation at respondent's request and delay during respondent's tender of his resignation which he subsequently rescinded. The hearing proceeding on remand was also prolonged by respondent. This review was also delayed from the spring oral argument calendar until the fall because of respondent's failure to file a responsive brief after being given additional time to do so. He was thereafter precluded by order of the Presiding Judge from participating at oral argument although he was permitted to attend the argument given by the Office of Trials. Regardless of the reasons for delay, respondent was entitled to assume, based on our 1990 order, that the entire time would be credited to the ultimate discipline imposed.

2. Unless otherwise noted, all references hereafter to sections are to sections of the Business and Professions Code.

den. rehg., 1 Cal. State Bar Ct. Rptr. 19, we had similarly recommended that the Supreme Court give Mapps credit for time spent on involuntary inactive enrollment pursuant to section 6007 (c) and that the recommended discipline was adopted by the Supreme Court on November 29, 1990, expressly ordering "credit for any time on related inactive status." (No. S016265.) No request for reconsideration was filed by either party after our first opinion in this proceeding issued.

On remand after 10 days of hearing in October of 1991,[3] **[1 - see fn. 3]** consideration of additional evidence submitted by both parties and allowing an opportunity for post-trial briefs, the newly assigned hearing judge pro tempore ultimately issued his decision on December 23, 1992, making findings on all of the remanded issues and recommending that respondent be disbarred. Pursuant to our directive, the hearing judge recommended that respondent be given credit for all time spent on inactive enrollment. Costs were recommended to be awarded to the State Bar, but the hearing judge did not recommend that respondent be ordered to comply with rule 955 of the California Rules of Court since, by that time, he had been on inactive status for more than four years.

DISCUSSION

The Office of Trials sought review solely on the issue of whether respondent should have been given credit by the hearing judge for the time spent on involuntary inactive status. It argues, as it did in 1990 on the first appeal, that no authority supports giving credit for inactive enrollment against the time period for seeking reinstatement following disbarment. **[2a]** In essence, the Office of Trials is seeking reconsideration of our first determination of this issue long after the time for seeking reconsideration has passed without offering any justification for its delay. No new case law or statute is relied upon that was not in existence at the time of our earlier opinion. While the law of the case doctrine is one of policy and does not preclude the relitigation of issues already determined in a prior appeal before the review department (see, e.g., *In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 261), strong reasons should be put forward for seeking to relitigate an issue already fully litigated and decided on a prior appeal.

[2b] We have been provided with no cognizable reason to reconsider our prior conclusion that respondent is entitled to credit for time spent on involuntary inactive enrollment. However, because the Office of Trials apparently misconceives the relationship of the Legislature to the Supreme Court on this issue and the policy reasons for giving respondent credit, we will explain our reasoning at greater length in this opinion after we review the findings below which resulted in the disbarment recommendation.

The Proceedings Below and Recommendation of Disbarment

The two matters that were consolidated on review in 1990 were case number 84-O-14336 which involved 13 counts[4] and case number 88-O-12250

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3. The hearing below appears to have been unduly prolonged in part due to respondent's disorganization. Respondent failed to file a pretrial statement as he had been ordered to do. No sanction was ordered by the hearing judge for that failure although the hearing judge did indicate that he would entertain appropriate trial motions by the deputy trial counsel based on respondent's failure to file a pretrial statement.

[1] Pretrial statements are an important tool in conducting an efficient multi-count trial. Their principal purpose is "to simplify and define the issues and determine how the trial may proceed most expeditiously." (*Trickey* v. *Superior Court* (1967) 252 Cal.App.2d 650, 653.) Unexcused failure to comply with an order requiring a pretrial statement in compliance with rule 1222 of the Provisional Rules of Practice of the State Bar Court should not be treated lightly. (Cf. Gov. Code, § 68609, subd. (d); Super. Ct. L.A. County Rules 1105.3, 1109; Fed. Rules Civ.Proc., rule 16(f); *Link* v. *Wabash R.R. Co.* (1962) 370 U.S. 626 [dismissal for failure to appear at pretrial conference]; *Admiral Theatre Corp.* v. *Douglas Theatre* (8th Cir. 1978) 585 F.2d 877 [court had discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of pretrial order].) Unfortunately here, despite the court's invitation, no motions were made by the deputy trial counsel resulting from respondent's failure to file a pretrial statement and no issue was preserved for appeal.

4. Respondent was originally found culpable on 10 counts, 9 of which were also relied on in a separate proceeding for his inactive enrollment under section 6007 (c).

which arose out of respondent's alleged unlawful practice of law following his inactive enrollment on May 14, 1988. On our review of the original culpability findings and disciplinary recommendations, we found clear and convincing evidence that respondent was culpable in case number 84-O-14336 on counts 2 and 3 (Porsch matters) 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; on count 8 (Martel matter) of violating former rules 6-101(A)(2) and 2-111(A)(2) and section 6068 (m); on count 11 (Williams/Rego matter) of violating section 6106 by the knowing issuance of a check drawn on insufficient funds; and on count 12 (Floyd matter) of violating former rules 2-111(A)(2) and 6-101(A)(2).[5] We also found respondent culpable in case number 88-O-12250 of violating sections 6068 (a), 6125 and 6126. We remanded for further proceedings to determine other charges in counts 1 through 5 and counts 7 and 10 in case number 84-O-14336 and for a recommendation of discipline. (*In the Matter of Heiner*, *supra*, 1 Cal. State Bar Ct. Rptr. 301.)

On remand, the hearing judge found respondent culpable on count 1 (Frierson matter) for failing to perform services for which he was employed; failure to return the unearned fee and failure to turn over the client's file pursuant to her written request. Respondent therefore was held to have violated former rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2). He was also additionally found culpable on counts 2 and 3 (Porsch matters) of violating section 6106 by concealing his misappropriation of funds and issuing a check with knowledge that there were insufficient funds to cover it. Respondent was further found culpable of violating former rules 2-111(A)(2) and 6-101(A)(2) on count 4 (Gilliland matter).[6] **[3 - see fn. 6]** Count 5 (Gardner matter) was submitted on the prior record because the witness was unavailable to testify and was thereafter dismissed for failure of proof. On count 7 (Terry matter) the hearing judge found culpability of violating former rule 6-101(A)(2) for failure to perform services competently, but lack of clear and convincing evidence of violations of former rules 2-111(A)(2) and 2-111(A)(3). The record showed that respondent had been removed as counsel in a murder case pursuant to a *Marsden* motion. (*People* v. *Marsden* (1970) 2 Cal.3d 118, 123 [inadequacy of counsel].) The hearing judge dismissed count 10 (Jackson matter) for lack of proof after considering both the testimony of Jackson and respondent and the documentary evidence.[7]

The hearing judge also made findings in aggravation and mitigation. In aggravation, the misconduct was surrounded by bad faith and dishonesty. The evidence in aggravation included, among other things, the filing of an unlawful lis pendens in 1990 against real property in the name of a woman friend who had testified on his behalf in the 1989 proceedings in this court and came back to testify against him in the current proceeding after he failed to repay loans and otherwise betrayed her trust. He also, while on inactive status, entered into a business transaction with a divorced woman to purchase real property for which

5. At the first trial, the examiner had dismissed count 6 of case number 88-O-14336 and the referee had found respondent not culpable on counts 9 and 13.

6. **[3]** In our prior opinion, we noted that in count 4 respondent was not charged with failing to return an unearned advance fee or with violating former rule 2-111(A)(3) and that "no finding could be entered against respondent on this issue absent an amendment of the charges." (*In the Matter of Heiner*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 312.) Despite a clear directive as to the need to amend the charges and an opportunity to do so well in advance of the trial date, the deputy trial counsel waited until *after* all the evidence was in on this count to move to amend "to conform to proof." This was properly denied as an idle act in light of lack of sufficient evidence to support the charge. However, it appears it could also have been denied simply for inexcusable delay in seeking the amendment.

7. The testimony of Jackson at the rehearing indicates that Jackson was totally surprised on cross-examination with copies of documents she did not recall but which she testified nonetheless appeared to bear her signature—a chapter 7 bankruptcy petition (ex. O), the retainer agreement (ex. P) and a receipt (ex. Q). Given the opportunity for pretrial discovery, it is puzzling why the witness was not made aware of these intended exhibits prior to testifying. It is unclear on the record whether the deputy trial counsel requested them in discovery or had seen them prior to trial. Although the deputy trial counsel did initially object to their introduction in evidence, she did not object to the witness being questioned about these documents despite respondent's failure to file a pretrial statement listing any exhibits. Later she also dropped any objection to the inclusion of these exhibits in the record.

she put up her house as collateral and lost both the purchased property and her home following his abandonment of the project after receipt of approximately $16,000 in cash advances.

In mitigation, respondent had no prior record of discipline since his admission in 1971. (Std. 1.2(e)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Trans. Rules Proc. of State Bar, div. V ("standards").) However, it was also noted that the misconduct started in 1983. The hearing judge also found that respondent suffered personal problems including a bitter divorce and difficulties as sole custodian of three of his minor children that affected his performance as an attorney. (Std. 1.2(e)(iv).) The hearing judge accorded slight weight to these problems and to respondent's severe financial problems, resulting in two bankruptcy proceedings in 1981 and 1989 because respondent took new matters which he mishandled while he was already having difficulty handling his existing caseload during the time of his personal and financial troubles. The hearing judge also accorded little weight to the character evidence respondent presented which did not consist of a wide range of references or persons outside his family with sufficient contacts to make the character testimony meaningful.

After reviewing the entire record on remand de novo, we adopt all of the findings of the hearing judge on remand as supported by clear and convincing evidence. **[4]** However, we note that count 5 was dismissed without any credibility determinations having been made on conflicting evidence in the prior record. The fact that no live witness appeared for the prosecution did not preclude the hearing judge from making a credibility determination based on prior recorded trial testimony which was subjected to cross-examination. The problem with the first trial is that tentative culpability was announced before respondent testified and the referee did not resolve the credibility issue raised by respondent's conflicting testimony. Nonetheless, the deputy trial counsel did not object to the dismissal of count 5 and we conclude that the hearing judge's recommendation of disbarment on the remaining counts is fully supported by the standards (see, e.g., std. 2.2(a)) and the case law. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21; *Chang* v. *State Bar* (1989) 49 Cal.3d 114; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649.) We further note that respondent's misconduct continued for a number of years and that should he seek reinstatement at some point he will have to demonstrate "'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.)

Credit for Time on Inactive Enrollment

The Office of Trials notes in its brief that the Rules of Procedure of the State Bar adopted by the Board of Governors expressly provide that respondents who are disbarred be given credit for time served on interim suspension against the minimum time period which must expire prior to seeking reinstatement. Rule 662 states the general rule in this regard: "No petition [for reinstatement] shall be filed within five years after the effective date of interim suspension or disbarment or resignation whichever first occurred."[8] The Office of Trials also points out that the Legislature expressly provides for credit to respondents pursuant to section 6007 (d) for any period of inactive enrollment against any period of actual suspension subsequently ordered based on the respondent's violation of probation. The Office of Trials then argues that if the Legislature had intended to give credit to respondents placed on inactive enrollment pursuant to section 6007 (c), it would have so provided. The brief goes on to note that "notwithstanding the apparent intent of the legislature, however, in the last four years, the [Supreme] Court has, in several instances awarded credit to

8. For good cause, this period can be reduced to three years (rule 662, Trans. Rules Proc. of State Bar), although historically this reduction of time has rarely been granted. As the Office of Trials knows from representing the State Bar in all reinstatement proceedings, rule 662 merely provides the opportunity to apply for reinstatement. All petitioners for reinstatement must, among other things, show by clear and convincing evidence sustained exemplary conduct in order to qualify for reinstatement. (See, e.g., *In re Giddens*, *supra*, 30 Cal.3d at p. 116; *Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1091-1092.) The burden on petitioners for reinstatement is a heavy one. (See discussion and cases cited in *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 30.)

respondents of time so spent," citing *In re Lamb* (1989) 49 Cal.3d 239 and *In the Matter of Mapps, supra*, 1 Cal. State Bar Ct. Rptr. 1.

[5a] By arguing that our reliance on case law did not constitute proper authority for our 1990 decision to grant respondent credit, the Office of Trials questions the Supreme Court's authority to order on the Court's own initiative, as it did in *In re Lamb, supra*, and in *In the Matter of Mapps, supra*, parallel treatment of inactively enrolled attorneys to the treatment accorded attorneys on interim suspension and inactive enrollment under section 6007 (d). This evidences a fundamental misunderstanding of the Supreme Court's role with respect to attorney regulation in the State of California.

[5b] We reviewed the nature of the Supreme Court's inherent authority over practitioners in *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71. As we noted therein, the Legislature has expressly acknowledged in section 6087 of the State Bar Act that "Nothing in this chapter shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of chapter 34 of the statutes of 1927, relating to the State Bar of California." It reiterated this limitation in similar language in section 6100: "Nothing in this article limits the inherent power of the Supreme Court to discipline . . . any attorney."

[5c] The Legislature's recognition of its limited role in attorney regulation in light of the Supreme Court's inherent authority mirrors the Supreme Court's own repeated pronouncements. Thus, over 30 years ago in *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300, the Supreme Court explained: "Historically, the courts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them [citations]." The Supreme Court also stated in *Brotsky* that "In disciplinary matters . . . [the State Bar] proceeds as an arm of this court. If the Legislature had not recognized this fact, and made provision therefor, the constitutionality of those portions of the State Bar Act which provided for the admission, discipline and disbarment of attorneys could have been seriously challenged on the ground of legislative infringement on the judicial prerogative." (*Ibid.*)

In *Hustedt* v. *Workers' Compensation Appeals Board* (1981) 30 Cal.3d 329 the Supreme Court again reviewed the inherent powers of the courts, noting that "An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question." (*Id.* at pp. 336-337, fns. omitted.) **[5d]** Not surprisingly therefore, the Supreme Court has not felt constrained by lack of authorizing legislation to exercise its inherent power. (See, e.g., *Stratmore* v. *State Bar* (1975) 14 Cal.3d 887 [suspending an attorney for misconduct occurring before he was admitted to practice].)

[5e] If a convicted felon is automatically entitled under rule 662 to apply for reinstatement after five years of interim suspension,[9] on what basis could the Court justify denying the same opportunity to an attorney not convicted of a crime who is placed on involuntary inactive enrollment under 6007 (c) for five years prior to being disbarred? The only answer provided by the Office of Trials is that the Court is not the appropriate body to address this issue. As discussed above, this answer is misconceived. The Supreme Court had no trouble deciding in *In re Lamb, supra*, 49 Cal.3d 239, that it had authority without any prior legislative action to award Lamb credit toward the time period for applying for reinstatement for time spent on stipulated inactive enrollment. In so acting, the Court explained: "We realize . . . that as a direct result of these proceedings, petitioner has been under a legal disability to practice law since April 10, 1988. She stipulated to inactive status, effective on that date, after the hearing officer's disbarment recommendation opened the way for the

9. By definition, attorneys on interim suspension are attorneys who have been convicted of either a felony or a misdemeanor involving moral turpitude. (See § 6102 (a).) As noted above, if these attorneys are subsequently disbarred in the same proceeding, rule 662 of the Transitional Rules of Procedure, promulgated by the State Bar Board of Governors, provides that the attorneys *automatically* receive credit toward the minimum time for seeking reinstatement, regardless of the circumstances. No determination need be made in connection with giving credit as to the petitioner's readiness to resume the practice of law—that determination is only necessary if a reinstatement proceeding is subsequently instituted.

State Bar examiner to seek involuntary inactive status pending final determination of the disciplinary case. [Citation.] Under the stipulation, petitioner may not regain active status except by the terms of our final order herein.

"The Rules of Procedure of the State Bar specify that a petition for reinstatement may not be filed 'within five years after the effective date of *interim suspension* or disbarment or resignation whichever first occurred . . . .' (Rule 662, Rules Proc. of State Bar [emphasis added by Supreme Court].) Though petitioner suffered no 'interim suspension' in the technical sense, her acquiescence to inactive enrollment was of similar import.

"Moreover, rules governing State Bar procedures do not limit this court's inherent authority to fashion an appropriate discipline. (Bus. & Prof. Code, § 6087.) Under the circumstances, and in furtherance of the policy that disbarred attorneys should receive 'credit' against the reinstatement period for any related interim ban on practice, we conclude that petitioner may obtain such credit for the period of her enrollment in inactive status." (*In re Lamb*, *supra*, 49 Cal.3d at pp. 248-249, fn. omitted.)

[5f] The Supreme Court has always concerned itself with comparable treatment of respondents in comparable situations. Thus, for example, in *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, the Court noted that it was appropriate to consider whether the discipline imposed was disproportionate to that imposed in similar cases. In *In re Young*, *supra*, 49 Cal.3d 257, in light of all relevant evidence, the Supreme Court refused to order two years prospective disciplinary suspension of an attorney irrespective of his three years on interim, as urged by the State Bar, because it placed the respondent at a disadvantage compared with disciplined attorneys who were not interimly suspended. In *In re Leardo* (1991) 53 Cal.3d 1, 18, where interim suspension had also been imposed, the Supreme Court rejected the State Bar's argument for disbarment or actual prospective suspension, took into account four years of interim suspension and ordered that all prospective suspension be stayed, noting that "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." (*Ibid.*)

In re Ford (1988) 44 Cal.3d 810, cited by the Office of Trials in its brief, is not inconsistent with the above Supreme Court opinion. In *In re Ford*, the attorney had similarly argued that his interim suspension for three years prior to the Supreme Court's consideration of his case was sufficient discipline for his conviction for embezzlement and that disbarment was unnecessary. In that case, the Supreme Court found no compelling mitigation justifying a remedy short of disbarment. However, as a consequence Ford automatically got credit pursuant to rule 662 for his three years of interim suspension toward the five-year waiting period for reinstatement. Ford, as it turned out, still has not been reinstated.

Nor does *In re Basinger* (1988) 45 Cal.3d 1348 support the Office of Trials' position. There an attorney also argued that his lengthy time on interim suspension should militate against disbarment. The Supreme Court again noted that it must determine the appropriate discipline in light of all of the relevant evidence. (*Id.* at p. 1361.) The Office of Trials correctly points out that the Supreme Court did, in dictum, reject the argument that fundamental fairness required credit for time spent on interim suspension and stated that the interim suspension was not imposed to punish the petitioner but to protect the public. However, this was prior to the Supreme Court decision in *In re Leardo*, *supra*, and in any event the cited language in the *Basinger* opinion had no relevance to the issue before us now. Basinger was arguing, as did Ford, that his lengthy interim suspension justified final discipline short of disbarment.

In Basinger's case the hearing referee had concluded that the lengthy interim suspension and Basinger's changed behavior since his crime justified only one further year of stayed suspension with monitored probation. While the Supreme Court rejected this argument and found that Basinger's misconduct did justify disbarment, its discussion of "credit" for interim suspension was simply a repeat of the issue raised by Ford whether time already served on suspension was sufficient discipline in lieu of disbarment. In fact, Basinger was entitled to

automatic credit under rule 662 for the time spent on interim suspension and, as the Office of Trials is aware from having participated in the proceeding, Basinger was ordered reinstated by the Supreme Court on October 16, 1991 (S023180), just over three years after his disbarment.

[6a] Rather than supporting the position of the Office of Trials, both *In re Ford* and *In re Basinger* illustrate the fact that, by operation of rule 662, convicted felons are always entitled to credit for time spent on interim suspension against the waiting period for seeking reinstatement. As the Supreme Court recognized in *In re Lamb*, inactive enrollment has the same effect as interim suspension in banning the practice of law pending a final order of discipline. It is also similarly designed to protect the public during the pendency of a disciplinary case against the malfeasant attorney. When ordered inactively enrolled pursuant to section 6007 (c), the attorney generally cannot practice law until proof has been made that the attorney no longer poses a threat to clients or the public. However, unlike interim suspension, involuntary inactive enrollment does not follow a criminal conviction, but results solely from action by the State Bar Court. **[7a]** Because of the due process concerns addressed in *Conway* v. *State Bar*, *supra*, 47 Cal.3d 1107, time spent on involuntary inactive enrollment is limited to a total period of one year from the filing of the order of inactive enrollment to the filing of the review department decision on the merits of the underlying matter, absent proof of delay caused by the respondent or his counsel or circumstances otherwise affirmatively justifying lack of compliance with the time requirements of rule 799 of the Transitional Rules of Procedure. (See *Conway*, 47 Cal.3d at p. 1122 and rule 799.8, Trans. Rules Proc. of State Bar.)

[7b] Here, respondent's inactive enrollment has been continuous since it was ordered in 1988. Respondent asked us for a ruling in 1990 whether he could get credit for remaining on inactive status. The deputy trial counsel herself notes that we discussed at oral argument on the first appeal the alternative opportunity respondent had on remand to seek to resume practice on the basis of unconstitutional delay in completion of the proceeding. She also notes that at no time did respondent seek to terminate his involuntary inactive status, which thereby protected the public for the duration of this proceeding. She nonetheless contends that respondent would not be prejudiced by retroactively being denied credit for more than five years time spent on inactive enrollment and being required to wait five years following his disbarment before being permitted as of right to apply for reinstatement. This would require him to wait twice as long as numerous convicted felons who had the right to seek immediate reinstatement following the order of disbarment because of the lengthy time spent on interim suspension following conviction. (See, e.g., *In re Aquino* (1989) 49 Cal.3d 1122, 1134; *id.* at p. 1135 (conc. opn. of Kaufman, J.); *In re Rivas* (1989) 49 Cal.3d 794, 802, fn. 8.) The prejudice to respondent is obvious.

[6b] The general rule authorizing a reinstatement proceeding to be brought no sooner than five years after disbarment is presumably predicated on the assumption that the passage of five years since the attorney has been ordered to stop practicing law is the minimum time needed to provide a sufficient opportunity for rehabilitation. The authorization of credit against the five-year waiting period for time spent on interim suspension reflects the decision that five years removal from practice is a sufficient minimum opportunity, even if the time period precedes the order of disbarment. The focus is on the duration of the ban from the practice of law, not the timing of the disbarment itself. Indeed, whether a convicted attorney is interimly suspended at all can be arbitrary (*In re Young*, *supra*, 49 Cal.3d at p. 267, fn. 11), and the difference in length of interim suspension can reflect one convicted attorney's decision to exercise a right to appeal his criminal conviction and another's decision not to do so. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 515.) Fairness dictates taking the length of interim suspension into account.

[6c] No policy interest has been articulated that would be served by treating respondent differently from an interimly suspended attorney when both are similarly banned from the practice of law for the duration of the order pursuant to which they have been removed from the list of authorized practitioners. Similarly to an attorney exercising his right of appeal of a conviction while interimly suspended,

respondent, while on inactive enrollment, exercised his right of appeal of the first decision recommending disbarment. After respondent's successful argument on the first appeal, the final recommendation of the State Bar Court was necessarily delayed pending remand and reconsideration of several counts of charged misconduct. The necessity of a remand raised the issue of the propriety of respondent continuing on inactive enrollment.

If we had declined to permit respondent credit in 1990 the public could have been placed at great risk in this proceeding. Under *Conway* v. *State Bar*, *supra*, 47 Cal.3d 1107, every inactive enrollment of an attorney whose underlying disciplinary proceeding takes more than a year to reach the Supreme Court is of doubtful constitutionality regardless of the risk posed to the public. If we had rejected his request for credit, respondent would have had every incentive to seek to resume practice pending the final outcome of these proceedings despite the very concerns that the Office of Trials has raised about the suitability of the respondent practicing law under the circumstances. Under the dictates of *Conway* v. *State Bar*, *supra*, the hearing judge in a proceeding brought by respondent pursuant to rule 799.8 of the Transitional Rules of Procedure of the State Bar would have had very little choice but to allow respondent to resume practice long before now.

This brings us to the Office of Trials' argument that respondent still poses a risk of harm to the public and potential clients. We recommend his disbarment on the current record precisely because we have determined that respondent has committed very serious acts of misconduct for several years starting in 1983. Whether he can achieve reinstatement is not an issue before us at this time. We do note, however, that most disbarred attorneys do not ever achieve reinstatement as a consequence of the high burden of proof that they must meet on the issue of rehabilitation. "'In determining whether that burden has been met, the evidence of present character must be considered in light of the moral shortcomings which resulted in the imposition of discipline.'" (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403, quoting *Roth* v. *State Bar* (1953) 40 Cal.2d 307, 313.)

Assuming arguendo, therefore, that respondent still poses a serious current risk to the public, respondent has done a service to the public by remaining on inactive status. But this does not support the Office of Trials' position on the issue of credit. Indeed, the risk respondent might pose in the immediate future is even more likely to be true of the convicted felon who receives automatic credit for interim suspension prior to disbarment. Just as the Board of Governors in enacting rule 662 expressed no opinion as to the viability of reinstatement petitions by attorneys following lengthy interim suspension prior to disbarment, we did not by our decision to give respondent credit in 1990 express any opinion as to the timing or likelihood of his actual readiness to resume the practice of law, nor do we do so now.

If the Supreme Court accepts our disbarment recommendation, due to the extraordinary length of these proceedings, respondent will have the right to file his petition for reinstatement immediately thereafter, but may well choose to wait longer depending on his assessment of his chances of meeting the high burden that is required for reinstatement. If, as the Office of Trials contends, he is not yet rehabilitated, that office should have no trouble opposing an immediate petition for reinstatement. This does not justify requiring respondent to wait five years longer than a convicted felon before being allowed to present any evidence on the issue because he was inactively enrolled under 6007 (c) for serious misconduct not necessarily constituting a crime instead of interimly suspended for serious criminal conduct.

CONCLUSION

For the reasons stated above, we recommend that respondent be disbarred; that he be given credit for time spent on inactive enrollment toward the time period for seeking reinstatement as previously ordered; and that costs be awarded the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JACQUES C. CHEN

A Member of the State Bar

No. 89-O-11851

Filed October 15, 1993, reconsideration denied, January 10, 1994

SUMMARY

Respondent, represented by counsel, reached a settlement agreement in his disciplinary matter which was reflected in an order filed by the settlement conference judge. The Office of the Chief Trial Counsel refused to honor the agreement, contending that it was not binding and that one of its provisions was not acceptable. After entering into a subsequent settlement agreement on different terms, respondent sought relief from the costs awarded against him based on the alleged bad faith conduct of the Office of the Chief Trial Counsel in disavowing the original settlement agreement. The hearing judge denied the motion. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Respondent sought review, contending that the hearing judge abused her discretion in declining to rule on his contention that the Office of the Chief Trial Counsel had acted in bad faith. The review department declined to grant relief, holding that although respondent could have sought to enforce the original settlement, he could not seek to have his costs reduced on account of his additional expenditure of attorneys fees due to the breach of the settlement agreement.

Counsel for Parties

For Office of Trials: Teresa M. Garcia

For Respondent: R. Gerald Markle

HEADNOTES

[1] **130 Procedure—Procedure on Review**
178.90 Costs—Miscellaneous
199 General Issues—Miscellaneous

Respondents in public proceedings should anticipate that their names will be published in any opinion except those resulting in dismissal or private reproval or, in the case of remanded proceedings, those which may potentially result in dismissal or private reproval. Accordingly, where respondent was on notice that petition for review of order denying relief from costs would

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.

probably be referred to review department in bank, and where respondent had already been required to notify clients, courts and opposing counsel of his suspension, review department declined to omit respondent's name from published opinion in relief from costs matter.

[2 a, b] **130 Procedure—Procedure on Review**
169 Standard of Proof or Review—Miscellaneous
178.90 Costs—Miscellaneous

Where a party did not seek review of that portion of an order on a motion for relief from costs with which it disagreed, but stated its disagreement in its brief on review without seeking affirmative relief, that party's challenge to the order was not properly before the review department in a proceeding resulting from the opposing party's petition for review of a different portion of the same order.

[3] **167 Abuse of Discretion**
178.90 Costs—Miscellaneous

The standard for review of rulings on chargeable costs is abuse of discretion.

[4 a-c] **119 Procedure—Other Pretrial Matters**
139 Procedure—Miscellaneous
199 General Issues—Miscellaneous

Negotiations regarding an agreement ordinarily result in a binding contract when all of the essential terms are definitely understood, even if a formal writing is to be executed later and even if there is uncertainty in a minor, nonessential detail. Where all elements of a stipulation settling a disciplinary proceeding were resolved at a settlement conference, and the settlement judge's ensuing order indicated that a final compromise had been reached, the settlement agreement was binding even though no formal written stipulation had yet been signed.

[5 a, b] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
119 General Issues—Miscellaneous
139 Procedure—Miscellaneous
213.20 State Bar Act—Section 6068(b)
220.00 State Bar Act—Section 6103, clause 1

Where a settlement judge's order following a settlement conference indicated that a final compromise had been reached, the order was binding and an attorney's failure to abide by it, without moving for relief therefrom, constituted a violation of the statutes requiring obedience to court orders and respect for courts and judicial officers.

[6 a-c] **101 Procedure—Jurisdiction**
119 Procedure—Other Pretrial Matters
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
194 Statutes Outside State Bar Act

No method of enforcement of settlement agreements in disciplinary proceedings is set forth in the Transitional Rules of Procedure, but an express provision governing this subject is not essential to the court's inherent jurisdiction to exercise reasonable control over proceedings before it in order to avoid unnecessary delay. Where one party refused to abide by a settlement agreement, the other party could have made a motion to compel enforcement of the agreement, by analogy with the statutory motion permitted by Code of Civil Procedure section 664.6, or could have asserted the agreement as an affirmative defense in the pending proceeding.

[7 a, b] **119 Procedure—Other Pretrial Matters**
136 Procedure—Rules of Practice
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act

It is well established that an aggrieved party may properly bring to the court's attention the alleged breach of a settlement agreement arrived at before a judge and reflected in an ensuing court order. Rule 1231 of the Provisional Rules of Practice and Evidence Code sections 1152, subdivision (a) and 1154 only preclude evidence of settlement offers and negotiations that do not result in an agreement.

[8] **139 Procedure—Miscellaneous**
333.00 Rule 5-300(B) [former 7-108(B)]

A letter sent by counsel for one party in a disciplinary proceeding to the opposing counsel, with copies to the settlement judge and assigned trial judge, did not constitute a prohibited ex parte communication with the court.

[9] **179 Discipline Conditions—Miscellaneous**
1099 Substantive Issues re Discipline—Miscellaneous
2290 Section 6007(c)(2) Proceedings—Miscellaneous

The Supreme Court has expressly approved retroactive disciplinary suspension.

[10] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
199 General Issues—Miscellaneous
204.90 Culpability—General Substantive Issues

Prosecutors must be held to the ethical standards which regulate the legal profession as a whole.

[11] **178.75 Relief from Costs—Denied**

The statute governing cost awards in disciplinary proceedings expressly excludes attorney fees from recoverable costs to either the State Bar or the respondent. Accordingly, the provision of the statute permitting reduction of costs for good cause cannot be interpreted to permit an offset for a party's incurrence of additional attorney's fees due to the other party's bad faith tactics in failing to comply with a settlement agreement.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

This is a petition for review pursuant to rule 462(c), Transitional Rules of Procedure of the State Bar of California, of a hearing judge's order denying in part the verified petition of disciplinary respondent Jacques Clayton Chen ("Chen")[1] **[1 - see fn. 1]** for relief from an order assessing costs of a disciplinary proceeding.

The petition for relief alleged bad faith litigation tactics as a basis for reduction of costs otherwise recoverable by the State Bar.

The hearing judge found good cause to reduce costs otherwise recoverable by the State Bar for unnecessarily requiring respondent to respond to a pretrial motion, but no good cause to reduce recoverable costs for the alleged refusal of the Office of the Chief Trial Counsel ("OCTC") to honor a settlement agreement reached at a voluntary settlement conference in January of 1992 before a judge pro tempore because she considered the facts to be in dispute and was reluctant to get involved in the details of the settlement negotiation process.

On review, respondent contends that the hearing judge abused her discretion in partially denying relief from costs. **[2a]** OCTC did not seek review of the part of the order partially relieving respondent from costs for the unnecessary expenditure of respondent's counsel's time on the pretrial motion.[2] **[2b - see fn. 2]** In its brief responding to the petition for review, OCTC contends that the hearing judge did not abuse her discretion in granting respondent only a partial waiver of costs because of the factual dispute regarding the settlement negotiations in January of 1992 and that, in any event, the judge had no authority to interpret good cause under Business and Professions Code section 6086.10 to sanction the State Bar for alleged bad faith litigation tactics which did not affect chargeable costs. It therefore requests that this court deny respondent's petition.

BACKGROUND

A notice to show cause was filed against respondent in this proceeding on May 20, 1991, which was ultimately resolved by the filing, on June 24, 1992, of the parties' comprehensive stipulation as to facts and discipline calling for a period of two years suspension, stayed on certain terms and conditions of probation, including a nine-month period of actual suspension. This settlement was approved by a hearing judge of this court and the Supreme Court issued its order imposing the discipline contained in the settlement on December 30, 1992, including costs of $2,540. Pursuant thereto, respondent was placed on suspension effective January 29, 1993.

In a subsequent petition filed with the assigned hearing judge, respondent sought to be relieved from all of the costs, alleging that an earlier settlement had been reached on January 13, 1992, after the examiner and respondent's counsel participated in a series of three voluntary settlement conferences before a judge pro tempore.

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1. In *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, no objection was raised to respondent's counsel's request that respondent's name not be designated when he had not been required to notify clients and others of his brief suspension and had not anticipated referral of the petition by the Presiding Judge to the full review department for its consideration and published opinion. Here, a similar request for anonymity was made but an objection was timely raised. **[1]** Since respondent was on notice of the probable referral of this issue to the review department in bank and had already been required to comply with the notice requirements of rule 955, we see no policy reason not to publish respondent's name in this proceeding. Respondents in public proceedings should anticipate that their names will be published in any opinion except those resulting in dismissal or private reproval or, in the case of remanded proceedings, those which may potentially result in dismissal or private reproval. (See, e.g., *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1.)

2. **[2b]** A footnote in OCTC's brief did state that it disagreed with the hearing judge's analysis that the motion in limine was brought in bad faith. At oral argument, upon questioning by the court, the examiner belatedly asserted that OCTC was also challenging that part of the hearing judge's order reducing costs for the pretrial motion. Since no review was sought by OCTC nor any affirmative relief sought in its brief, we do not consider a challenge to that part of the hearing judge's order to be properly before us. (Cf. *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 540, fn. 1.)

Respondent alleged that essentially the same terms as later agreed upon were agreed upon at that time except that the nine-month period of actual suspension was to commence as of the effective date of petitioner's voluntary transfer to inactive membership status in February of 1992. Respondent further alleged that during the course of the final conference on January 13, 1992, the examiner excused herself from the hearing room for the purpose of obtaining approval from her supervising assistant chief trial counsel to the settlement generally, and in particular, to that portion of the settlement wherein the actual suspension condition would be deemed to have commenced as of the date of respondent's transfer to inactive status. Respondent further alleged that after returning to the hearing room a few moments later, the examiner informed respondent, his counsel and the judge that the necessary approval had been obtained.

The examiner has never disputed any of the terms of respondent's offer made during their settlement conference on January 13, 1992. She also has acknowledged that she had authority to reach a settlement at that conference. However, she disputes that she came to a final agreement at that conference, asserting that after conferring with her office by telephone, she merely stated that "the State Bar believed the offer would be a workable stipulation." She further alleges that "prior to the adjournment of the conference, [respondent's counsel] made the comment that no stipulation is final until it is in writing. I agreed, stating that I did not anticipate any problems in finalizing the stipulation."

Respondent's counsel alleged that following the January 13 conference, since respondent understood that all of the terms of the settlement had been fully agreed to and approved by the court, he took irremediable steps in reliance upon the agreement in order to prepare for his immediate transfer to inactive status.

The day after the January 13, 1992, settlement conference, the judge pro tempore issued an order that stated in pertinent part "The parties have reached a final compromise as to facts, culpability and disposition including investigation matter" and that "The parties are preparing a written stipulation memorializing their agreement." The examiner was ordered to submit the written stipulation reflecting the parties' agreement to respondent and his counsel by January 24, 1992. Respondent's counsel was ordered to return the stipulation by January 31, 1992.

Instead of preparing the written stipulation ordered by the court, the examiner telephoned respondent's counsel on January 23, 1992, and, in her own words, "informed him that the State Bar had taken the position that it will not stipulate to discipline which takes effect prior to the effective date of the Supreme Court order approving discipline. As such, I would not be able to stipulate to the settlement we orally agreed to on January 13, 1992." After the examiner disavowed the settlement agreement, respondent's counsel immediately proposed a modification of the agreement to provide that the court would determine the commencement date of the period of actual suspension. Respondent's counsel alleges that the examiner initially agreed to respondent's proposed modification, but by letter dated January 24, 1992, disavowed that agreement as well. That letter requested a response to a new proposal for a partial stipulation.

On February 7, 1992, petitioner's counsel responded to the examiner, sending copies of his letter to the judge pro tempore, as well as to the assigned trial judge, describing the disavowal by OCTC of two alleged consecutive agreements and urging reconsideration by OCTC of the proposal to leave the issue of the commencement date of the suspension for determination by the court.

In response to respondent's counsel's February 7, 1992, letter, the examiner filed a motion "in limine" on March 6, 1992,[3] asking the court to: (1) preclude

3. A motion in limine is ordinarily a motion for an evidentiary ruling made on the threshold of a jury trial "designed to prevent the prejudicial effect that may result when an objection to evidence is sustained, and the jury is then instructed to disregard the evidence." (6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 2, p. 328.) No reason appears why a formal motion set for a date prior to a judge trial was necessary here. Moreover, on February 5, 1992, the previously scheduled trial dates of February 13 and 14, 1992, were vacated due to the trial judge's unavailability due to lengthy illness. The examiner indicated to the court below that she had still been under the impression that the trial date remained on schedule when she filed her motion "in limine" one month later.

petitioner from introducing into evidence inadmissible, confidential settlement negotiations; and (2) strike from the court's file the "improper correspondence" which respondent had provided to the court. Respondent's counsel filed opposition to the motion arguing that the motion should be denied because the prohibition against admissibility of settlement discussions ceased to exist once the settlement in the instant case was reached on January 13, 1992, and because respondent's counsel did not engage in a prohibited ex parte communication when he sent a copy of his February 7, 1992, letter to both judges. Respondent's counsel also argued that OCTC brought its motion in bad faith, and that it had also acted in bad faith in disavowing the settlement agreement, thereby forcing petitioner to incur unnecessary and significant expense. On May 22, 1992, due to the assigned hearing judge's continued unavailability due to illness, a different hearing judge issued an order denying OCTC's motion, criticizing the use of a motion and characterizing OCTC's citation of authorities as either being or bordering on an attempt to misrepresent to the court the circumstances of the present case.

Respondent's counsel asserts that in early April 1992, respondent, "having exhausted the meager resources he had available to finance his defense," instructed his counsel to accept unconditionally the "new" settlement position adopted by the OCTC because of its continued refusal to implement the agreement reached on January 13, 1992. By letter dated April 6, 1992, respondent's counsel conveyed respondent's acceptance of the new offer. As indicated above, the stipulation as to facts and discipline ultimately resolving the matter was subsequently prepared and filed on June 24, 1992 and the Supreme Court order with respect thereto was issued on December 30, 1992. Respondent's actual suspension commenced on January 29, 1993—almost one year after the date on which respondent alleges the parties agreed that he would start his suspension.

PROCEEDINGS RE COST RELIEF BELOW

By verified petition filed February 3, 1993, respondent sought relief under rule 462 of the Rules of Procedure[4] from that portion of the Supreme Court's order awarding disciplinary costs to the State Bar on the dual grounds that OCTC's conduct (1) in the settlement process and disavowal of the settlement agreement reached on January 13, 1992, and (2) in bringing its unsuccessful pretrial motion was in bad faith, and caused respondent to incur substantial and unnecessary defense costs. Respondent argued that the unnecessary increase in the cost of his defense was in excess of the amount of the disciplinary costs assessed against him.

On May 29, 1993, the assigned hearing judge issued an order on the petition. In the order, the court found good cause for a partial reduction in recoverable disciplinary costs based upon the expense respondent incurred in having to oppose the inappropriate pretrial motion.[5] However, as indicated above, the court denied respondent relief in connection with his submission that OCTC's settlement process amounted to bad faith and caused respondent to incur additional unnecessary expense. Respondent asserts that abuse of discretion was demonstrated because the court declined to consider the merits of his argument on the second issue. He bases this challenge on language on page two of the order which reads as follows: "This court is unwilling to become enmeshed in accusations and aspersions regarding what the parties did or did not say, or should or should not have done, during settlement negotiations. To do so would inject the court into an area that is jealously guarded from any information regarding offers, counteroffers, conditions, modifications, exchanges, etc."

On the basis of this court's opinion in *In the Matter of Respondent J* (Review Department 1993) 2 Cal. State Bar Ct. Rptr. 273, respondent asserts that

4. All references herein to the Rules of Procedure are to the Transitional Rules of Procedure of the State Bar.

5. The order required respondent's counsel to file a declaration of the number of hours spent in defense of the motion in limine and the hourly legal fee charged to respondent for that purpose. It then stated that "This court will order a partial waiver of disciplinary costs to be paid by the Respondent equal to one-half (1/2) the legal fees charged to Respondent specifically for defense of the motion in limine." No subsequent order had been issued as of the time of oral argument.

sufficient cause exists to warrant further relief from disciplinary costs.

DISCUSSION

[3] The standard for review of rulings on chargeable costs is abuse of discretion. (*In the Matter of Respondent J*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 276.) OCTC first argues that it was not an abuse of discretion for the hearing judge to decline to resolve the conflicting versions of the settlement process presented to her by the parties.

[4a] We therefore address the legitimacy of OCTC's position that no enforceable oral agreement had been reached at the settlement conference. Generally speaking "Parties may engage in preliminary negotiations, oral or written, in order to reach an agreement. These negotiations ordinarily result in a binding contract when all of the terms are definitely understood, even though the parties intended that a formal writing embodying these terms shall be executed later." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 136, pp. 159-160, and cases cited therein.) It is also "well settled that an agreement definite in its essential elements is not rendered unenforceable by reason of uncertainty in some minor, nonessential detail. Hence, it is common practice to provide that such details be left to further agreement of the parties." (*Id.*, § 155, p. 176.)

[4b] Here, OCTC does not dispute that all of the essential elements of the agreement were resolved at the voluntary settlement conference. The only issue raised is whether statements were made at the time of the conference that the agreement was tentative and not intended to be binding until a formal written stipulation was signed. This position is no longer tenable in light of OCTC's failure to challenge the court order immediately following the January 13, 1992, settlement conference. That order is a form order with numerous options ranging from "the parties are unable to reach any compromise" to "the parties have reached a final compromise" which is the provision that the judge who presided over the settlement conference marked.

[4c, 5a] The position of the examiner that she only reached a tentative agreement at the settlement conference is belied by the opportunity on the form order for the judge to check a box which states just that: "The parties have reached a tentative agreement on a compromise." The order which instead denoted that the parties had reached a final compromise was served on the parties on January 14, 1992—nine days before the examiner called the respondent's counsel to tell him that she would not be following through with a written stipulation memorializing the oral agreement they had reached. The examiner and the persons in her office with whom she consulted apparently failed to appreciate that their office's subsequent conduct was in direct violation of a court order from which relief was never sought.

[6a] No method of enforcement of settlement agreements is set forth in the Rules of Procedure of the State Bar. However, the State Bar Rules of Procedure are largely modeled on the Code of Civil Procedure. Prior to enactment of Code of Civil Procedure section 664.6, there was also no specific statutory provision governing enforcement of civil settlement agreements although there were two generally recognized methods of enforcement of compromise agreements in civil proceedings: (1) an independent action to compel enforcement of the compromise or (2) setting up the compromise as a special defense by supplemental pleadings in the pending action. (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 58, p. 66.) Witkin notes that the latter method was favored, since the defendant had the opportunity to have the affirmative defense tried first, before the merits.

In *Gregory* v. *Hamilton* (1978) 77 Cal.App.3d 213, 217-220, a Court of Appeal approved a third method of enforcement of settlement agreements—by motion to compel enforcement of the agreement and judgment thereon prior to trial in the proceeding. *Gregory* involved a settlement which was judicially supervised and the facts of settlement and terms were not subject to reasonable dispute. Later cases considered the proper approach in most cases to be a motion for summary judgment. (See, e.g., *DeGroat* v. *Ingles* (1983) 143 Cal.App.3d 399, 401; but see *Gopal* v. *Yoshikawa* (1983) 147 Cal.App.3d 128, 132.) The Legislature resolved the procedural issue in

1981 by enacting Code of Civil Procedure section 664.6 which provides: "If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." This statute does not preclude alternative remedies such as those earlier established by case law. (*Gorman* v. *Holte* (1985) 164 Cal.App.3d 984.)

Here, before sending a letter complaining of the conduct of OCTC, respondent's counsel did attempt to pursue a similar remedy to that of an affirmative defense, by seeking to have the trial judge decide the only issue which OCTC had disputed—the timing of the commencement of the agreed discipline. However, the respondent's counsel apparently assumed he needed OCTC's consent to litigate this issue which was ultimately not forthcoming and eventually entered into a new stipulation rendering the issue moot except for possible sanctions. Although respondent's counsel indicates that he was aware of the possibility of a motion to enforce the settlement by analogy to Code of Civil Procedure section 664.6,[6] **[6b - see fn. 6]** he chose not to pursue that course for alleged monetary reasons. This was unfortunate. It could have saved both respondent and the State Bar considerable time and expense and resulted in earlier protection of the public.

Nonetheless, it is not respondent who is responsible for the unnecessary expenditure of litigant and judicial time in this proceeding and the consequent yearlong delay in public protection. **[5b]** The position of the examiner at oral argument was that OCTC was justified in failing to abide by the court order because respondents in other proceedings have allegedly sometimes reneged on settlement agreements. We cannot speculate as to what may have occurred in other proceedings, but OCTC should hold itself up as an example to others, not sink to the level of the lowest common denominator. It is a violation of Business and Professions Code section 6103 for any member of the State Bar wilfully to violate a court order and a violation of Business and Professions Code section 6068 (b) not to maintain the respect due to courts and judicial officers.

[7a] Here, OCTC's failure to abide by the court order was followed by its misguided motion "in limine" which asserted that respondent's counsel had improperly brought settlement discussions to the court's attention, citing rule 1231 of the Provisional Rules of Practice, Evidence Code sections 1152, subdivision (a) and 1154 and Rules of Professional Conduct, rule 7-108 (repealed May 27, 1989). Rule 1231 is expressly limited to exclusion of the content of a settlement conference that does *not* result in a stipulation. Evidence Code sections 1152, subdivision (a) and 1154 similarly refer to the inadmissibility to prove liability of settlement *offers*, not alleged settlement agreements. The examiner's research apparently failed to turn up reference to Code of Civil Procedure section 664.6 enacted 11 years previously or the case law that preceded and followed it expressly countenancing judicial remedies for alleged violation of settlement agreements.

Indeed, the examiner's citation of former rule 7-108(B) of the Rules of Professional Conduct was indicative of the inadequacy of her research. The hearing judge noted in her denial of the motion that rule 7-108(B) had been superseded three years earlier by rule 5-300(B). **[8]** Moreover, the thrust of the examiner's argument based on rule 7-108(B) was that the letter sent by respondent's counsel *to the examiner* with copies to both the settlement judge and assigned trial judge was a prohibited *ex parte* communication to the court. This argument was also meritless since there was patently no ex parte communication.

The problem with respondent's letter is that it was a communication to the court apparently seeking to influence the court without expressly seeking any judicial relief. It appeared simply to be airing dirty

6. The Rules of Procedure of the State Bar are currently in the process of revision. **[6b]** An express provision governing enforcement of settlement agreements appears to be warranted although it is not essential to the court's inherent jurisdiction to exercise reasonable control over proceedings before it in order to avoid unnecessary delay. (See, e.g., *Jones* v. *State Bar* (1989) 49 Cal.3d 273, 287; cf. *Gorman* v. *Holte*, *supra*, 164 Cal.App.3d 984.)

linen in front of the court. **[6c]** Appropriate alternative courses available to respondent would have been either to make a motion to compel enforcement of the agreement by the settlement judge or to assert the settlement agreement as an affirmative defense in the pending proceeding before the assigned hearing judge. The examiner was entitled to question the propriety of the use of a letter addressed to her to advise the court of the issue without requesting any judicial relief, but she was wrong in challenging the contents of the letter under the authorities cited which provided no support for her position. **[7b]** To the contrary, it is well established that an aggrieved party may properly bring to the court's attention the alleged breach of a settlement agreement arrived at before a judge and reflected in an ensuing court order. (Cf. *Gopal* v. *Yoshikawa*, *supra*, 147 Cal.App.3d 128; *Gorman* v. *Holte*, *supra*, 164 Cal.App.3d 984; Code Civ. Proc. § 664.6; see generally 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, §§ 58, 59, pp. 65-68.)

This brings us to the question of whether the remedy sought—reduction of recoverable costs under Business and Professions Code section 6086.10—is available in State Bar Court proceedings for the wrong done to respondent. In *In the Matter of Respondent J*, *supra*, 2 Cal. State Bar Ct. Rptr. 273, we upheld the discretion of a hearing judge to reduce a cost award for unjustified delay in settlement which increased the costs to respondent. However, as we noted therein, "Respondent recognized that no matter how cooperative he was and how responsive counsel for the State Bar were, certain costs would be chargeable to him in connection with the [discipline] to which he stipulated, even if such result had been reached very early in the negotiations." (*Id.* at p. 278.)

Respondent cannot claim that the chargeable costs in this proceeding would have been different had OCTC honored the original settlement agreement. We agree that the goal of public protection could have been far better served had the original agreement been fully executed. Respondent admitted his wrongdoing in January of 1992 and the public could have had almost immediate protection from the discipline system following respondent's recognition of his wrongdoing instead of the delay of one year that occurred instead. OCTC never sought to provide the court with a cogent rationale for relieving it from the stipulation it had been ordered to memorialize.[7]

OCTC argued on review that it would be inappropriate to compel the Supreme Court to order discipline with retroactive effect. But the stipulations uniformly recite that they are not binding on the Supreme Court and the respondent would therefore have proceeded knowing the risk that the Supreme Court might order greater discipline. (See, e.g., *Inniss* v. *State Bar* (1978) 20 Cal.3d 552, 555.) Ordinarily it does not have a practice of doing so. **[9]** Indeed, the Supreme Court has expressly approved retroactive disciplinary suspension in a number of cases. (See, e.g., *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, recommended discipline adopted Nov. 29, 1990 (S016265).) The Supreme Court has also so credited interim suspension noting that "Whether a suspension be called interim or actual, . . . the effect on the attorney is the same—he is denied the right to practice his profession for the duration of the suspension." (*In re Leardo* (1991) 53 Cal.3d 1, 18 [ordering no prospective suspension in light of lengthy interim suspension]; see also *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 109-110, recommended discipline adopted Nov. 29, 1990 (BM 5274).)

Nor can OCTC find support for its concern in legislative pronouncements. Business and Professions Code section 6007 (d) automatically provides for commencement of disciplinary suspension prior to the Supreme Court disciplinary order in cases where inactive enrollment is ordered by the State Bar Court for violation of probation. Indeed, the policy belatedly asserted by OCTC here is inconsistent with its own practice in stipulating where appropriate to retroactive discipline. For example, two weeks after it

7. The State Bar Rules of Procedure provide that either party may be relieved from a stipulation within 15 days of its approval for good cause shown. (Rule 407(c), Trans. Rules Proc. of State Bar.) But the rules were not followed here and no good cause was ever demonstrated.

disavowed its stipulation in this proceeding, it entered into a stipulation in another proceeding to "give full credit for the period of interim suspension heretofore served" thereby agreeing to two months retroactive disciplinary suspension. (*In the Matter of Gibson*, No. 91-C-04938, stipulation filed February 10, 1992, approved by a State Bar Court judge February 13, 1992, and adopted by the California Supreme Court June 17, 1992 (S026054).) The June 1992 Supreme Court order expressly stated that it was ordering "actual suspension for 60 days retroactively concurrent with the period of interim suspension that commenced November 29, 1991."

The question remains whether the remedy sought by respondent's counsel for OCTC's disavowal of the agreement and disobedience of a court order is supported by any authorities. Respondent's counsel cites *Corkland* v. *Boscoe* (1984) 156 Cal.App.3d 989, 994, which affirmed a trial court order enforcing a settlement agreement. Respondent chose to forego such a motion here ostensibly due to the cost of such effort although he did pursue another course which appears at least equally consumptive of counsel's time.

Respondent's counsel argues that because OCTC is charged with the responsibility of enforcing compliance with ethical requirements and professional responsibility, its lawyers "ought not be above the law they are required to enforce." He urges this court to use Business and Professions Code section 6086.10 as a vehicle for sanctioning bad faith actions or tactics as defined in Code of Civil Procedure section 128.5, including frivolous actions or actions solely intended to cause unnecessary delay. He further argues that the bad faith requirement of section 128.5 does not require a determination of evil motive but includes vexatious tactics which unreasonably or unnecessarily injure the opposing counsel or party, citing *West Coast Development* v. *Reed* (1992) 2 Cal.App.4th 693, 702.

[10] We agree that prosecutors must be held to the ethical standards which regulate the legal profession as a whole. (*United States* v. *Lopez* (9th Cir. 1993) 989 F.2d 1032, 1042* [holding extreme sanction of dismissal of criminal case unavailable under the circumstances, but recommending alternative lesser sanctions of contempt or referral of federal prosecutor to the State Bar for disciplinary proceedings].) **[11]** However, we see no basis for offsetting the respondent's incurrence of attorneys' fees against otherwise chargeable costs. Business and Professions Code sections 6086.10 (b)(3) and (d) expressly exclude attorneys fees from recoverable costs either to the State Bar or respondent. Absent legislation extending Code of Civil Procedure section 128.5 to State Bar proceedings or Supreme Court authorization for doing so we cannot interpret "good cause" to include an offset for attorneys fees against recoverable costs.

CONCLUSION

For the reasons stated above, respondent's petition for review of the hearing judge's order regarding recoverable costs is DENIED.

We concur:

NORIAN, J.
STOVITZ, J.

* Editor's note: Opinion superseded by *United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT O

A Member of the State Bar

No. 90-C-17469

Filed November 17, 1993

SUMMARY

Respondent was convicted in 1991 of one felony count of assault with a firearm, with an enhancement charge that he discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another. The conviction was referred to the hearing department for a hearing and decision as to whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline, and if so found, the recommended discipline to be imposed. After a hearing, the hearing judge found neither moral turpitude nor other misconduct warranting discipline and granted respondent's motion to dismiss the matter. (Hon. Jennifer Gee, Hearing Judge.)

The Office of Trial Counsel requested review, arguing that the facts and circumstances of respondent's conviction involved moral turpitude or at the very least, other misconduct warranting discipline, and that respondent should be disciplined. The review department rejected respondent's claim of self-defense as inconsistent with the conclusive effect of his conviction, but considered his testimony regarding his honest belief that he acted in self-defense as part of the facts and circumstances surrounding the conviction. The review department concluded that the elements of the crime for which respondent was convicted and the facts and circumstances surrounding the criminal conduct demonstrated that respondent did not commit an act of moral turpitude, but was culpable of other misconduct warranting discipline. The review department also concluded that the record was not complete for purposes of imposing or recommending the imposition of discipline and therefore remanded the matter to the hearing judge for further proceedings on the degree of discipline. (Stovitz, J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

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] **148 Evidence—Witnesses**
159 Evidence—Miscellaneous
165 Adequacy of Hearing Decision
1691 Conviction Cases—Record in Criminal Proceeding

There are numerous factors to consider in assessing witness credibility beyond observing the witness while testifying. The hearing judge, as the trier of fact in State Bar proceedings, is to determine the credibility of witnesses and hearsay declarants. The fact that some witnesses testified at the State Bar hearing by way of a transcript of the witnesses' criminal court testimony, which is expressly authorized by statute in State Bar proceedings, is not reason to discount their testimony or find it less credible than live witness testimony.

[2 a, b] **147 Evidence—Presumptions**
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 of assault conclusively established that he did not act in self-defense, i.e., that he did not have an honest *and* reasonable belief that he was about to suffer bodily injury. Hearing judge could not reach conclusions, even based on credible evidence, that were inconsistent with such conclusive effect. Thus, where hearing judge found that respondent honestly believed he was about to be assaulted, review department rejected any finding that such belief was reasonable as being inconsistent with the conviction.

[3] **147 Evidence—Presumptions**
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding

In attorney discipline proceedings arising from a criminal conviction, the record of the attorney's conviction is conclusive evidence of the attorney's guilt of the crime for which the attorney was convicted. This conclusive presumption of guilt applies whether the convicted attorney seeks to reassert his or her innocence or merely to relitigate a claim of procedural error. The convicted attorney is conclusively presumed to have committed all of the elements of the crime.

[4] **147 Evidence—Presumptions**

A conclusive presumption is an assumption of fact that the law requires to be made from the finding of the existence of another underlying fact. A conclusive presumption is in reality a rule of substantive law, not a rule of evidence, and no evidence may be received to contradict it.

[5] **147 Evidence—Presumptions**
1691 Conviction Cases—Record in Criminal Proceeding

The conclusive presumption of guilt in attorney conviction matters does not apply only for crimes involving moral turpitude. The presumption also applies where the crime for which the attorney was convicted did not involve moral turpitude per se.

[6] **147 Evidence—Presumptions**
1691 Conviction Cases—Record in Criminal Proceeding
1699 Conviction Cases—Miscellaneous Issues

The conclusive effect of an attorney's criminal conviction merely establishes for State Bar purposes that the attorney committed the acts necessary to constitute the offense. Whether those

acts amount to professional misconduct, in the context of a crime that does not necessarily involve moral turpitude, is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction.

[7] **147 Evidence—Presumptions**
191 Effect/Relationship of Other Proceedings
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1691 Conviction Cases—Record in Criminal Proceeding

An attorney's conviction for assault with a firearm is conclusive proof that the attorney committed the elements for that crime, i. e., that a person was assaulted and that the assault was committed with a firearm. An assault is defined as an unlawful attempt to apply physical force upon the person of another at a time when the accused had the present ability to apply such physical force. An attempt to apply physical force is not unlawful when done in lawful self-defense. An attorney's conviction of this crime therefore conclusively established that the attorney unlawfully attempted to apply physical force upon the victim. As the assault was by definition unlawful, the review department concluded that it was not done in self-defense.

[8 a-c] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1527 Conviction Matters—Moral Turpitude—Not Found

The crime of assault with a firearm does not in and of itself constitute a crime of moral turpitude for attorney discipline purposes. If moral turpitude exists for this crime, it must be based on the particular circumstances surrounding the conviction. Criminal convictions have been determined to involve moral turpitude where the surrounding circumstances indicate a flagrant disregard for human life. However, where respondent's crime occurred while he had an honest belief that he had been shot or shot at and was in immediate danger of being shot at again; respondent considered his escape options before using his firearm, and fired only once as safely as he could from a moving vehicle; and there was no evidence that respondent intended to injure the victim, the review department concluded that respondent's conviction did not demonstrate moral turpitude or render respondent unfit to practice law.

[9] **1528 Conviction Matters—Moral Turpitude—Definition**

Moral turpitude has been defined in many ways, including as an act contrary to honesty and good morals. The foremost purpose of the moral turpitude standard is not to punish attorneys but to protect the public, courts, and the profession against unsuitable practitioners. Finding that an attorney's conduct involved moral turpitude characterizes the attorney as unsuitable to practice law.

[10] **1527 Conviction Matters—Moral Turpitude—Not Found**
1699 Conviction Cases—Miscellaneous Issues

Where the crime for which an attorney has been convicted does not inherently involve moral turpitude, a review of comparable case law and an examination of the particular facts and circumstances of the criminal conduct must be made in order to determine if cause for professional discipline exists.

[11 a, b] **196 ABA Model Code/Rules**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1527 Conviction Matters—Moral Turpitude—Not Found
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

Violent criminal behavior that does not rise to the level of moral turpitude may result in the imposition of discipline under both California case law and the ABA model ethics rules.

[12 a-c] 1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

Where the circumstances of respondent's conviction for assault with a firearm indicated that respondent engaged in a confrontation on a crowded freeway with another motorist which put innocent third parties at great risk and ultimately resulted in serious injury, the acts which were conclusively established by respondent's conviction, and the circumstances surrounding the conviction, including respondent's status as a trained and experienced reserve law enforcement officer, demonstrated a reckless disregard for the safety of others and therefore involved other misconduct warranting discipline.

[13 a, b] 130 Procedure—Procedure on Review
159 Evidence—Miscellaneous
165 Adequacy of Hearing Decision

Where, as a result of a hearing judge's dismissal of a disciplinary proceeding, the hearing judge did not make findings regarding aggravation/mitigation and concluded there was no need to rule on the admissibility of certain exhibits, thus foreclosing respondent's opportunity to substitute other evidence if the exhibits were not admitted, the review department concluded, when the dismissal was overturned, that it was appropriate to remand the matter to the hearing judge for further proceedings on the degree of discipline.

ADDITIONAL ANALYSIS

[None.]

OPINION

NORIAN, J.:

We review a hearing judge's dismissal of this disciplinary proceeding against respondent.[1] Respondent was convicted in 1991 of one felony count of assault with a firearm. (Pen. Code, § 245, subd. (a)(2).) The conviction was referred to the Hearing Department of the State Bar Court for a hearing and decision as to whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline, and if so found, the discipline to be imposed.

After a hearing, the hearing judge found neither moral turpitude nor other misconduct warranting discipline and granted respondent's motion to dismiss the matter. The Office of Trial Counsel seeks review of that decision, arguing that the facts and circumstances of respondent's conviction involved moral turpitude (or at the very least, other misconduct warranting discipline), and respondent should be suspended from the practice of law for four years, stayed, with three years actual suspension and four years probation.

Based upon our independent review of the record, we conclude that the elements of the crime for which respondent was convicted and the facts and circumstances surrounding the criminal conduct demonstrate that respondent is culpable of other misconduct warranting discipline. We also conclude that the record is not complete for purposes of imposing or recommending the imposition of discipline and therefore we remand this matter to the hearing judge for further proceedings on the degree of discipline.

BACKGROUND

In June 1991, respondent was charged with two felony counts: shooting at an occupied motor vehicle (Pen. Code, § 246), with the allegation that he intended to inflict great bodily injury upon a person not an accomplice (Pen. Code, § 12022.7); and assault with a firearm (Pen. Code, § 245, subd. (a)(2)), with the allegation that he discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another (Pen. Code, § 12022.5, subd. (b)). After a preliminary hearing, respondent was held to answer on both counts.

In September 1991, respondent entered a plea of no contest to violating Penal Code section 245, subdivision (a)(2), and admitted the Penal Code section 12022.5, subdivision (b) enhancement.[2] Respondent was placed on three years of formal probation, on conditions including one year of county jail (which was recommended to be served in a work furlough program), restitution, and psychological counseling. The remaining charge and its enhancement were dismissed.

FACTS AND FINDINGS

The hearing judge's findings of fact and the record indicate the following. Respondent was admitted to the practice of law in California in June 1983, and has been a member of the State Bar since that time. Respondent served as a reserve police officer with the Town of Los Gatos, California from June 1981 through April 1987. In April 1987, he became a reserve police officer with the City of East Palo Alto, California. Respondent has never been a full-time police officer. However, while with the Los Gatos department, he sometimes filled the position of "vacation relief" for the regular police staff. The vacation relief position required essentially full-time work as a police officer for certain periods of time.

Between 1980 and 1981, and prior to beginning service as a reserve police officer with Los Gatos, respondent undertook approximately 480 hours of classroom training at San Jose City College, which

1. Because we do not reach the issue of the appropriate discipline, we do not affirmatively publicize respondent's name in this published opinion. (*In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1.) However, the underlying disciplinary proceeding remains public.

2. Penal Code section 12022.5, subdivision (b), does not define a crime or offense. Rather, it provides for enhanced punishment for crimes under certain circumstances. (*People* v. *Henry* (1970) 14 Cal.App.3d 89, 92.)

included classroom and field training in the use of firearms, including, specifically, training in the use of force, "shoot/don't shoot" situations, use and care of firearms, and gun range training. In addition, respondent attended advanced officer training while at Los Gatos. He also attended reserve peace officer conferences, which included formal training, and was involved in putting on reserve peace officer conferences.

As a reserve police officer, respondent was required to qualify at the gun range in the use of firearms. At Los Gatos, he was required to qualify every six months initially, and eventually, every three months. At East Palo Alto, he was required to qualify every six months. Also while a reserve police officer, respondent attended "Hogan's Alley," an advanced police training gun range operated by the Los Angeles Police Department, and went through a "FATS" training system session, which simulates the use of firearms in various situations.

In June 1990, after making a court appearance in his capacity as a reserve police officer (wearing civilian clothes) for East Palo Alto, respondent had dinner with another officer. At approximately 10 p.m., he drove his civilian car toward his home.[3] After entering the freeway, respondent merged in front of a white Mazda which flashed its high beams at him. The Mazda was being driven by Patricia Philips, with Maine Jennings in the front passenger seat and fifteen-year-old Karen Phillips in the left rear passenger seat. The Mazda had tinted windows. Respondent was able to see that there were a driver and a passenger in the front of the Mazda, but he was unable to see the Mazda's rear seat and did not know that Karen Phillips was seated there.

After the Mazda flashed its high beams at him, respondent stepped on his brakes causing the Mazda to brake. During the course of his drive, respondent changed lanes two more times in front of the Mazda and the Mazda flashed its high beams at him. At one point, while respondent's vehicle was in the number one lane (counting from the left), the Mazda pulled over to the paved median on the left to try to pass respondent's vehicle. Respondent testified that he edged over towards the median to prevent the Mazda from passing him because he knew that the center median narrowed ahead and that the Mazda would not be able to get around him.

As respondent neared his exit, he moved to the far right, the exit-only number three lane. While driving in that lane, respondent observed the Mazda in his mirror. The Mazda was coming up behind him in the number two lane, slightly behind and to the left of respondent's vehicle. At that time, respondent observed a long, silver, slender, cylindrical object being stuck out the right front passenger window of the Mazda. He also saw part of a head sticking out of the window. Respondent believed that the cylindrical object could be a rifle or a shotgun. The Mazda also entered respondent's lane, so respondent tried to stay to the far right of his lane.

The traffic in the exit-only lane began to slow. Respondent lost sight of the cylindrical object and the head sticking out of the window when the Mazda came up on his vehicle's blind spot. He then heard a popping sound, and his driver's door window shattered, scattering glass into the car and over his arm and neck. Respondent felt a burning sensation in his left shoulder, and his neck was bleeding. Respondent believed that he had either been shot or shot at by the passenger in the Mazda. Maine Jennings had in fact shattered respondent's car window with a silver baseball bat that had been on the Mazda's rear floorboard.

The Mazda moved ahead of respondent's car in the number two lane. Respondent then noticed the Mazda's brake lights go on, that the Mazda was slowing down, and that the distance between his car and the Mazda was decreasing. Respondent saw a head sticking out of the Mazda's passenger window, looking back at him. In addition, as the Mazda was moving back towards respondent's car, the Mazda partially entered respondent's traffic lane. Respondent believed that because of the traffic conditions he

3. Respondent's car was equipped with a cellular telephone, but apparently not with a two-way police radio.

could not take evasive action. Respondent removed from his glove compartment a nine-millimeter semi-automatic handgun, which he was allowed to carry, and rested it on his left wrist, pointing it at the Mazda as it slowed and moved closer to him. Respondent believed that he was going to be shot at again. When the Mazda continued to slow down, respondent fired one shot at the right passenger door of the Mazda. At the time respondent fired his gun, the Mazda was a couple of feet away from him. Although respondent intended to hit the right passenger door of the Mazda, his bullet entered the right rear window and struck Karen Phillips in the face, severely injuring her.[4]

Patricia Philips then drove immediately to a hospital. Respondent tried to follow the Mazda to record its license plate number. He was unable to do so, because the Mazda reached speeds in excess of 90 miles per hour. Unable to get the Mazda's license plate number, respondent dialed 911 on his car telephone. He informed the California Highway Patrol (CHP) emergency dispatcher that he was a reserve police officer, and that he had been shot at or that someone had struck his vehicle with an object, breaking his driver's side window. He did not inform the dispatcher at that time that he had fired his weapon at the vehicle. He was instructed by the CHP dispatcher to return to his home, and that they would send someone out to see him.

After arriving home, respondent called his police department's reserve officer coordinator and told him that he had been involved in a shooting incident. He then contacted the CHP as he had been requested to do earlier by the emergency dispatcher. Respondent was informed at the time that the CHP had a report of a female having been shot on the freeway. Respondent became concerned because he did not know there was a female in the Mazda. Respondent did not know whether the reported shooting was related or not to his incident. After learning of the injury, respondent became upset and informed the CHP that he had fired his weapon.

The hearing judge found that respondent did not initiate the confrontation with the occupants of the Mazda; that he believed he had been shot or shot at and believed he was about to be shot at again; that he considered all his escape options before retrieving his weapon; that he delayed shooting until the last second; that he shot only once; and that he had not shot freehand. Although respondent's actions led to a tragic result, the hearing judge concluded that respondent's conduct did not show a total disregard for the safety of others and therefore did not involve moral turpitude. Furthermore, the hearing judge concluded there was no nexus between the circumstances of respondent's criminal conduct and the practice of law, and that respondent's actions did not demean the integrity of the legal profession or breach his responsibility to society. As a result, the hearing judge concluded that the conviction did not involve other misconduct warranting discipline.

DISCUSSION

As indicated above, the Office of Trial Counsel requested review, arguing that the facts and circumstances of respondent's conviction involved moral turpitude or at the very least, other misconduct warranting discipline. In reply, respondent asserts that we should adopt the hearing judge's dismissal because "A lawyer should not be disciplined when he took reasonable and considered steps to preserve his own life."

At oral argument we requested supplemental briefing from the parties on the effect of Business and Professions Code section 6101 on respondent's claim of self-defense.[5] That section provides in relevant part that in attorney disciplinary proceedings, the record of the attorney's conviction "shall be conclusive evidence of guilt of the crime of which he or she has been convicted." The Office of Trial Counsel argues that section 6101 precludes the use of a self-defense claim to defeat culpability, but that such evidence may be considered on the issue of the degree of discipline. Respondent asserts in his supple-

4. The bullet entered the right side of her face and exited the left side. She lost several teeth and part of her gum.

5. All further references to sections are to the Business and Professions Code unless otherwise indicated.

mental brief that the section only applies to crimes that inherently involve moral turpitude, which respondent's crime does not, and that any contrary interpretation of the statute would be unconstitutional.

A. Disputed Factual Findings

Before we turn to the effect of the statute on this proceeding, we address the Office of Trial Counsel's argument that we should reject some of the hearing judge's factual findings. All three occupants of the Mazda testified at respondent's preliminary hearing in the criminal proceeding. At the State Bar hearing, a transcript of the three witnesses' preliminary hearing testimony was introduced instead of their live testimony. (See § 6102 (f).) All three occupants of the Mazda testified similarly as to the events and their testimony differed significantly from respondent's version of the events. According to the people in the Mazda, respondent initiated the confrontation and was the aggressor throughout.

The State Bar Court hearing judge found respondent's version of the events to be the more credible version, as reflected in her findings of fact. In a footnote, the hearing judge explained that she found respondent's version more credible because she had the opportunity to observe him during his testimony and that the testimony of the other witnesses was, in some instances, implausible. The Office of Trial Counsel cites to this footnote in arguing that the hearing judge did not properly assess credibility. The Office of Trial Counsel contends that we should reassess the credibility of the witnesses and find that the occupants of the Mazda told the more credible version.

[1] We agree with the Office of Trial Counsel that there are numerous factors to consider in assessing witness credibility beyond observing the witness while testifying. (See Evid. Code, § 780.) We also note that the hearing judge, as the trier of fact in State Bar proceedings, is to determine the credibility of witnesses and hearsay declarants. (Evid. Code, § 312.) Thus, all applicable factors used to determine witness credibility should have been considered when the relative credibility of respondent and the three people in the Mazda was assessed. The fact that the occupants of the Mazda testified by way of their preliminary hearing transcript, which is expressly authorized in State Bar proceedings by section 6102 (f), is not reason to discount their testimony or find it less credible than live witness testimony.

Contrary to the Office of Trial Counsel's assertion, however, we find nothing in the record to indicate that the hearing judge failed to consider all appropriate factors in determining the credibility of all witnesses. The cited footnote is at best, ambiguous. It does not indicate that the hearing judge did not apply other factors in determining credibility. On the contrary, the footnote indicates that the hearing judge considered more than respondent's demeanor while testifying. Viewing the record as a whole, we find no support for the Office of Trial Counsel's assertion that the hearing judge did not apply all appropriate factors in assessing the credibility of the witnesses in this matter. **[2a]** Nevertheless, we conclude that the hearing judge may not reach conclusions, even if based on evidence found to be credible, that are inconsistent with the conclusive effect of respondent's conviction.

B. Conclusive Effect of Conviction

[3] As indicated above, the record of respondent's felony conviction is conclusive evidence of his guilt of the crime for which he was convicted. (*In re Crooks* (1990) 51 Cal.3d 1090, 1097.) "[T]he conclusive presumption of guilt applies whether the convicted attorney seeks to 'reassert his innocence' or merely to relitigate a claim of procedural error." (*In re Prantil* (1989) 48 Cal.3d 227, 232.) The convicted attorney is conclusively presumed to have committed all of the elements of the crime. (See *In re Duggan* (1976) 17 Cal.3d 416, 423.)

[4] A conclusive presumption is an assumption of fact that the law requires to be made from the finding of the existence of another underlying fact. (Evid. Code, § 600.) A conclusive presumption is in reality a rule of substantive law, not a rule of evidence, and no evidence may be received to contradict it. (1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, § 277, p. 237.)

[5] We do not find persuasive respondent's argument that the conclusive presumption applies only for crimes involving moral turpitude. The Supreme Court has applied the same presumption where the crime for which the attorney was convicted did not involve moral turpitude per se (*In re Crooks*, *supra*, 51 Cal.3d at p. 1097; *In re Larkin* (1989) 48 Cal.3d 236, 244), and we have done the same. (*In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 204.) The Supreme Court has inherent authority to extend the same conclusive presumption to other criminal convictions. In addition, the difference in the standards of proof between the State Bar Court and the criminal courts presents a strong policy consideration that weighs in favor of the presumption in all discipline proceedings that result from criminal convictions. Without the presumption, matters would be litigated in the State Bar Court under a clear and convincing standard of proof that had already been adjudicated in the criminal courts beyond a reasonable doubt.

We also find respondent's constitutional argument unpersuasive, having been resolved by the Supreme Court in *In re Gross* (1983) 33 Cal.3d 561, 567, which held that neither constitutional nor policy reasons preclude applying a conclusive presumption for disciplinary purposes based on a criminal conviction. Further, we note that *In re Larkin*, *supra*, 48 Cal.3d 236, provided ample notice to respondent that the presumption would be applied for crimes that did not involve moral turpitude per se.[6] **[6 - see fn. 6]** We also perceive no unfairness to respondent in applying the conclusive presumption. He had well over a year to reflect on his conduct and the consequences of a criminal conviction on his license to practice law before he entered his plea.

[7] Thus, respondent is conclusively presumed to have committed the elements for the crime of assault with a firearm. Those elements are that a person was assaulted and that the assault was committed with a firearm. (CALJIC No. 9.02.) An assault is defined as an unlawful attempt to apply physical force upon the person of another at a time when the accused had the present ability to apply such physical force. (CALJIC No. 9.00.) An attempt to apply physical force is not unlawful when done in lawful self-defense. (*Id.*) Respondent's conviction therefore conclusively establishes that he unlawfully attempted to apply physical force upon the victim. As the assault was by definition unlawful, it was not done in self-defense.

Our rejection of respondent's claim that he should not be disciplined on the basis of his conviction because he acted in self-defense does not foreclose inquiry into the facts and circumstances surrounding the conviction. **[2b]** Self-defense in the criminal context requires that the accused entertain an honest and reasonable belief that bodily injury is about to be inflicted upon the accused. (CALJIC No. 5.30; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, §§ 239-242, pp. 275-279.) Thus, the conclusive effect of respondent's conviction establishes that respondent did not have an honest *and* reasonable belief. We have no basis for disturbing the finding on this record that respondent had an honest belief that he was about to be assaulted. However, we must reject, as inconsistent with the conclusive effect of respondent's conviction, the hearing judge's findings and conclusions which indicate that respondent's actions were reasonable.

C. Culpability

The Office of Trial Counsel contends that respondent's conduct involves moral turpitude. **[8a]** The crime for which respondent was convicted does not in and of itself constitute a crime of moral

6. Respondent apparently misinterprets the effect of the conclusive presumption on the discipline proceeding. The basis of his argument seems to be that applying the presumption for crimes not involving moral turpitude per se would necessarily establish that respondent is culpable of professional misconduct, thus depriving him of a meaningful opportunity to be heard in defense. **[6]** However, as indicated above, the conclusive effect of respondent's conviction merely establishes for State Bar purposes that respondent committed the acts necessary to constitute the offense. Whether those acts amount to professional misconduct, in the context of a crime that does not necessarily involve moral turpitude, is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction. (*In re Kelley* (1990) 52 Cal.3d 487, 494; see also *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260.) Respondent had every opportunity to, and in fact did, defend against that charge.

turpitude for attorney discipline purposes. (*In re Rothrock* (1940) 16 Cal.2d 449, 459.) If moral turpitude exists in this case, it must be based on the particular circumstances surrounding the conviction. (*In re Kelley*, *supra*, 52 Cal.3d at p. 494.) **[9]** Moral turpitude has been defined in many ways, including as an act contrary to honesty and good morals. (*In re Scott* (1991) 52 Cal.3d 968, 978.) The foremost purpose of the moral turpitude standard is not to punish attorneys but to protect the public, courts, and the profession against unsuitable practitioners. (*Ibid.*) Finding that an attorney's conduct involved moral turpitude characterizes the attorney as unsuitable to practice law. (*In re Strick* (1983) 34 Cal.3d 891, 902.)

[8b] Essentially, the Office of Trial Counsel argues that respondent's conviction involves moral turpitude because the surrounding circumstances demonstrate a flagrant disregard for human life. Criminal convictions not involving moral turpitude per se have been determined to involve moral turpitude where the circumstances surrounding the conviction indicate a flagrant disregard for human life. (*In re Alkow* (1966) 64 Cal.2d 838, 840-841; *In the Matter of Frascinella* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 543, 550.) On the other hand, drunk driving, while inherently dangerous to human life, has been classified as a crime which may or may not involve moral turpitude. (*In re Kelley*, *supra*, 52 Cal.3d at p. 494.) Even repeated convictions of driving under the influence by an attorney with experience prosecuting such crimes was characterized by the Office of Trial Counsel in another case as a crime which did not involve moral turpitude. (*In the Matter of Anderson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 39, 43.) On remand of *Anderson*, we determined that the facts and circumstances of the criminal conduct demonstrated that the misconduct approached but did not cross the moral turpitude line. (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.)

[8c] While we agree with the Office of Trial Counsel that the commission of respondent's crime on a crowded freeway is inherently dangerous to human life and that respondent's status as a police officer makes his crime more serious than otherwise might be the case, we cannot conclude that these factors necessarily demonstrate moral turpitude, in light of the other facts and circumstances found by the hearing judge. Respondent was found to have honestly believed that he had been shot or shot at and was in immediate danger of being shot at again; he considered his escape options before using his firearm; and he fired only once as safely as he could from a moving vehicle. In addition, there is no evidence that respondent intended to injure the victim. In view of the findings below with respect to respondent's subjective beliefs, we cannot conclude that his unlawful assault of the victim renders him morally unfit to practice law.

The Office of Trial Counsel argues in the alternative that respondent's felony conviction "impugn[s] the integrity of the profession" and that the conviction together with the facts and circumstances therefore constitute other misconduct warranting discipline. We agree.

[10] Where the crime does not inherently involve moral turpitude we must review comparable case law and examine the particular facts and circumstances of the criminal conduct in order to determine if cause for professional discipline exists. **[11a]** The Supreme Court has repeatedly imposed discipline on attorneys for violent behavior that did not rise to the level of moral turpitude. In *In re Larkin*, *supra*, 48 Cal.3d 236, the Supreme Court concluded that an attorney's conviction for misdemeanor assault with a deadly weapon and conspiracy to commit the assault involved other misconduct warranting discipline. Larkin conspired with a client to assault a man who was dating Larkin's estranged wife. The victim was struck on the chin with a metal flashlight by the co-conspirator/client. The charges were filed as felonies but were thereafter reduced to misdemeanors. Larkin "assaulted the victim not in the 'heat of anger,' but in the course of a premeditated and conspiratorial plan. It was no spontaneous reaction out of anger or passion." (*Id.* at p. 245.)

In *In re Otto* (1989) 48 Cal.3d 970, the Supreme Court concluded that the attorney's felony conviction for assault by means likely to produce great bodily injury and infliction of corporal punishment on a cohabitant of the opposite sex involved other misconduct warranting discipline.

The criminal court reduced Otto's convictions to misdemeanors. The facts and circumstances surrounding the convictions are not stated in the opinion. However, the Supreme Court agreed with the State Bar that the matter involved other misconduct warranting discipline.

In *In re Hickey* (1990) 50 Cal.3d 571, the Court also found other misconduct warranting discipline. Hickey was convicted of carrying a concealed weapon, a misdemeanor, and was found culpable of violating former rule 2-111 of the Rules of Professional Conduct in a client matter. The circumstances surrounding the conviction included Hickey's repeated acts of violence toward his wife and others, which arose from his abuse of alcohol. The victims' injuries were apparently not serious.

Respondent asserts that *In re Otto* and *In re Hickey* are distinguishable because the criminal conduct in those cases involved repeated acts of violence and was at least partly attributable to alcohol abuse. We also note that *In re Larkin* involved the attorney's assault in the course of a premeditated and conspiratorial plan. Nevertheless, the convictions in *Hickey* and *Larkin* were misdemeanors and in *Otto*, the conviction was reduced to a misdemeanor. Also, the criminal conduct in these cases did not involve the discharge of a firearm or serious injury to the victim. **[11b]** We further note that criminal offenses involving violence are set forth in the official comment to rule 8.4 of the American Bar Association, Model Rules of Professional Conduct, as the type of crime for which a lawyer should be professionally answerable. (See discussion in *In the Matter of Respondent I*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 270.) **[12a]** Finally, respondent's status as a law enforcement officer sworn to uphold the law makes his crime particularly egregious. (Cf. *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933.)

[12b] At the time of his criminal conduct, respondent had been a reserve police officer for approximately nine years and had extensive training in the use of firearms. The tragic incident in this matter began with an altercation between two motorists on a crowded freeway. Despite respondent's contrary testimony, our review of the record indicates that respondent was not blameless in the confrontation with the Mazda. Upon initial contact with the Mazda, respondent refused to allow the Mazda to pass him even though he had ample opportunity to do so. Thereafter, instead of slowing down and allowing the Mazda to pass, he pulled over onto the paved center median to prevent the Mazda from passing him.

Despite his training and experience as a police officer, respondent did not use his car telephone to inform the CHP about the erratic and illegal driving by the Mazda. Despite his training and experience as a police officer, he participated in a dangerous confrontation with another automobile on a crowded freeway, endangering not only himself and the occupants of the Mazda, but innocent third party motorists. This confrontation precipitated the even more dangerous altercation that resulted in respondent unlawfully firing his weapon from his automobile at an occupied automobile while both cars were traveling on a crowded freeway at night.

[12c] That death or more serious injury to human life did not occur is indeed fortuitous. The occupants of the Mazda clearly were not blameless in these events. Nevertheless, respondent, a trained and experienced reserve police officer, engaged in a confrontation that put innocent third parties at great risk of injury and ultimately resulted in serious injury to Karen Phillips. We find that the acts which are conclusively established by respondent's conviction and the circumstances surrounding the conviction, demonstrate a reckless disregard for the safety of others and warrant professional discipline. (See *In the Matter of Respondent I*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 270.) We therefore conclude that respondent's conviction involved other misconduct warranting discipline.

DISPOSITION

Respondent asserted at oral argument that he should be allowed to present evidence in mitigation if the review department found culpability. The deputy trial counsel opposed the request. **[13a]** The record reveals that at least part of the aggravation/mitigation phase of the trial occurred before the hearing judge. However, respondent offered several character letters in mitigation and the deputy trial

counsel requested an opportunity to speak to the authors before he decided whether to object to their introduction. The hearing judge deferred ruling on the admissibility of those letters and gave the deputy trial counsel a period of time to file objections. No discussion followed regarding what would happen in the event the deputy trial counsel objected to some or all of the letters and the hearing judge sustained the objections. The deputy trial counsel objected to the introduction of the letters in his initial brief on review.

[13b] Because of the dismissal, the hearing judge did not make findings regarding aggravation/mitigation and concluded there was no need to rule on the admissibility of the exhibits. Had the hearing judge ruled at trial that the letters were inadmissible, respondent may have decided to present the evidence in admissible form. In light of the foregoing, we deem it appropriate to remand this matter to the hearing judge for further proceedings on the degree of discipline. (See *In the Matter of Respondent N* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 502, 504 [hearing on remand may be limited to newly-offered evidence and argument].) We express no opinion on what that discipline should be.

I concur:

PEARLMAN, P.J.

STOVITZ, J., concurring:

I agree fully with the reasoning and disposition of this court's opinion. I merely wish to emphasize that the facts of this conviction referral proceeding support so strongly the Supreme Court's consistent application to attorney disciplinary matters of the principle that an attorney's conviction of any crime is conclusive evidence of guilt of the elements of that crime. (E.g., *In re Crooks* (1990) 51 Cal.3d 1090, 1097, cited in this court's opinion.)

In the face of this settled principle of law, respondent has asked us to disregard his no contest plea to a firearm felony and instead to consider justified his shooting at another car on a freeway, which all concede ended in tragic injury to a passenger. This court's opinion addresses correctly the legal reasons why we do not and cannot accede to respondent's request. I emphasize that even if the law were not settled, we have no factual basis for relieving him from the consequences of his felony conviction.

Although the entire freeway incident in June 1990 happened in somewhat compressed time, respondent had a year and three months to reflect on it before entering his plea, for he was not charged with assault until June 1991 and did not enter his plea until September 1991.

A criminal defendant may plead nolo contendere or guilty for a variety of reasons. I assume that respondent weighed many factors before entering his plea. But respondent was not the usual criminal defendant. He had been a member of the State Bar for eight years at the time of his plea. Even more significantly, he had served very actively as a reserve police officer for ten years, completing hundreds of hours of basic and advanced police training, including in firearm "shoot/don't shoot" situations involving even more compressed time spans than he experienced in the June 1990 freeway incident. This record shows that respondent's police work was very important to him as measured by the number of hours he devoted to service and training. Given the drastic consequences as to future police service which any peace officer can assume will flow from a felony firearm assault conviction, I cannot deem respondent's felony plea to be anything other than a purposeful acknowledgment of his guilt. (See Pen. Code, § 1016, subd. 3; 4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2140, pp. 2508-2509.) For that reason alone, I must assume that whatever other interests his plea may have served, it is exactly the type of deliberate act which tells us why the law, as applied by the court, calls on us to reject in this proceeding any theory of culpability defense inconsistent with the elements of his crime.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DOUGLAS WILLIAM SNYDER

A Member of the State Bar

No. 88-O-11908

Filed November 24, 1993

SUMMARY

In 1990, as a result of misconduct involving commingling, misappropriation, and failure to account for trust funds, respondent received five years stayed suspension and was actually suspended for two years, placed on probation and ordered to comply with rule 955, California Rules of Court. In this proceeding, respondent was found to have perjured himself in his affidavit submitted pursuant to rule 955(c), to have engaged in the unauthorized practice of law while suspended, to have failed to account for and return unearned fees, and to have appeared for a client without the client's authority. Based on mitigating circumstances and the fact that the Office of the Chief Trial Counsel did not recommend disbarment, the hearing judge recommended a five-year stayed suspension, five years probation, and actual suspension for 30 months, commencing retroactively as of the expiration of respondent's prior two-year actual suspension and continuing until respondent could show rehabilitation and fitness to practice. (Michael E. Wine, Judge Pro Tempore.)

The Office of the Chief Trial Counsel requested review solely on the issue that the retroactive commencement of the recommended suspension inappropriately gave respondent credit for his continuous suspension due to non-payment of his State Bar membership fees. Upon independent review of the record, the review department concluded that the recommendation of suspension rather than disbarment could not be reconciled with Supreme Court precedent generally ordering disbarment as the usual discipline for an attorney's wilful violation of rule 955. The review department held that under the circumstances, applicable case law compelled a recommendation of disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Victoria R. Molloy, Paul A. Tenner

For Respondent: Theodore A. Cohen

HEADNOTES

[1 a-c] 130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure

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.

166 Independent Review of Record
1093 Substantive Issues re Discipline—Inadequacy
1911.90 Rule 955—Other Procedural Issues

Because the review department must review the record independently and is not bound by the hearing judge's findings or recommendation (Trans. Rules Proc. of State Bar, rule 453(a)), the issue of appropriate discipline in a matter involving violation of rule 955, California Rules of Court and other misconduct did not turn on the one narrow issue argued on review by the parties regarding the appropriateness of a retroactive suspension. The review department therefore considered whether any form of suspension was adequate discipline given Supreme Court precedent generally ordering disbarment for rule 955 violations. Although the State Bar's declination to recommend disbarment was accorded considerable weight, it could not be reconciled with the precedent making disbarment the appropriate discipline.

[2 a, b] 213.20 State Bar Act—Section 6068(b)
221.00 State Bar Act—Section 6106
1913.90 Rule 955—Other Substantive Issues

Where an attorney failed to advise a client, the insurer-defendant or the superior court in which the client's lawsuit was filed of his disciplinary suspension, but filed an affidavit with the Supreme Court declaring under penalty of perjury that he had complied with the rule requiring him to notify all clients, courts, and opposing parties of his suspension, his false affidavit constituted an act of moral turpitude and dishonesty, and his failure to comply with the rule violated the statute requiring respect for courts and judges.

[3 a-d] 213.10 State Bar Act—Section 6068(a)
220.30 State Bar Act—Section 6104
230.00 State Bar Act—Section 6125

Where an attorney had been suspended from practice and had been contacted by new counsel retained by his former client, the attorney's subsequent negotiation with an insurance company on the client's behalf without the new counsel's consent constituted unauthorized practice of law and violated the statute prohibiting attorneys from appearing without authority.

[4 a-c] 1913.24 Rule 955—Delay—Filing Affidavit
1913.42 Rule 955—Compliance—Notice
1913.44 Rule 955—Compliance—Affidavit

Wilful violation of rule 955 deserves strong disciplinary measures because of the rule's critical prophylactic function. Disbarment is the usual discipline ordered by the Supreme Court for such violations. Where respondent not only filed his affidavit of compliance late, itself a cause for discipline, but also completed the affidavit shortly after improperly contacting an insurer while on suspension and without client authorization, as well as falsely reporting his compliance with the rule, respondent's violation of rule 955 was a serious one.

[5] 511 Aggravation—Prior Record—Found
521 Aggravation—Multiple Acts—Found
740.59 Mitigation—Good Character—Declined to Find
750.52 Mitigation—Rehabilitation—Declined to Find
795 Mitigation—Other—Declined to Find

The fact that misconduct arose from aberrant facts and circumstances has been accorded mitigating weight in appropriate cases. However, where respondent's prior misconduct had involved multiple acts over his relatively few years of practice, and his prior and current misconduct together spanned six of his ten years in practice, it was not appropriate to consider respondent's misconduct as aberrational.

[6 a, b] **725.36 Mitigation—Disability/Illness—Found but Discounted**
740.33 Mitigation—Good Character—Found but Discounted
750.32 Mitigation—Rehabilitation—Found but Discounted
760.34 Mitigation—Personal/Financial Problems—Found but Discounted
765.39 Mitigation—Pro Bono Work—Found but Discounted
793 Mitigation—Other—Found but Discounted
802.64 Standards—Appropriate Sanction—Limits on Mitigation
1093 Substantive Issues re Discipline—Inadequacy

Mitigating evidence of family pressures and misfortunes, good character, therapy, community service, and compliance with probation duties, similar to evidence which had been found sufficiently mitigating to avert an attorney's disbarment for prior misconduct, was not sufficient to justify a recommendation short of disbarment in a subsequent matter in view of the attorney's additional, serious misconduct and the need for protection of the public.

[7] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
179 Discipline Conditions—Miscellaneous
1911.90 Rule 955—Other Procedural Issues
2509 Reinstatement—Procedural Issues

Where review department recommended respondent's disbarment, issue of whether respondent should be given credit toward required waiting period to apply for reinstatement (Trans. Rules Proc. of State Bar, rule 662), on account of time spent on continuous suspension prior to disbarment, was properly reserved for consideration by a hearing judge on an appropriate petition following the disbarment.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
213.21 Section 6068(b)
220.31 Section 6104
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
1915.10 Rule 955

Aggravation

Found

611 Lack of Candor—Bar

Standards

802.30 Purposes of Sanctions

Discipline

1921 Disbarment

Other

175 Discipline—Rule 955

OPINION

STOVITZ, J.:

Effective February 1990 the Supreme Court suspended respondent, Douglas W. Snyder, from practice for five years, stayed the execution of that suspension and placed him on probation on conditions including a two-year actual suspension. The Supreme Court also required him to comply with the provisions of rule 955, California Rules of Court.[1] (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302 (hereafter "*Snyder I*").)

In the present case we review, a State Bar Court hearing judge pro tempore found respondent culpable of very serious additional misconduct including perjuring himself with respect to his compliance with rule 955 and unauthorized practice of law while suspended, and recommended that he be suspended for five years, that that suspension be stayed and that respondent be placed on a five-year probation with an actual suspension for thirty months commencing on February 8, 1992, the day after his prior 1990 two-year actual suspension ended.[2] The current recommendation also calls for respondent to demonstrate his rehabilitation, present 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.)

Neither party disputes the findings of the hearing judge on which the present suspension recommendation rests. The Office of the Chief Trial Counsel ("OCTC") seeks our review on one ground only: that the hearing judge erred in recommending that respondent's suspension start in 1992, arguing that retroactive suspension would inappropriately give respondent credit for his continuous suspension for nonpayment of State Bar membership fees. Respondent supports the hearing judge's recommendation, pointing out that he allowed himself to be suspended earlier in order to avoid later leaving clients in a bind because of interrupted representation, he has been suspended continuously since 1990 and he should not be penalized for his decision to act in his clients' interest.

[1a] This review under rule 450, Transitional Rules of Procedure of the State Bar, requires us to review the record independently. We are not bound by the hearing judge's findings or recommendation. (Trans. Rules Proc. of State Bar, rule 453(a); see *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916; *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 229.) Having undertaken this independent review of the record, we shall adopt the hearing judge's findings of culpability. However neither party at oral argument nor the hearing judge in his decision explained how the suspension recommendation could be reconciled with Supreme Court precedent generally ordering disbarment as the usual discipline for an attorney's wilful violation of a Supreme Court order directing compliance with rule 955(a). Under that precedent we are unquestionably obligated to recommend disbarment on the findings of this case.

A. BACKGROUND AND RESPONDENT'S PRIOR RECORD OF DISCIPLINE.

Effective February 7, 1990, the Supreme Court suspended respondent in *Snyder I*. According to the Supreme Court's opinion in that case, respondent's misconduct started in 1984, just four years after his admission to practice. This misconduct involved his commingling, misappropriation and failure to account for nearly $3,500 in trust funds.

In *Snyder I*, respondent represented a friend in a personal injury case. After the case settled for $15,000 in 1984, respondent disbursed much of the funds at his client's instructions and paid himself his attorney

1. Hereafter, references to "rule 955" will be to that provision of the California Rules of Court. As pertinent, rule 955 requires suspended, disbarred or resigned attorneys to notify clients, courts and opposing counsel in pending matters of the attorney's inability to practice law, to make prescribed arrangements for return of the clients' property and to file an affidavit with the Supreme Court attesting to compliance with the rule.

2. Respondent, who was admitted to practice law in 1980, has been under continuous suspension for nonpayment of State Bar membership fees since July 30, 1990.

fee. However, when his client wanted the nearly $3,500 balance, respondent told him there was no money left. Respondent admitted to his client that he had used some of the funds for respondent's own expenses. The State Bar investigation started in late 1984. Repeatedly promised repayment to the client was not completed until 1988.

The volunteer State Bar Court considered mitigating several circumstances including that respondent suffered an emotional breakdown in 1984 when his wife abandoned him, that he had to care for his 11-year-old daughter and that he also suffered financial problems and voluntarily stopped practicing law from 1984 to 1987. The volunteer hearing panel and review department recommended the five-year stayed, two-year actual suspension ordered by the Supreme Court.[3]

Although in *Snyder I*, the Supreme Court declined to order disbarment in view of the mitigation, it was "not so compelling" as to warrant reduction of the two-year suspension. (*Snyder* v. *State Bar*, *supra*, 49 Cal.3d at p. 1309.) Justices Kaufman and Broussard dissented in part, opining that the record showed "overwhelming" mitigation and that a one-year actual suspension was enough discipline. (*Id.* at p. 1312 (conc. and dis. opn. of Kaufman, J.).) The majority noted respondent's claim that the misconduct was "isolated," and had not recurred. However, it opined that respondent's misconduct after only a short period of practice and its extension over a substantial time period did not offer confidence as to lack of future harm. (*Id.* at p. 1309 (maj. opn.).) The majority also noted the length of time restitution took (well after State Bar investigation had started) and concluded that for degree of discipline purposes, this case was comparable to the case of *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, in which the Court ordered a two-year actual suspension. (*Snyder* v. *State Bar*, *supra*, 49 Cal.3d at pp. 1310-1311.)

B. CURRENT MATTER WE NOW REVIEW.

1. Dismissal of count 1.

Respondent was charged with three matters of misconduct. The hearing judge dismissed the first count for lack of clear and convincing evidence. This count arose out of respondent's purchase in 1978 of 280 acres of land in Riverside County. The charges alleged that respondent made false statements in 1986 and 1988 in federal court actions concerning the property and also made improper use of an attorney-client trust bank account. Notwithstanding OCTC's lack of dispute over the dismissal of count 1, we have reviewed the evidence received on that count, especially since some documentary evidence indicates on its face that respondent may have made a misrepresentation to a federal district court and it appears further that the hearing judge may not have considered all of the relevant documentary evidence in reaching his decision. However, after assessing the evidence, we do not consider it to constitute proof by the required standard of clear and convincing evidence that respondent made a culpable misrepresentation. We therefore adopt the hearing judge's findings for dismissal of count 1. Two counts remain involving the same client, Lori Smith, a dry cleaner.

2. Count 2: Smith's dissolution of marriage action.

In March 1989 Smith hired respondent to obtain a summary dissolution of marriage. Respondent asked for a $500 fee which covered attorney fees and court filing costs. Smith paid $250 and she and respondent agreed that the $250 balance could be satisfied by Smith doing dry cleaning for respondent. Respondent brought Smith three large orders of dry cleaning over the next month or six-week period. Respondent interviewed Smith twice and, at a third meeting, gave her a dissolution petition for her husband to sign. Smith got her husband's signature on the petition, returned it to respondent but was unable to contact respondent further. Respondent never filed the peti-

3. The only difference between the hearing panel and review department recommendations was that the latter called for the actual suspension to continue until a standard 1.4(c)(ii) showing was met. The Supreme Court considered the standard 1.4(c)(ii) recommendation unnecessary in *Snyder I* and declined to impose it.

tion and performed no further services for Smith. In April 1990 another attorney helping Smith wrote to respondent five times seeking an accounting or refund of money but was unsuccessful. Smith hired a new lawyer, paid another $500 fee and finally got her dissolution which became final in November 1991.

In defending culpability on this count, respondent testified that he recalled Smith telling him to hold off taking action because she was looking at a possible reconciliation with her husband. He also testified that Smith owed him part of his fee which she was unable to pay. After assessing Smith's testimony which differed from respondent's, the hearing judge concluded that respondent was culpable as outlined above. On review, respondent does not take issue with the judge's findings.

The hearing judge concluded that respondent wilfully violated current rule 3-700(D)(2) of the Rules of Professional Conduct by not returning unearned fees upon his withdrawal from employment; that he wilfully violated former rule 8-100(B)(3) and current rule 4-100(B)(3) of the Rules of Professional Conduct by not accounting for his use of Smith's advance for attorney fees and court filing costs, and that he wilfully violated current rule 3-110(A) of the Rules of Professional Conduct by failing, on account of reckless disregard of his duties to Smith, to proceed on her behalf during an almost one-year period.

3. Count 3: Smith's personal injury case.

In March 1989, Smith hired respondent to represent her in a personal injury case. In early 1990, her case was nearing the one-year limitation on filing suit, she had not heard from respondent in some time and wondered whether respondent still represented her. In about mid-April 1990, she spoke with another attorney who agreed both to check into the matter and to represent her in it.

In the meantime, respondent's two-year suspension in *Snyder I* became effective February 8, 1990. **[2a]** Pursuant to rule 955, by March 10, 1990, respondent was required to notify clients and others in pending matters of his suspension and by March 20, 1990, file the affidavit with the Supreme Court that he had done so. He never notified Smith of his suspension, nor did he notify the insurer-defendant or the superior court in which Smith's suit had been filed. Smith found out about respondent's suspension from her new attorney who had checked with the State Bar. On April 4, 1990, respondent filed a rule 955 affidavit with the Supreme Court falsely declaring under penalty of perjury that he had notified all clients, courts and opposing parties of his suspension.

[3a] Smith's new attorney was able to contact respondent in mid-April. In the meantime and in late March 1990, respondent called the insurer handling Smith's claim. Two weeks later (about two months after his suspension started), respondent contacted the insurer again and without the new attorney's consent, respondent received a $7,700 offer to settle Smith's case. Respondent then called Smith with the offer. Smith reported this to her new attorney and respondent ultimately cooperated with that attorney by turning over Smith's file. The record shows that Smith's new attorney was able to settle the case for $9,000 but respondent delayed somewhat in communicating with Smith's new lawyer to settle his claim for attorney fees.

As to this count, respondent testified that he tried to get substitutions of attorney from all his clients. His motive for doing so was to avoid having to tell his clients that he was suspended. He mailed the substitutions out but conceded he had not gotten a signed one back from Smith. His explanation was unclear as to why he dealt with the insurer after he was suspended. However, as in count 2, *ante*, on review respondent does not dispute the findings.

[3b] The hearing judge concluded that respondent's practice of law while suspended violated Business and Professions Code section 6068 (a) by violating section 6125.[4] **[2b]** Respondent's failure to comply properly with rule 955 violated section 6068 (b), and the false affidavit he filed with

4. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

the Supreme Court attesting to his compliance with rule 955 violated section 6106. **[3c]** His appearance as Smith's attorney without authority violated section 6104. The hearing judge found respondent not culpable of violating several charged provisions of the Rules of Professional Conduct.

4. Evidence in mitigation and aggravation.

Respondent presented very favorable evidence from the monitor assigned in May 1990 to oversee his probation in *Snyder I*. That monitor gave his very high opinion as to respondent's cooperation and compliance with probation conditions. Respondent testified on his own behalf to additional domestic trauma beyond what he had suffered leading up to *Snyder I*. According to respondent, at the end of 1989, his wife remarried and his daughter, whom he had raised for several years, went to live with her mother. In March 1990 respondent's father suffered a heart attack, causing respondent added anxiety. Respondent also presented favorable character, therapeutic and community service evidence. Respondent completed four months of therapy in early 1990 to recover from the anxiety, emotional strain and abuse of alcohol he experienced about the time his prior suspension started. Respondent testified that although he was entitled to resume law practice after February 1992, he abstained from doing so in order not to have to withdraw from client matters if this proceeding led to discipline.

The hearing judge considered the following evidence in aggravation: respondent's prior discipline, that his conduct involved multiple acts of wrongdoing and that in attempting to justify his acts in both Smith matters, respondent "has been and remained less than candid in accepting responsibility for his actions." (Decision, p. 18.)

The hearing judge's decision accurately noted OCTC's declination to recommend disbarment. OCTC so decided primarily due to the weight it gave to mitigating evidence and the high opinion respondent's probation monitor gave with regard to respondent's cooperation and compliance with conditions. The judge noted the seriousness of respondent's conduct but found that it was aberrational in character, occurring during a period in which he experienced emotional distress.

C. DISCUSSION.

[1b] We start by adopting the hearing judge's findings and conclusions as to culpability in both Smith matters (counts 2 and 3). Accordingly, the only remaining issue is the appropriate degree of discipline to recommend. Rather than that issue turning on the narrow question argued by the parties of whether respondent's actual suspension should start in 1992 or in the future, we believe that the appropriate issue is whether any form of suspension is adequate discipline.

[4a] The Supreme Court has stated that a wilful violation of rule 955 "is, by definition, deserving of strong disciplinary measures" because the rule performs a "critical prophylactic function." (*Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1187.) The rule seeks to ensure that all concerned parties to a pending case, including the tribunal, learn about an attorney's discipline and that the Supreme Court, the ultimate body regulating attorneys, learns of the whereabouts of attorneys subject to its jurisdiction. (*Ibid.*)

[4b] In four decisions involving wilful violation of rule 955 this year, we recommended, and in three which have become final the Supreme Court ordered, disbarment—the usual discipline ordered by the Supreme Court for an attorney's wilful violation of rule 955(a). (*In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480 [original disciplinary proceeding after prior two-year actual suspension which showed wilful failure to comply with rule 955 as well as other serious misconduct; disbarment recommended]; *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439 [extensive mitigation did not outweigh record of repeated failure to adhere to duties to clients and Supreme Court orders; recommended disbarment ordered by Supreme Court Oct. 27, 1993, S020014]; *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382 [recommended disbarment ordered by Supreme Court July 28, 1993, S022260]; *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322 [recommended disbarment ordered by Supreme Court Sept. 30, 1993. S014931].) While some of the individual decisions cited above involved some facts more serious than in this record, others involved either less serious facts or less serious prior discipline than here.

The only rule 955 proceeding in which we did not recommend disbarment was *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527 which involved a relatively minor violation only of rule 955(c) by a two-week delinquency in the filing of a truthful affidavit after timely notification of clients under rule 955(a). **[4c]** The present case illustrates both the importance of rule 955 and the seriousness of respondent's violations of it. Had respondent complied with the rule, his client, Smith, would not have had to seek counsel simply to learn whether respondent was still representing her. Respondent's filing of his rule 955 affidavit was untimely, itself a cause for discipline. (See rule 955(c); *In the Matter of Friedman, supra*, 2 Cal. State Bar Ct. Rptr. at p. 534.) But far more serious was the fact that when he completed his affidavit, he had just made a recent contact with the insurer on Smith's behalf while he was suspended and without client authorization. The conclusion is inescapable from this record that respondent falsely reported his compliance in an attempt to seek his contingent fee after months of inactivity in derogation of his client's interest and in violation of a Supreme Court order specifying his duties to report his suspension to Smith and others.

[3d] In addition to the gravity of respondent's rule 955 violation, the record also shows in count 3 that respondent violated section 6125 by practicing law while suspended. We agree with the hearing judge that negotiating with the insurer in Smith's case constituted the practice of law. (See *In the Matter of Rodriguez, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 494-495.) We also agree with the hearing judge that respondent's practice of law after suspension violated section 6104 (see *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576-577), especially since the record shows that respondent obtained a settlement offer for Smith after Smith's new attorney had contacted respondent by leaving a phone message that he was now representing Smith. Moreover, respondent wilfully violated three of the Rules of Professional Conduct in failing to proceed on Smith's dissolution of marriage case for an extended period of time after receiving an advance for attorney fees and court filing expenses, in failing to account for those funds and in withdrawing without refunding unearned advanced fees.

[1c] The hearing judge's recommendation of suspension rather than disbarment appears influenced primarily by two factors: OCTC's declination to recommend disbarment and the hearing judge's characterization of the misconduct in the present record as aberrational. We have accorded OCTC's declination to recommend disbarment considerable weight. Yet, in our independent review, we cannot square OCTC's declination to seek disbarment with the authorities cited *ante* which make disbarment the appropriate discipline for an attorney's serious rule 955 violation, standing alone.

[5] The fact that misconduct arose from an aberrant episode has been accorded mitigating weight by the Supreme Court in an appropriate case. (See, e.g., *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245; but cf. *Hitchcock* v. *State Bar* (1989) 48 Cal.3d 690, 709-710.) Looking to Supreme Court decisions for guidance, this does not seem to be the appropriate case for considering respondent's acts aberrant. In the first place, in *Snyder I*, the Supreme Court did not accord any significant mitigating weight to a State Bar Court finding that respondent's prior misconduct was isolated. On the contrary, the Supreme Court noted that respondent's misconduct involved multiple acts over his relatively few years of practice and that combination did not offer confidence as to the lack of future harm. (*Snyder* v. *State Bar, supra*, 49 Cal.3d at p. 1309.) Looking at the combined effect of *Snyder I* and the present record, respondent's misconduct has spanned six of the ten years of his practice from his admission to his actual suspension in *Snyder I*.

[6a] Respondent did provide evidence of anxiety caused by family pressures and misfortunes as well as evidence of good character, positive therapy to overcome personal problems, community service and positive compliance with probation duties. Some similar evidence was considered by the Supreme Court in *Snyder I*. In that case, the Supreme Court determined that that favorable evidence showed that disbarment was not warranted. In view of the additional and serious misconduct we now judge, we cannot reach the same result as was reached in *Snyder I*.

[6b] Since our primary goal in imposing discipline is the protection of the public, the courts and the legal profession (see *Snyder* v. *State Bar*, *supra*, 49 Cal.3d at p. 1307; *Matthew* v. *State Bar* (1989) 49 Cal.3d 784, 790), we conclude that the public is entitled to the protection of a formal reinstatement hearing after disbarment before respondent is entitled again to practice law.

[7] If the Supreme Court adopts our recommendation, respondent may apply for reinstatement five years after disbarment. (Trans. Rules Proc. of State Bar, rule 662(a).) Upon good cause shown, rule 662(b) allows a petition to shorten the time to seek reinstatement to be made as early as three years after disbarment. The issue addressed below and raised by OCTC on review as to credit for time spent on continuous suspension is properly reserved for consideration by a hearing judge on appropriate petition by the respondent following disbarment. (See *In the Matter of Rodriguez*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 501, fn. 10; *In the Matter of Grueneich*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 444, fn. 7.)

D. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Douglas W. Snyder, be disbarred from the practice of law in this state. Assuming he remains continuously suspended until the effective date of the Supreme Court's order, we do not recommend that he again be required to comply with the provisions of rule 955. We do recommend that costs be awarded 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

ROBERT MICHAEL SKLAR

A Member of the State Bar

Nos. 87-O-13044, 91-P-07863

Filed December 10, 1993; as modified, February 7, 1994

SUMMARY

Respondent was found culpable of six counts of misconduct, involving misappropriation of trust funds in three personal injury cases, failure to advise clients in three cases of potential conflicts of interest, an improper loan to one client, failure to return files in three cases, failure to perform services in one case and failure to communicate with a client in another matter. Respondent also violated the reporting requirements of his previously imposed disciplinary probation. The hearing judge concluded that the misconduct was aggravated by bad faith and dishonesty and caused harm to clients, the public, and the administration of justice, and that no mitigating evidence was presented. Respondent admittedly suffered from cocaine addiction for which he was then in a court-ordered treatment program. The hearing judge recommended a four-year stayed suspension on conditions including actual suspension for two years and until respondent demonstrated his rehabilitation and fitness to practice. (George C. Wetzel, Judge Pro Tempore.)

Both parties sought review. The State Bar Office of Trials contended that respondent should be disbarred, based on his misappropriation of over $13,800 and his prior record of discipline, which the Office of Trials argued should have been given greater weight. Respondent contended that the misappropriation was negligent rather than intentional, that he was not culpable of the conflict of interest charges because the applicable rule did not cover potential conflicts, and that his loan to his client was a proper advance of litigation costs. He also argued that mitigating evidence should have been considered and that his prior misconduct should not have been considered aggravating because it was contemporaneous with the misconduct in this matter. He urged that the discipline include only one year of actual suspension.

The review department concluded that respondent did violate the conflict of interest rule by failing to advise three sets of clients of potential conflicts of interest, and that his loan to a client was improper, but that these violations were minor. However, the review department recommended respondent's disbarment based on his dishonest misappropriation of over $13,800 in trust funds over several years, the additional misappropriation of which he had been found culpable in the prior matter, his ongoing substance abuse problem, and his failure to comply with the terms of his probation.

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, b] **101 Procedure—Jurisdiction**
139 Procedure—Miscellaneous
191 Effect/Relationship of Other Proceedings
1549 Conviction Matters—Interim Suspension—Miscellaneous
1691 Conviction Cases—Record in Criminal Proceeding

Finality of an attorney's criminal conviction is not essential for an order referring the conviction to the State Bar Court Hearing Department for a determination whether there is probable cause to conclude that the circumstances of the conviction involved moral turpitude for purposes of interim suspension of the attorney.

[2] **101 Procedure—Jurisdiction**
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding

The possibility that criminal proceedings against an attorney may be dismissed if the attorney complies with the terms of criminal probation is not relevant to the effect of the conviction in disciplinary proceedings.

[3] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding

A conviction after a plea of nolo contendere is a conviction for disciplinary purposes no less than a conviction after a plea or verdict of guilty.

[4] **220.10 State Bar Act—Section 6103, clause 2**
221.00 State Bar Act—Section 6106

Unlike the statute regarding violations of an attorney's oath and duties, which has been construed only to state a sanction and not to proscribe conduct, the statute regarding conduct by attorneys which involves moral turpitude, corruption or dishonesty has been construed so as to permit violations thereof to be charged and proved.

[5 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
273.30 Rule 3-310 [former 4-101 & 5-102]

A notice to show cause in a disciplinary proceeding meets the requirements of due process when it specifies the conduct at issue and the rule charged. Where a notice to show cause named the clients involved in each count, identified them as driver and passenger, averred that respondent agreed to represent each in a personal injury case without advising them of their potential conflict and obtaining their written consent, and cited the rule regarding representation of adverse interests, respondent was given adequate notice of the charge against him. Given the specificity of the factual allegations, adequate notice was given even in a count which did not specify the subsection of the rule being charged.

[6 a-d] **204.90 Culpability—General Substantive Issues**
273.30 Rule 3-310 [former 4-101 & 5-102]

Although the former rule of professional conduct governing representation of clients with conflicting interests did not expressly state that it encompassed potential as well as actual conflicts of interest, once the rule had been interpreted in case law to make it clear that potential conflicts between clients required written consent for a single attorney to represent them in civil litigation, and in light of the prophylactic intent of the rule, an attorney had a duty to obtain the clients' informed consent before agreeing to represent both driver and passenger in an automobile accident case where there was no bar to a claim by the passenger against the driver.

[7 a, b] **162.19 Proof—State Bar's Burden—Other/General**
169 Standard of Proof or Review—Miscellaneous
204.90 Culpability—General Substantive Issues
273.30 Rule 3-310 [former 4-101 & 5-102]

In a disciplinary proceeding, a culpability determination must not be debatable. Accordingly, where the applicable rule of professional conduct did not expressly require written consent to joint representation of clients with potentially conflicting interests, the issue for the court was whether the case law at the time of an attorney's alleged violation of the rule made it clear that such consent was required in civil litigation.

[8 a, b] **273.30 Rule 3-310 [former 4-101 & 5-102]**
720.10 Mitigation—Lack of Harm—Found

By failing to disclose to clients the potential conflict between driver and passenger in an automobile accident case, and to secure their written consent to joint representation, an attorney exposes the clients to sharing confidences without realizing the potential impact of doing so; to possible delay if the attorney is later disqualified due to the development of an actual conflict; and to reduction of the passenger's recovery through failure to allege the driver's negligence. However, where it was not clear that respondent's clients would not have given their informed consent if they had been afforded the opportunity do so, respondent's violation of the rule requiring him to obtain such consent was not serious.

[9 a-c] **273.00 Rule 3-300 [former 5-101]**
291.00 Rule 4-210 [former 5-104]
720.10 Mitigation—Lack of Harm—Found

Advancing expenses to clients is not a generally accepted practice because it may cause clients to choose attorneys on the basis of the loans they are willing to make rather than the services they offer and may also create an attorney-client conflict. The rule permitting attorneys to advance client expenses is limited to expenses related to litigation or legal services. Where, after respondent was retained by a client in a personal injury action, he made an interest-free, unsecured loan to the client to cover funeral costs and other expenses, such advance was not permitted by the rule even though the expenses might be recoverable as damages in the litigation. The loan was also improper because respondent did not obtain the client's informed written consent. However, where there was no evidence of client harm, the violation was not serious.

[10] **221.00 State Bar Act—Section 6106**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Where, after receiving medical payments advanced by his personal injury client's first-party insurer, respondent misappropriated the funds; failed to apprise his client that the first-party insurer was subrogated to the client's recovery against the other driver; failed to ensure that the first-party

insurer was reimbursed from the ultimate settlement; failed to deduct the subrogation amount from the settlement in calculating his fee, and failed to refund the resulting excess fee for three years after the client demanded the refund, respondent violated the statute prohibiting moral turpitude and dishonesty and the rule regarding prompt payment of client funds on demand.

[11 a, b] 162.19 Proof—State Bar's Burden—Other/General
162.20 Proof—Respondent's Burden
164 Proof of Intent
204.90 Culpability—General Substantive Issues
420.00 Misappropriation
541 Aggravation—Bad Faith, Dishonesty—Found
802.69 Standards—Appropriate Sanction—Generally
822.10 Standards—Misappropriation—Disbarment

Once a trust account balance has fallen below the appropriate amount, an inference of misappropriation may be drawn, and the burden shifts to the attorney to show that misappropriation did not occur. Where there were numerous instances over several years in which funds were depleted or nearly depleted from respondent's trust account; respondent delayed in making repayment until the client complained to the State Bar or was sued, and respondent's explanations lacked credibility, the evidence supported the conclusion that respondent's repeated acts of misappropriation were due to dishonesty rather than negligence. The distinction between negligent and dishonest misappropriation can be very significant in determining appropriate discipline.

[12 a-c] 513.10 Aggravation—Prior Record—Found but Discounted

Prior discipline is always a proper factor in aggravation. However, because part of the rationale for considering it is that it is indicative of a recidivist attorney's inability to conform to ethical norms, the aggravating force of prior discipline is diminished if the misconduct occurred during the same period as the misconduct in the prior matter. In this circumstance, it is appropriate to consider what the discipline would have been if all the charged misconduct during the time period had been brought as one case.

[13 a-c] 420.00 Misappropriation
521 Aggravation—Multiple Acts—Found
582.10 Aggravation—Harm to Client—Found
691 Aggravation—Other—Found
805.10 Standards—Effect of Prior Discipline
822.10 Standards—Misappropriation—Disbarment
1093 Substantive Issues re Discipline—Inadequacy

Where an attorney has previously been disciplined for misappropriation, the attorney is eligible for disbarment if found culpable of misappropriation in a second matter. Where respondent's total misconduct in two separate disciplinary cases involved ten client matters, spanned all but three years of his practice, and harmed or jeopardized numerous clients, and respondent had an ongoing substance abuse problem and had not complied with his probation in the first matter, his aggregate misconduct clearly required imposition of the harshest discipline, and there was no basis for a recommendation of suspension rather than disbarment.

[14] 745.51 Mitigation—Remorse/Restitution—Declined to Find
795 Mitigation—Other—Declined to Find
1719 Probation Cases—Miscellaneous

Respondent's partial restitution and attempts to obtain an accountant in order to file his quarterly probation reports were not entitled to any mitigating weight, because he did not complete

restitution until the eve of his disciplinary hearing, and failed to notify his probation monitor of his difficulty in complying with the disciplinary order requiring him to have an accountant certify his trust account records.

[15 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
230.00 State Bar Act—Section 6125
565 Aggravation—Uncharged Violations—Declined to Find

An attorney's unauthorized practice of law while on suspension is an appropriate matter to be considered in aggravation. Where, during the trial in a disciplinary matter, the respondent made a court appearance in a client's case while suspended for nonpayment of dues, the deputy trial counsel was not obligated to wait to file another disciplinary action to address the issue. Where respondent's counsel agreed that the deputy trial counsel could introduce evidence regarding respondent's court appearance during a later phase of the hearing, respondent received proper notice of the charge in aggravation.

[16] **230.00 State Bar Act—Section 6125**

Where an attorney appeared in court on the date his suspension began solely to report to the court that his client was now without representation, and acted under the trial court's instructions to speak with the client about possibly resolving the lawsuit that day, and the trial was continued for the client to retain new counsel, there was not clear and convincing evidence that the attorney knowingly practiced law while suspended.

[17] **561 Aggravation—Uncharged Violations—Found**
691 Aggravation—Other—Found
802.69 Standards—Appropriate Sanction—Generally

An attorney's admitted cocaine dependency is an appropriate factor to consider in determining the appropriate discipline for public protection.

[18] **130 Procedure—Procedure on Review**
139 Procedure—Miscellaneous
1715 Probation Cases—Inactive Enrollment

Where respondent had been given notice that if his disciplinary probation were revoked he could be placed on inactive enrollment, and where the Office of Trials expressed grave concerns as to the threat posed by respondent to clients and the public, the Office of Trials could have sought to have respondent placed on inactive enrollment at the time the hearing judge revoked probation. Where it did not do so, respondent was allowed to continue to practice pending review of the hearing judge's order.

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)]
273.01 Rule 3-300 [former 5-101]
273.31 Rule 3-310 [former 4-101 & 5-102]

277.51 Rule 3-700(D)(1) [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)]
291.01 Rule 4-210[former 5-104]
420.11 Misappropriation—Deliberate Theft/Dishonesty
1751 Probation Cases—Probation Revoked

Not Found

214.35 Section 6068(m)
221.50 Section 6106
230.05 Section 6125
253.05 Rule 1-400(C) [former 2-101(B)]
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]

Mitigation

Found but Discounted

725.36 Disability/Illness
750.32 Rehabilitation

Standards

831.40 Moral Turpitude—Disbarment
831.50 Moral Turpitude—Disbarment

Discipline

1010 Disbarment
1810 Disbarment

Other

173 Discipline—Ethics Exam/Ethics School
196 ABA Model Code/Rules
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1

OPINION

PEARLMAN, P.J.:

This case comes before the review department on cross requests for review from a decision of a judge pro tempore of the hearing department finding respondent, Robert Michael Sklar ("respondent") culpable of charges in six original counts of misconduct. The misconduct involved misappropriation of client trust funds in three personal injury cases; failure to return files in three cases; failure to advise clients of potential conflicts of interest in three cases;[1] an improper loan of $10,000 to a client; failure to perform in one case and failure to communicate in another. Respondent was also found culpable of violating the terms of probation imposed as part of prior discipline. His misconduct, which spanned most of his years of practice since he was admitted in 1981, was found to be aggravated by bad faith and dishonesty and to have caused substantial harm to clients, the public, and the administration of justice.

In the proceeding below, respondent also admitted that he suffered from cocaine addiction for which he was under a court-ordered treatment program commencing in May of 1992. The hearing judge found no mitigating circumstances, noted the potential applicability of disbarment for the misconduct found, but recommended four years stayed suspension on conditions, including actual suspension for two years and until respondent makes a showing of rehabilitation, learning and ability, and fitness to practice law under standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct ("the standards"). (Trans. Rules Proc. of State Bar, div. V.) In making his recommendation, the judge indicated that he would strongly recommend disbarment if any further proceedings were initiated against respondent for any new matter or violation of any probationary condition.

The State Bar Office of Trials seeks disbarment on this record, pointing out in its brief on review, among other things, that the misappropriation involved over $13,800 and that respondent's prior record of discipline should have been given greater weight.

Respondent's counsel admits respondent's culpability of misappropriation, but contends that it was negligent rather than intentional and stemmed from poor office management, since remedied. He also argues that respondent was not culpable of any of the three counts charging violation of former rule 5-102(B)[2] on the ground that the rule did not cover potential conflicts of interest, but only actual conflicts of interest which never occurred. He also challenges respondent's culpability with respect to the $10,000 "advance" to respondent's client to pay for funeral expenses of her daughter. He further contends that mitigating evidence should have been considered and that the prior discipline should not be considered a true "prior" since the misconduct occurred during the same period of time as the current charges and could have been brought in one proceeding. Respondent's counsel urges us to determine that the appropriate discipline should include only one year of actual suspension.

Upon our independent review, giving great weight to the credibility determinations of the hearing judge, we adopt almost all of the findings below as augmented by additional findings supported by the record. While we conclude that respondent was properly found culpable of not obtaining written consent to represent joint clients in three cases and of failure to obtain a written promise of repayment of the $10,000 loan, these violations were of relatively minor consequence under the circumstances. They are not the focus of our concern. Respondent cannot escape the serious consequences that stem from the finding that he misappropriated over $13,800; that his conduct was dishonest; that it occurred over several years; that he thereby caused substantial

1. Following oral argument, we deferred submission of this case on our own motion pending receipt of post-argument briefs in another proceeding argued on the same date in which the interpretation of former rule 5-102(B) of the Rules of Professional Conduct (in effect through May 26, 1989) was also before this court. (*In the Matter of Twitty*, case number 90-O-15541 and consolidated cases.) This matter was thereafter deemed resubmitted on October 18, 1993, the date the last brief was received by the court in *In the Matter of Twitty*.

2. Hereafter, unless otherwise noted, all references to former rules are to the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

client harm; and that he was found not to be credible by the judge below.

The prior disciplinary proceeding against respondent also involved a finding that he misappropriated close to $5,000 for his own use. This misappropriation was also found not to be the result of mere negligence. In addition, he also was found in that proceeding to have failed to perform and failed to turn files over to new counsel. Whether we consider the previously found misconduct a true "prior" as urged by the Office of Trials or whether, as urged by respondent's counsel, we treat the "prior" as part of a continuing course of misconduct, the result is the same. Respondent misappropriated nearly $19,000 for his own use over several years' time. Restitution was found to have not been completed until 1992, long after he was reported to the State Bar. He has an ongoing substance abuse problem and failed to comply with the terms of his probation. Both case law and the standards clearly justify disbarment on the facts found here and we so recommend to the Supreme Court.

THE FINDINGS BELOW

This case involved three consolidated proceedings. In case number 87-O-13044, respondent was charged with nine counts of original misconduct commencing in 1984, six counts stemming from his personal injury practice and three from his immigration law practice. The second proceeding was case number 91-C-03507, which the hearing judge abated at the unopposed request of the deputy trial counsel.[3] **[1a, 1b, 2, 3 - see fn. 3]** The third proceeding was case number 91-P-07863, which arose out of respondent's alleged violation of the terms of his probation imposed as part of the discipline ordered by the Supreme Court in 1991 in State Bar Court case number 86-O-13652. (*In the Matter of Sklar* (S020779), order filed July 10, 1991.) The following facts are derived principally from the decision below as augmented by the parties' stipulation of facts.

Count 1

This count charged respondent with violations of Business and Professions Code sections 6068 (m) and 6106[4] and former rule 6-101(A)(2). Respondent was employed to secure a labor certification and eventual permanent residence status for a client. The initial application was rejected because the client's American employer did not properly document the lack of available applicants for the position in the existing labor force. After a six-month waiting pe-

3. The decision indicates that the abatement was predicated on the deputy trial counsel's assertion that the referral from the review department was premature because no conviction had allegedly been entered after respondent had pled no contest to a misdemeanor violation of Penal Code section 417, subdivision (a)(1). Her earlier pretrial statement referred to respondent's conviction but noted that it had not yet become final. **[1a]** Finality of the conviction is not essential for a referral order. (*In re Strick* (1983) 34 Cal.3d 891, 898.) **[2]** In her motion papers to the court below, the deputy trial counsel also noted the possibility that the criminal proceedings would ultimately be dismissed if respondent complied with the terms of his probation. This possibility has long been held irrelevant to the effect of the conviction in State Bar proceedings. (Cf. *In re Phillips* (1941) 17 Cal.2d 55, 59.)

[3] The Office of the Chief Trial Counsel, in its "Transmittal of Records of Conviction of Attorney" dated November 13, 1991, listed the date of Sklar's conviction as September 25, 1991, the date his plea of nolo contendere was accepted and entered by the convicting court. Subdivision (e) of Business and Professions Code section 6101 provides in pertinent part that a conviction after a plea of nolo contendere is a conviction no less than a conviction after a plea or verdict of guilty. (See *In re Dedman* (1976) 17 Cal.3d 229, 231 [". . . plea of nolo contendere . . . constitutes 'conclusive evidence of guilt'"; *In re Gross* (1983) 33 Cal.3d 561, 564, 567 [attorney conviction based on plea of nolo contendere].)

[1b] Prior to 1991, the Supreme Court routinely referred nonfinal misdemeanor convictions to the Hearing Department of the State Bar Court for determination of whether there was probable cause to conclude that the circumstances involved moral turpitude, in order to determine whether the member should be interimly suspended pending the finality of the conviction. (*In re Strick, supra*, 34 Cal.3d at p. 898.) Effective December 10, 1990, the Supreme Court authorized 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. (See rule 951(a), Cal. Rules of Court.) The hearing judge was thereby empowered, even though the conviction was not final, to determine the issue of whether there was probable cause to conclude that the circumstances of respondent's crime involved moral turpitude for purposes of interim suspension. However, since he did not do so and no issue is raised concerning the abatement we do not reach the question whether it was an abuse of discretion to abate the proceeding.

4. Hereafter, unless otherwise noted, all references to sections of statutes are to sections of the Business and Professions Code.

riod, the application was resubmitted and ultimately approved. The hearing judge found that the employer's failure to comply with the government's recordkeeping requirements was not attributable to respondent as a failure to provide competent legal services under former rule 6-101(A)(2). He also found respondent adequately communicated significant events to his clients as required by section 6068 (m) and found no basis for the charged violation of section 6106. Accordingly, this count was dismissed; the State Bar does not challenge this result.

Count 2

At the hearing, the deputy trial counsel moved for dismissal of this count which charged respondent with identical violations to those charged in count 1 but involved a different client. It was dismissed without submission of any evidence.

Count 3

This count charged respondent with violating former rule 2-101(B)[5] when he requested permission to address the employees of a factory and later spoke to them in October 1987. The owner had first checked with his employees to determine if they were interested in hearing respondent's presentation regarding changes in United States immigration law and attendance was voluntary. The hearing judge concluded that this presentation was purely informational and within the permitted ethical bounds. The State Bar does not challenge any of the findings or the resulting dismissal of this count.

Count 4

This count charged respondent with violation of former rules 2-111(A)(2), 5-102(B), 8-101(B)(3) and (B)(4) and section 6106. In May 1984, respondent was retained by the driver (Doreen Ross) and the passenger (Kay Lancaster) to represent both of them on a contingent fee basis to bring a personal injury case for injuries resulting from an automobile accident which they attributed to the negligence of the other driver. The hearing judge concluded that respondent violated former rule 5-102(B)[6] when respondent did not disclose the potential conflict of interest in representing both the passenger and the driver in an automobile accident case and did not obtain their written consent to the joint representation.

Thereafter, respondent settled the case on behalf of Lancaster for $15,000. The settlement draft dated February 28, 1985, was signed by both Lancaster and respondent and deposited in respondent's trust account on March 5, 1985. By March 22, 1985, respondent's trust account balance had fallen to $82.11.

Answering Lancaster's request for funds, on April 18, 1985, respondent issued from his trust account two checks totaling $4,000. One check for $3,000 was returned for insufficient funds. On July 22, 1985, respondent issued Lancaster a new $3,000 check which was honored.

Respondent contended that he and his staff intended to compromise the medical liens so that Lancaster could keep the $4,000 he had distributed to her,[7] but

5. Former rule 2-101(B) stated: "No solicitation or 'communication' seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or 'communication' specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or 'communication' is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

"Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients."

6. Former rule 5-102(B) read as follows: "A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."

7. Respondent's counsel asserts that the two checks written to the client during this period were not then due to Lancaster as her portion of the settlement since the medical and attorney's fee liens against the recovery then exceeded the total amount of the recovery. He does not suggest that the $4,000 he paid her at that time might be construed as a voluntary reduction of his own fee although respondent testified that he eventually compromised his fee as well as the medical lienholders' claims in order to provide Lancaster with a right to receive the $4,000 he had already distributed to her. However the payments to Lancaster are characterized, the fact remains that respondent misappropriated all but $82.11 of the funds payable to health care providers on Lancaster's behalf.

encountered prolonged resistance from the medical providers. The medical lienholders' claims were eventually compromised and paid by respondent in late July of 1992 on the eve of the disciplinary hearing below. The hearing judge concluded that respondent had violated former rule 8-101(B)(3) by failure to render an appropriate accounting to Lancaster and former rule 8-101(B)(4) by failure to pay funds over on demand and section 6106[8] **[4 - see fn. 8]** by his misappropriation of the funds subject to medical liens.

The evidence concerning Lancaster's requests for her files from respondent was inconclusive and the judge determined that insufficient proof was produced to establish by clear and convincing evidence a violation of former rule 2-111(A)(2).

Count 5

This count charged respondent with violations of former rules 2-111(A)(2), 5-101, 5-104(A) and 6-101(A)(2) and section 6068 (m). Priscilla Valencia testified through an interpreter at the hearing that she retained respondent on May 21, 1986, while she was still hospitalized and under sedation for injuries from an automobile accident which killed her daughter. Respondent indicated to the family that available insurance coverage might result in a settlement in the neighborhood of $100,000. She and her family requested that respondent assist them by giving them $10,000 to offset expenses related to the daughter's burial. No repayment terms were discussed and the transaction was not otherwise memorialized. The check, which respondent characterized as a cost advance for litigation expenses, and the retainer agreement bear the same date. The hearing judge concluded that respondent agreed to pay personal expenses of his client in violation of former rule 5-104(A).[9] He also found that respondent violated former rule 5-101 by failing to disclose fully in writing the terms and conditions of the transaction and to give the client the opportunity to seek independent advice concerning it.

Thereafter, under pressure from the family and admittedly without complete investigation into the case, respondent filed a lawsuit on Priscilla Valencia's behalf. It did not name the owner of the car as a defendant, nor did it include a wrongful death claim. Between May and December 1986, respondent met with Valencia at her home once and at his office, where he presented a proposed settlement which was rejected. The client's family contacted respondent's office regularly for progress reports from respondent's staff. Respondent was discharged by letter dated December 5, 1986, and the client requested the return of her file. Respondent neither answered the request nor returned the file until four months later. The hearing judge did not find a lack of communication in violation of section 6068 (m), nor a repeated failure to provide competent legal representation to the client in violation of rule 6-101(A)(2). He did find that a four-month delay in surrendering the client's file violated former rule 2-111(A)(2).

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8. **[4]** In his discussion of each of the counts charging violations of section 6106, the hearing judge indicated that section 6106 did not proscribe conduct but simply stated the sanction for conduct involving moral turpitude, corruption, or dishonesty. We assume he reached this conclusion by analogy to similar language in section 6103. The Supreme Court has not similarly construed section 6106 but has repeatedly held that violation of section 6106 may be properly charged and proved. (See discussion in *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 349-350.)

9. Former rule 5-104(A) provided that "A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for a client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member: [¶] (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or [¶] (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or [¶] (3) from advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client."

Count 6

This count charged violations of former rules 2-111(A)(2) and 5-102.[10] **[5a - see fn. 10]** Respondent was retained in April 1986, by the driver (Marion Knight) and passenger (Alvin Horn, Jr.) in an automobile accident case. Respondent did not advise Horn of the possible conflict in joint representation and did not secure a waiver from him. Respondent contends that no actual conflict existed because the accident was caused by the negligence of the other driver.

Horn discharged respondent and obtained new counsel, who requested Horn's file from respondent on November 11, 1986. Respondent surrendered the file in April 1987, shortly before the expiration of the statute of limitations. The new counsel for Horn filed a complaint naming Knight as a defendant. The hearing judge concluded that respondent's failure to obtain a written waiver from his client to represent potential conflicting interests violated former rule 5-102. The hearing judge also concluded that respondent's conduct in delaying transfer of the file violated former rule 2-111(A)(2).

Count 7

This count charged respondent with violating former rules 5-102(B) and 8-101(B)(4) and section 6106 in a third automobile accident case. Respondent represented the Felixes, Ben Hur (brother/driver) and Benelyn (sister/passenger) in July 1984. As in the other matters, the potential conflict in representing both the driver and passenger in an automobile accident case was found not to have been discussed with the clients and respondent was found to have violated former rule 5-102(B).

Respondent received medical payments totaling $8,072 from the first-party insurance company for his clients in advance of settlement, which were subject to repayment to the insurance company upon settlement with the other driver's insurer. Respondent placed these funds in his trust account and later misappropriated most of them.

The matters were settled in December 1985. Respondent did not honor the subrogation rights of the insurance company nor did he advise the clients that a portion of their settlement had to be returned to the insurance company. Further, he computed his fee by including the advanced funds which the clients were required to refund. The clients were later sued by the insurance company and Ben Hur Felix had to borrow funds to repay the advance after unsuccessfully demanding a return from respondent of the excess fees he had taken out of the settlement. Respondent ultimately refunded the difference between the fee he had taken and the properly calculated amount ($3,885.35) on August 3, 1990—three years after the client had demanded payment. The judge found a violation of former rule 8-101(B)(4) and section 6106.

Count 8

This count charged respondent with violating former rule 8-100(B)(4), current rule 4-100(B)(4)[11] and section 6106 by misappropriating funds set aside to pay a medical lien for Dr. Jai H. Lee out of a personal injury settlement for client Jin Young Park. The matter was settled in April 1986 and $2,405 was withheld from Park's recovery to pay Dr. Lee's lien. The parties stipulated that respondent issued two checks on April 7, 1986, for $2,405 payable to Dr. Lee but that the checks were never delivered. From April 1986 until January 1990, when Dr. Lee's bill was paid, respondent did not maintain sufficient funds in trust to pay the lien. Dr. Lee contacted respondent's office regularly about his lien, without response. The hearing judge concluded that this conduct violated former rule 8-101(B)(4), current rule 4-101(B)(4) and section 6106.

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10. **[5a]** In count 6, unlike counts 4 and 7, the notice to show cause charged a violation of former rule 5-102 rather than specifying rule 5-102(B). Given the specificity of the factual allegations, this constituted adequate notice of the charged violation. (Cf. *Ainsworth* v. *State Bar* (1988) 46 Cal.3d 1218, 1228, fn. 4; *Brockway* v. *State Bar* (1991) 53 Cal.3d 51, 63; see also discussion, *post*.)

11. References hereafter to "current rule" are to the Rules of Professional Conduct which were in effect from May 27, 1989, to September 13, 1992.

Count 9

In this final count of the original proceeding, neither party disputes the hearing judge's findings and conclusions that respondent, as charged, violated former rules 2-111(A)(2) and 6-101(A)(2) as well as section 6068 (m). Respondent was retained by Ramona Johnson in August 1983 to set aside a real estate sale. Respondent filed a complaint on behalf of the client in October 1983, but little else was done on the matter. After four years, the client retained new counsel and she and the new attorney requested the file, both in writing and by telephone. Finally, the new attorney filed an ex parte motion seeking the tolling of the statute providing for dismissal of the action after five years for failure to prosecute to trial (Code Civ. Proc., §§ 583.310, 583.360) and for an order directing respondent to produce the Johnson file. Respondent did not surrender the file in response to the court order, although he promised counsel he would do so by express messenger service. Finally, the new counsel filed a motion before the superior court in San Diego seeking to have respondent held in contempt. Respondent showed up an hour and a half late to the contempt proceedings and only turned over the file after the judge advised him that he would be held in contempt if he did not do so immediately.

The Probation Revocation Proceeding

The notice to show cause in the probation revocation proceeding charged respondent with wilful violation of sections 6093 (b), 6068 (k) and 6103. Respondent had been the subject of a disciplinary order filed by the California Supreme Court on July 10, 1991, in State Bar Court case number 86-O-13652 (Supreme Court case number S020779) which included one year of stayed suspension and which placed him on probation for three years with conditions, including an actual suspension for 80 days and passage of the multistate professional responsibility examination ("PRE") within one year.[12] Among other conditions, respondent was to submit a quarterly report under penalty of perjury, attesting to his compliance with the State Bar Act and the Rules of Professional Conduct. If he handled any client trust funds during the quarter, he was to submit a certificate from a certified public accountant or public accountant ("CPA" or "PA") certifying to compliance with the specified trust account requirements. Respondent had met with his probation monitor before the first report was due to review all of the requirements, but had no further contact with the monitor until July 31, 1992, shortly before this disciplinary hearing began. Respondent conceded that he did not submit any quarterly reports when due on October 10, 1991, January 10, 1992, April 10, 1992, and July 10, 1992. All required reports which, except for their untimeliness, conformed to the probation conditions were finally filed on September 18, 1992, the last day of the hearing below.

Respondent's evidence on this issue concentrated on his efforts beginning in August 1991 to find a CPA to certify his trust account and the difficulties he encountered. The hearing judge found that respondent offered no explanation for the delay in filing quarterly reports without the certification or his failure to contact his monitor regarding the difficulties he was having in filing his reports. As a consequence, the hearing judge recommended revocation of respondent's probation for wilful violation of the terms and conditions of the Supreme Court order. He further recommended that respondent be given credit for the 80 days he had actually been suspended and that his suspension for violation of probation run concurrently with the actual suspension recommended in the consolidated original proceeding.

12. In 1991, the California State Bar developed its own examination for use in disciplinary cases—the California Professional Responsibility Examination ("CPRE"). The CPRE is specifically designed to test knowledge of the State Bar Act and California Rules of Professional Conduct as opposed to the American Bar Association's Model Rules tested by the PRE. Passage of the CPRE is now routinely ordered instead of passage of the PRE in cases where an examination is deemed appropriate. (See *Layton* v. *State Bar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn. 9.)

ISSUES ON REVIEW

Respondent's counsel raised the bulk of the substantive legal issues on review. They include: (1) whether respondent's failure to advise his clients and get written consent in three instances where he represented both the driver and passenger in automobile personal injury cases constituted misconduct within the ambit of former rule 5-102(B); (2) whether respondent's "advance" of $10,000 to a client to pay the funeral expenses of his client's daughter constituted a violation of former rules 5-101 and 5-104(A); (3) what obligations respondent had, if any, under a subrogation policy to assure that the insurance company was reimbursed, under former rule 8-101(B)(4); and (4) whether respondent's misappropriation of funds through mismanagement of his trust account was appropriately characterized as negligent rather than intentional. Respondent's counsel also argues that in two instances where respondent failed to return files promptly to clients and their new attorneys, no harm resulted from the delay. The recommended discipline is excessive, in his view, given the remedial steps taken by respondent to avoid repeating his misconduct, including his reduction of the size of his staff and practice. He argues that a one-year actual suspension is appropriate, rather than the two years recommended by the hearing judge.

The Office of Trials filed for review primarily on the issue of the appropriate discipline. It did not raise any question regarding the findings in favor of respondent on all charges in the first three counts. However, with respect to counts 4, 7 and 8 it proposes additional findings of fact which derive primarily from the partial stipulation of facts filed by the parties during the trial below. We agree that the undisputed facts show that respondent misappropriated a total of at least $13,807.34.[13]

The deputy trial counsel also argues that in analyzing the factors in aggravation, the hearing judge made two errors. The first was his declination to consider respondent's prior disciplinary matter as aggravating because the misconduct in the prior matter and the present case occurred during the same period. The second alleged error was the hearing judge's failure to mention or weigh evidence submitted concerning respondent's unauthorized practice of law during the disciplinary hearing as a factor in aggravation.

Analysis of Potential Conflict of Interest
Under Former Rule 5-102(B)

First we address respondent's challenge to the finding that in three instances where both the driver and passenger in automobile accident cases sought representation by respondent (counts 4, 6 and 7), he violated former rule 5-102(B) by not advising them of the potential conflict of interest in the joint representation and failing to obtain their written consent to appear as counsel for both.

[5b] Preliminarily, respondent's counsel argues that under *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, he did not get sufficient notice of the charge. This argument is not well taken. In each count, the notice named the clients, identified the driver and passenger, stated that the respondent was employed to file a personal injury lawsuit on behalf of each and averred that respondent accepted the employment without advising either of the potential conflict of interest and obtaining their written consent to do so. At the end of counts 4 and 7, violation of former rule 5-102(B) is alleged; at the end of count 6, violation of former rule 5-102 is alleged. Since the notice specified the conduct at issue and the rule charged, the requirements of due process were met. (*Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1153-1154; see also *Brockway* v. *State Bar*, *supra*, 53 Cal.3d at p. 63; *Ainsworth* v. *State Bar*, *supra*, 46 Cal.3d at p. 1228, fn. 4.)

13. As proved in count 4, the balance in respondent's trust account fell to $82.11 eighteen days after he deposited the $15,000 settlement draft and repeatedly for three months thereafter fell below the $9,000 he should have been holding in his account to pay medical lien holders. This resulted in a misappropriation of $8,917.89. As proved in count 7, over a four and one-half month period respondent's trust account balance repeatedly fell below $8,072, the amount he should have held in trust. Respondent misappropriated at least $2,491.78 in this matter. As proved in count 8, respondent misappropriated $2,397.67 out of $2,405 which should have been held in trust between April 7, 1986, and January 19, 1990.

[6a, 7a] Respondent's primary contention is that the former rule does not encompass *potential* conflicts of interest. He relies on the lack of an express statement in the rule that the phrase "conflicting interests" encompasses potential as well as actual conflicts of interest. In contrast, the current version of this rule now sets forth expressly that it covers potential conflicts of interest. (See rule 3-310(C), Rules of Professional Conduct (as amended eff. Sept. 14, 1992).)[14] In a disciplinary proceeding, a culpability determination must not be debatable. (*Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 289; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 351.) As was noted in *In the Matter of Respondent K*, *supra*, few published California disciplinary opinions deal with violations of former rule 5-102(B) and its predecessor, rule 7. (*Id.* at p. 350.)

[6b, 7b] The issue before us is whether the existing case law in 1984 so construed former rule 5-102 as to make it clear that potential conflicts between clients required written consent for a single attorney to represent them in civil litigation. (Cf. *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 424 ["Existing case law as of 1976 clearly informed attorneys of their duty to refrain from representing multiple defendants in any criminal case where there was a possibility of conflicting defenses. (Citations.) It also taught that each client had a right to conflict-free advice on whether it was in his or her best interest to present such conflicting defenses. Absent such advice, no waiver of separate counsel could have been knowing and intelligent. (Citations.)"].)

We therefore look to the state of the law as of 1984 involving conflicts in civil proceedings, much as the Supreme Court has itself done in analyzing this area of professional responsibility. In *Klemm* v. *Superior Court* (1977) 75 Cal.App.3d 893, cited by the Office of Trials, the Court of Appeal for the Fifth Appellate District considered the issue of whether former rule 5-102 prohibited an attorney from representing both a wife and a husband in an uncontested dissolution proceeding and concluded that both actual and potential conflicts of interest were addressed by the rule. In cases of dual representation where there was the potential for conflict at any point in the litigation, the court found that "with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial. [Citations.]" (*Id.* at p. 899.) Indeed, the court stated that a purported consent in a contested proceeding to dual representation of litigants with actual present adverse interests would be per se inconsistent with the attorney's duty not to injure his client by advocating the interests of another client. (*Id.* at p. 898.)

More specifically on point is *Codiga* v. *State Bar* (1978) 20 Cal.3d 788, in which an attorney undertook representation of a woman and her husband to recover for the woman's personal injuries arising out of an automobile accident in which a newspaper was a defendant. The attorney had represented the newspaper in a number of matters and its stock was wholly owned by his in-laws. He was found culpable of misconduct by knowingly failing to disclose the conflict in violation of former rules 6 and 7. In 1975, former rules 6 and 7 were combined to comprise former rule 5-102. Former rule 5-102 additionally required the consent of the client to be in writing. (*Codiga* v. *State Bar*, *supra*, 20 Cal.3d at p. 792, fn. 2.) While *Codiga* involved fraudulent conduct, the Supreme Court in that case broadly stated that "An attorney representing clients with divergent interests in the same matter, must disclose to his clients all facts and circumstances which may aid them in making a free and intelligent choice of counsel." (*Id.* at p. 792, citing *American Mut. Liab. Ins. Co.* v. *Superior Court* (1974) 38 Cal.App.3d 579, 590 and *Lysick* v. *Walcom* (1968) 258 Cal.App.2d 136, 147.)

[6c] Because the duty to avoid conflicts under former rule 5-102(B) arises at the outset of the employment when there has been little if any oppor-

14. The December 1991 memorandum prepared by the State Bar Office of Professional Competence, Planning and Development which accompanied the request that the Supreme Court approve amendments to the Rules of Professional Conduct of the State Bar of California stated on page 16 thereof that no substantive change was intended by the inclusion of potential conflicts in rule 3-310(C) itself, noting that in the 1989 version of rule 3-310 the second paragraph of the discussion section made it clear that potential conflicts were covered.

tunity for investigation into the merits of the case, the intent of the rule is clearly prophylactic. Moreover, it is because of the lawyer's greater knowledge of their legal rights and remedies that the parties consult the lawyer in the first place. It is the lawyer's duty to secure as large a recovery as possible for the clients and to advise each client with undivided loyalty. (*Anderson* v. *Eaton* (1930) 211 Cal. 113, 116-118.) The rule against representing conflicting interests is designed not only "to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]" (*Id.* at p. 116.)

The *Anderson* case involved an actual conflict of interest. In *Spindle* v. *Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, the Court of Appeal distinguished between actual conflicts and potential conflicts. It defined an actual conflict of interest between jointly represented clients to occur "whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other." (*Id.* at p. 713.) The Court of Appeal noted that the lack of an actual conflict of interest defeated the plaintiff's claim of actionable impropriety in the joint representation, but acknowledged that the potential conflict of interest described by plaintiff constituted a "[d]ivergence in interest requir[ing] counsel to disclose to each of his jointly represented clients whatever is necessary to enable each of them to make intelligent, informed decisions regarding the subject matter of their joint representation. [Citations.]" (*Ibid.*)

[6d] In the light of these authorities interpreting the attorney's ethical duties, we must therefore reject respondent's argument that he did not have to obtain the informed consent of his clients to their joint representation because he believed there to be no conflict of interest between them. Prior to 1973, the California guest statute (Veh. Code, § 17158) precluded social passengers involved in car accidents from suing the driver of the car in which the guests traveled. At that time, respondent's position that informed consent was not essential for the dual representation of the driver and passenger against the other driver would appear to have had validity. However, that time is long gone. In 1973, the guest statute was declared unconstitutional (*Brown* v. *Merlo* (1973) 8 Cal.3d 855), and in the same year, California adopted the doctrine of comparative negligence. (See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1083, p. 482.) Thereafter, a potential conflict of interest existed between every driver and passenger. (See also *Cooper* v. *Bray* (1978) 21 Cal.3d 841 [striking down last remaining legislative bar against suits by certain passengers against the driver of the car in which they were riding].)

Respondent had not undertaken discovery at the time he undertook the joint representation and clearly had a duty to explore the issue of the driver's comparative negligence on behalf of the passenger client. That the facts as they developed in two of the cases appear to have supported respondent's view that no negligence claim against the driver was viable is relevant only to the seriousness of his violation of the rule requiring him to advise his clients of the potential conflict at the outset. In the third case, substitute counsel did in fact ultimately file a complaint on behalf of the passenger against the driver although the outcome was not made a part of this record.

[8a] By failing to disclose the potential conflict and to secure the clients' written consent to the joint representation, among other things, respondent exposed his clients to sharing confidences without realizing the potential impact of doing so; to possible delay due to disqualification of their lawyer if an actual conflict developed; and to reduction of the sources of recovery to the client passenger if any negligence of the client driver were established but never alleged. These were possible risks which the clients were clearly entitled to weigh before hiring a single joint attorney. Indeed, the concerns regarding potential conflicts in this setting are so strong that at least one state adopted a per se ban on joint representation of a driver and passenger in automobile negligence cases unless the driver and passenger were husband and wife or parent and child. (See *In the Matter of Petition for Review of Opinion 552 of the Advisory Committee on Professional Ethics* (1986) 102 N.J. 194, 206, fn. 3 [507 A.2d 233, 239, fn. 3].) In California, no such bar has been imposed and it is

by no means clear that respondent's clients would not have given their consent had he explained the lack of evidence of driver negligence and the risks and benefits of joint representation. However, no such opportunity was afforded them.

[8b] Culpability was properly found by the judge below on all three counts. Nonetheless, under the circumstances established in the record, we do not find these violations to be serious.

Culpability for $10,000 Loan to Client in Count 5

[9a] Respondent challenged the culpability findings in count 5, charging him with violating former rules 5-101 and 5-104(A) in giving his client $10,000 at the time he was retained to represent her in a personal injury action. At the hearing and on review, respondent maintained that this was a payment "advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests" under former rule 5-104(A)(3). Respondent does not quote the remainder of the rule, which limits such advances to "all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client." Respondent himself testified that this was not an advance of litigation costs, but of client expenses similar to medical expenses. The fact that the client's various expenses (which she did not limit solely to funeral costs in her testimony) might or might not be included in her lawsuit's prayer for relief as damages recoverable from the defendant do not make them a litigation expense.[15] **[9b - see fn. 15]**

The hearing judge concluded that respondent violated the requirements of former rule 5-101 that the terms and conditions of the transaction be in writing and that the client be given a reasonable opportunity to seek the advice of independent counsel. The hearing judge further concluded that respondent paid personal expenses of the client in violation of former rule 5-104. Respondent denies that the transaction was a loan to secure the client or that it constituted a business transaction with the client because "there was no profit or profit potential involved" and respondent did not acquire a pecuniary interest adverse to the client. Respondent does not deny that, although the terms for repayment were not established, he expected the moneys to be repaid and, in fact, respondent was ultimately reimbursed in July of 1992.

[9c] We agree that the transaction was an unsecured, no-interest loan, offered by respondent to pay, among other personal expenses, the funeral costs of the client's daughter. However, we agree with respondent's counsel that there was no basis for finding that respondent made the payment in order to obtain the client—the client testified that the loan occurred after respondent was hired—and we therefore delete the finding below that respondent paid the $10,000 to secure the individual as a client. This does not affect the propriety of the finding, however, that respondent's payment was a loan for client expenses in violation of the requirements of both former rules 5-101 and 5-104 since former rule 5-104(A)(2) also required written consent of the client to the loan. We also conclude that there was no evidence of client harm and that the violation was not serious.

Violation of Rule 8-101(B)(4) in Count 7

[10] The hearing judge found that having received medical payments advanced by the client's first-party insurance company and having placed them in his trust account, respondent failed to apprise his client of the company's subrogation rights upon settlement with the other driver, and took excess fees in violation of former rule 8-101(B)(4). *In the Matter of Lazarus* (Review Dept. 1992) 1 Cal. State Bar Ct. Rptr. 387, 399, cited by respondent, is not on point. There we noted that the receipt of a draft made payable to the attorney and client under medical payment coverage of an insurance policy is not necessarily earmarked for medical payments only.

15. **[9b]** We note that a few jurisdictions allow lawyers to advance money to their clients for nonlitigation expenses. (See, e.g., Alabama DR 5-103(B); Minnesota Rule of Professional Conduct 1.8(e)(3).) However, this practice has not generally been accepted because financing by an attorney may cause clients to choose attorneys on the basis of the loans they are willing to make rather than the services they offer and may also put the attorney in conflict with the client regarding settlement strategy. (See discussion in Rhode & Luban, Legal Ethics (1992) pp. 776-778.)

However, this does not affect the duty of the attorney to distribute all funds due at the time of settlement and to maintain funds in trust pending final settlement or other authorized distribution. *In the Matter of Lazarus* has no applicability to respondent's unexplained failure to reimburse the client for three years after demand was made by the client, subsequent to the erroneously calculated final distribution of settlement funds. By not paying back to the client the excess fees he admittedly received until three years after the client demanded such repayment, respondent clearly violated former rule 8-101(B)(4). As discussed below, we also adopt the finding of a violation of section 6106 based on respondent's misappropriation of the funds from his trust account.

Misappropriation of Client Funds

Respondent admits that he grossly neglected his client trust account, but contends that it was only through such gross neglect that he should have been found culpable of acts of moral turpitude under section 6106. **[11a]** Respondent obviously recognizes that the distinction between misappropriation arising from gross neglect and dishonest misappropriation can be very significant in determining the appropriate discipline. (*Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1367 ["not every misappropriation which is technically wilful is equally culpable"].) Nonetheless, the misappropriation found in respondent's prior disciplinary proceeding was determined to be due to misconduct more than mere neglect. The numerous dips in respondent's trust account occurred over such a long period of time (four years) that the hearing judge in that proceeding rejected respondent's explanation of negligence and concluded that respondent was repeatedly using the funds for his own purposes.

[11b] We see no reason to reject the hearing judge's similar conclusion in this proceeding that respondent's repeated acts of misappropriation were due to dishonesty rather than negligence. As respondent's counsel recognized at oral argument, once the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn. (*Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474.) The burden then shifts to the respondent to show that misappropriation did not occur. (Cf. *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17.) The numerous instances in which funds were totally or nearly totally depleted from respondent's trust account over several years, the delay in repayment until the client was sued or until after the State Bar was contacted and the lack of credibility of his explanation support the hearing judge's conclusion that respondent dishonestly used the money for his own purposes.

Mitigation and Aggravation

The hearing judge, for purposes of determining discipline, did not identify respondent's prior discipline as an aggravating factor. In case number 86-O-13652, respondent was charged with twelve matters, found culpable on five charges (counts 1, 5, 7, 10 and 11) and the remaining charges were dismissed. Respondent was found culpable of violating former rule 2-111(A)(2) in four counts, an additional violation of former rule 6-101(A)(2) in one of the four counts and, in the most serious count, violation of former rules 8-101(A) and 8-101(B)(4) and section 6106 for misappropriation of nearly $5,000 in trust account funds over a four-year period. Two significant factors were found in mitigation: his cooperation with the State Bar (std. 1.2(e)(v)) and remedial steps taken to insure against a repetition of the misconduct (std. 1.2(e)(viii)). No request for review was filed from that decision. In July of 1991, the Supreme Court ordered respondent suspended for one year, stayed, on conditions including 80 days actual suspension. (*In the Matter of Sklar* (S020779), order filed July 10, 1991.)

[12a] Respondent's counsel argues that it was proper not to consider the prior misconduct aggravating since the conduct, aside from the probation violation, took place during the same time period as the current misconduct, prior to disciplinary charges being filed in either case. We cannot agree. Prior discipline is a proper factor in aggravation "[w]henever discipline is imposed." (*Lewis* v. *State Bar* (1973) 9 Cal.3d 704, 715; see *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) **[13a]** Given respondent's prior discipline for misappropriation, respondent would clearly be eligible for disbarment based on the cur-

rent record of misappropriation. (Cf. *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 32, 36.) **[12b]** Nonetheless, the aggravating force of prior discipline is generally diminished if the misconduct underlying it occurred during the same time period. (*In the Matter of Hagen*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 171; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) Since part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms (see *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646), it is therefore appropriate to consider the fact that the misconduct involved here was contemporaneous with the misconduct in the prior case.

[12c] We therefore consider the totality of the findings in the two cases to determine what the discipline would have been had all the charged misconduct in this period been brought as one case. **[13b]** The misconduct found in both cases combined involved multiple acts—ten client matters—and spanned from 1984 through 1992—all but three years of respondent's practice. It caused harm to numerous clients and jeopardized the rights of others. We also note that in the first disciplinary proceeding, the hearing judge found the respondent to be cooperative with the State Bar and to have taken remedial action regarding his trust account to avoid repetition of his misconduct. The judge in the second proceeding found respondent's prior remedial efforts much less credible,[16] and had the additional knowledge that respondent had been using cocaine since the mid-1980's and by January of 1990 considered himself to be addicted. His substance abuse resulted in his hospitalization in 1991, continued into 1992 and was the subject of court-ordered treatment in May of 1992. This serious ongoing substance abuse problem had apparently not been acknowledged by respondent in the prior proceeding and was not addressed in the prior discipline. Finally, the hearing judge below had the knowledge that respondent did not comply with the terms of probation of his prior discipline.

[14] As mitigating factors, respondent urged that his partial voluntary restitution and efforts at obtaining a CPA in order to file his quarterly reports should be accorded some weight. We disagree. Respondent misappropriated funds for up to six years from several different client settlement payments placed in his trust account. He owed the same fiduciary duty with respect to funds held in trust for medical lienholders as to his clients. (*In the Matter of Mapps* (Review Dept. 1990) 1 State Bar Ct. Rptr. 1, 10.) Nonetheless, the last liens were not satisfied until the eve of the hearing below, long after respondent had been reported to the State Bar. Respondent was obligated under the Supreme Court's disciplinary order to submit quarterly reports starting in 1991, including having a CPA or a PA certify his trust account records if respondent were to handle client funds during the subsequent probationary period. Since respondent not only failed to meet the terms of the Supreme Court order but failed to notify his monitor of his difficulty in complying, credit for his unsuccessful efforts in this regard is not appropriate.

As to aggravating evidence, the deputy trial counsel raises an additional issue regarding a charge she brought up at the hearing which was not addressed by the hearing judge in his decision. Effective August 10, 1992, respondent was placed on administrative suspension from practice by Supreme Court order for his failure to pay $7,834 in costs ordered in connection with his prior disciplinary case and added by statute (§ 6140.7) to his State Bar member fees.[17] (S027727, order filed July 17, 1992.) August 10 was also the fifth day of trial of respondent's disciplinary hearing. Respondent's counsel reported to the hearing judge and the deputy trial counsel on August 10

16. It is readily apparent that respondent's remedial measures were insufficient at the time he testified thereto in the first proceeding. In the proceeding below, respondent testified that it was not until December of 1991—a year and a half after he testified in the first proceeding—that he discovered that a key longterm employee had misappropriated $70,000 from respondent's law practice over the past several years.

17. Respondent was suspended for less than two weeks—from August 10 through August 21 when the record below reflects that he brought his bar dues (including the costs added thereto) current by certified check. He had in 1985 also been briefly suspended for failure to pay bar dues and was suspended for 80 days in 1991 as part of his prior discipline.

that respondent was unavailable because of an emergency appearance he had to make in superior court in Los Angeles on what was to be the first day of trial in a case in which respondent was in the process of substituting out as counsel for the plaintiff. Respondent appeared therein solely for the purpose of informing the superior court judge that his client was now unrepresented and would need a continuance to obtain new counsel. Respondent had two months earlier arranged for substitute counsel to take over the case. However, after taking over depositions and other pretrial work, the substitute counsel had ultimately refused to sign the formal substitution of counsel leaving respondent as counsel of record.

[15a] At the disciplinary hearing on August 11, 1992, the deputy trial counsel indicated that if further proceedings were to be held to permit respondent to introduce additional evidence of rehabilitation, then she reserved the right to introduce at the same time additional evidence in aggravation, including evidence regarding respondent's court appearance. Respondent's counsel and the hearing judge agreed to that procedure as being fair.

At the hearing on September 18, 1992, the parties stipulated to the admission of the transcript of the superior court proceeding on August 10 and letters from the State Bar concerning respondent's outstanding costs and notice of his suspension. Respondent also testified concerning his appearance before the judge and his confusion as to whether his suspension commenced on August 10 or on August 11 and the fact that he told the judge he would be suspended by August 11.[18]

[15b] Respondent received proper notice of the charge in aggravation. The deputy trial counsel was clearly not obligated to wait to file another disciplinary action to address this issue; the unauthorized practice of law while on suspension is an appropriate factor to be considered in aggravation. (*In re Naney* (1990) 51 Cal.3d 186, 195.) **[16]** Here, however, there is no clear and convincing evidence that respondent knowingly practiced law while suspended on August 10. Respondent testified that he went to court on August 10 solely to report to the court that his client was now without representation; that he did not engage in settlement discussions with the opposing counsel, but that the judge tried to resolve the case directly and respondent's only role was to follow the court's instructions to speak with his client about the possibility of resolving the case that day. The superior court judge noted on the record that in that proceeding the client was without counsel, and continued the trial for the purpose of permitting him to hire new counsel.

Finally, we consider that respondent also testified that he came to the realization in January 1990 that he had a problem with cocaine dependency. He further testified that he was hospitalized for that problem for three weeks in June of 1991, which did not result in his abstention from cocaine thereafter, and that because of the conviction matter which was abated by the hearing judge, he has been under court-ordered treatment for his addiction since May 15, 1992. In *Conway* v. *State Bar* (1989) 47 Cal.3d 1107, 1126, the Supreme Court rejected evidence that Conway no longer suffered from cocaine addition as "insufficient to overcome the strong showing that [he] posed a substantial threat of harm to his clients and the public" in light of his "past lapses and history of recurring wrongs." Here respondent admitted that despite the absolute ban on cocaine use which the program he is now enrolled in requires, he has used cocaine on at least one occasion since starting the program in May of 1992 although not in the three months prior to the hearing below. **[17]** Respondent's cocaine dependency is appropriate for us to consider in determining the appropriate discipline for public protection. (Cf. *In re Kelley* (1990) 52 Cal.3d 487, 498.)

RECOMMENDED DISCIPLINE

The hearing judge, in weighing his recommended discipline, was particularly disturbed that

18. The Supreme Court order specified that the suspension took effect "from and after August 10." (S027727, order filed July 17, 1992.)

respondent's misconduct in both original proceedings began so soon after his admission to practice, that he failed to meet the probation terms of his prior discipline and that he made no attempt to file any timely report with an explanation to the probation department or his probation monitor concerning the problems he was having securing the services of a CPA.

[13c] We agree with the hearing judge that standard 2.2 generally calls for disbarment for misappropriations of the type involved here and that standard 2.3 also would justify disbarment for acts of moral turpitude under the circumstances found here. Although not discussed in the decision below, the case law clearly supports disbarment as well. (See, e.g., *Grim* v. *State Bar*, *supra*, 53 Cal.3d 21; *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128.) The amount misappropriated was clearly not insignificant, nor were there any mitigating circumstances found. Respondent's violation of probation and admitted cocaine addiction following imposition of discipline for years of professional misconduct underscore the danger to the public that he poses. The hearing judge noted that respondent has taken the initial steps in getting his personal life in order but did not explain how lengthy suspension was justified rather than disbarment which would also include the requirement of a reinstatement proceeding in order for respondent to seek to practice law in the future. We find no basis for the suspension recommendation. Respondent has engaged in numerous breaches of professional ethics, which in the aggregate clearly require imposition of the harshest discipline as urged by the Office of Trials.[19] **[18 - see fn. 19]** Respondent's counsel argues that *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708 is authority for imposition of only one year of actual suspension. This argument is misplaced. Robins's mishandling of his cases was found to be due to gross negligence. No dishonesty was found. Moreover, there was extensive mitigating evidence in terms of Robins's religious conversion, pro bono activities and character witness testimony all of which are totally lacking here.

For the reasons stated above, we recommend that respondent Robert Michael Sklar be disbarred and that his name be stricken from the roll of attorneys in this state; and that he be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively after the effective date of the Supreme Court's order. We further recommend that costs of this proceeding be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

19. **[18]** It is puzzling to us under these circumstances that the Office of Trials did not seek to have respondent placed on inactive enrollment under section 6007 (d) at the time the hearing judge issued his order revoking respondent's probation. Respondent was given proper notice in the notice to show cause issued in the probation revocation proceeding that inactive enrollment under section 6007 (d) was one of the remedies sought by the State Bar for his alleged violation of probation, but the Office of Trials did not mention this remedy in its pretrial statement. Nor did that office apparently raise the issue at the trial or in its brief to this court. As a consequence, respondent has been allowed to practice law for the last year pending this appeal (taking in approximately 10 new cases per month, by his testimony) despite grave concerns expressed by the Office of Trials as to the threat he poses to clients and the public.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT P

A Member of the State Bar

No. 90-O-10765

Filed December 21, 1993

SUMMARY

Respondent represented a Medi-Cal beneficiary in a personal injury matter. The California Department of Health Services ("DHS") informed respondent that any settlement of the matter was subject to a lien to reimburse Medi-Cal for medical services to respondent's client. Respondent told DHS that the client was covered by medical payments insurance. Subsequently, without filing suit, respondent negotiated a settlement payable from uninsured motorist coverage, deducted his own fees and costs therefrom, and, at the client's request, distributed all the remaining settlement funds to the client. Respondent did not inquire whether DHS had been paid from the medical payments coverage, did not inform DHS of the settlement, and did not allow DHS an opportunity to satisfy the outstanding Medi-Cal lien. Subsequently, DHS demanded that respondent pay the lien, and complained to the State Bar when he refused to do so. After a hearing which included a culpability phase, but not a sanction phase, the hearing judge dismissed all disciplinary charges against respondent, based on the conclusion that respondent had no statutory obligation to DHS. (Hon. Alan K. Goldhammer, Hearing Judge.)

The deputy trial counsel sought review. The review department held that although respondent did not comply with the statutory obligation to provide timely notice of the settlement to DHS, a culpability determination that respondent had violated his statutory duty as an attorney to comply with California law was not appropriate because respondent acted on the good faith, erroneous belief that he was entitled to distribute all the settlement funds to the client and let the client deal with the Medi-Cal lien. Respondent was culpable, however, of violating the rule of professional conduct requiring prompt payment of entrusted funds upon demand by failing to ensure that DHS's claim for payment of the Medi-Cal lien was honored. The proceeding was remanded for further proceedings as to the appropriate disposition.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro, Bruce H. Robinson

For Respondent: Respondent P, 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] **130 Procedure—Procedure on Review**
199 General Issues—Miscellaneous
Even though a disciplinary proceeding is a public matter, the respondent's name is not publicized in the review department's opinion when the disposition at the hearing level was dismissal and the review department cannot determine what the ultimate disposition of the proceeding will be.

[2] **194 Statutes Outside State Bar Act**
213.10 State Bar Act—Section 6068(a)
490.00 Miscellaneous Misconduct
Where respondent settled a personal injury claim, without filing suit, on behalf of a client who was a Medi-Cal beneficiary, respondent's failure to notify the Department of Health Services of the settlement did not violate a statute which only required such notice if an action had been filed (Welfare and Institutions Code section 14124.79).

[3] **194 Statutes Outside State Bar Act**
204.90 Culpability—General Substantive Issues
430.00 Breach of Fiduciary Duty
An attorney's obligation to his or her client is limited by the attorney's and the client's obligation to third parties. Where respondent's client, a Medi-Cal beneficiary, had a statutory obligation (Welfare and Institutions Code section 14124.76) to notify the Department of Health Services (DHS) of the impending settlement of a personal injury matter in which DHS claimed a lien, respondent had a fiduciary obligation under decisional law to provide the required notice on his client's behalf.

[4] **194 Statutes Outside State Bar Act**
213.10 State Bar Act—Section 6068(a)
430.00 Breach of Fiduciary Duty
Where a statute (Welfare and Institutions Code section 14124.76) required Medi-Cal beneficiaries to notify the Department of Health Services (DHS) regarding the impending settlement of matters in which no suit had been filed and DHS claimed a lien, the review department construed the statute to require that attorneys representing such beneficiaries must also give the required notice, because to construe the statute otherwise would frustrate the Medi-Cal third party liability recovery system and be in derogation of an attorney's general fiduciary responsibility to lienholders.

[5 a-c] **163 Proof of Wilfulness**
194 Statutes Outside State Bar Act
204.10 Culpability—Wilfulness Requirement
213.10 State Bar Act—Section 6068(a)
490.00 Miscellaneous Misconduct
The statute providing that attorneys have a duty to support the constitution and laws of California and the United States constitutes a conduit whereby attorneys may be disciplined for violating laws which are not otherwise disciplinable under the State Bar Act. However, a negligent mistake made in good faith does not constitute a violation of this statute. Thus, where respondent believed he had satisfied his obligation to a statutory medical lienholder by informing it of a source of insurance coverage, and thus believed that his client was entitled to all of the settlement funds obtained from a different source of coverage, respondent's failure to notify the lienholder of the impending settlement, as required by statute, did not violate his statutory duty to obey California law, because it constituted a negligent mistake, based on the good faith, erroneous belief that he was entitled to distribute all the settlement funds to the client and let the client deal with the statutory lien.

[6] **135 Procedure—Rules of Procedure**
162.19 Proof—State Bar's Burden—Other/General
169 Standard of Proof or Review—Miscellaneous
On the issue of whether a respondent acted in good faith, the credibility determinations of the hearing judge deserve great weight. (Trans. Rules Proc. of State Bar, rule 453(a).) In addition, the State Bar Court must resolve all reasonable doubts about culpability in favor of the accused attorney and must choose the inference leading to innocence if equally reasonable inferences may be drawn from the facts.

[7] **220.00 State Bar Act—Section 6103, clause 1**
220.10 State Bar Act—Section 6103, clause 2
Where a disciplinary proceeding did not involve a court order, respondent did not violate the statute which authorizes discipline to be imposed upon an attorney who violates a court order, but otherwise is not a basis for charged misconduct.

[8] **204.90 Culpability—General Substantive Issues**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
430.00 Breach of Fiduciary Duty
An attorney holding funds for a person who is not the attorney's client must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed. Where an attorney represents a Medi-Cal beneficiary in a personal injury matter and has received notice of the Medi-Cal lien, the attorney has a fiduciary obligation toward the Department of Health Services as to its advancement of funds for the beneficiary and the Medi-Cal lien.

[9 a, b] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
The rule regarding prompt payment of entrusted funds upon demand applies not only to an attorney's obligation to clients, but also to the attorney's obligation to pay third parties out of funds held in trust, including the obligation to pay holders of medical liens. Where respondent disbursed to a client the entire amount of the settlement of a personal injury claim without ensuring that the request by the Department of Health Services for payment of a Medi-Cal lien was honored, respondent wilfully violated such rule. It was no defense that respondent acted at the client's request, because the client was not entitled to receive all the settlement funds.

[10] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Unlike the proof of a violation of the State Bar Act, the proof of a wilful violation of the Rules of Professional Conduct merely has to demonstrate that the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it. Where respondent knew he was settling a personal injury claim without ensuring the payment of an applicable Medi-Cal lien and intended to do so, he acted wilfully; and a determination of culpability under the rule requiring proper payment of entrusted funds was appropriate even if he acted in good faith.

[11] **715.10 Mitigation—Good Faith—Found**
791 Mitigation—Other—Found
The lack of judicial precedent clearly establishing an attorney's duty at the time of the attorney's misconduct may be considered on the issue of possible mitigation.

[12 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

Where respondent negligently erred in failing to take proper steps to ensure payment of a medical lien, but the record did not contain clear and convincing evidence that respondent's misconduct was intentional, reckless, or repeated, respondent did not violate the former rule making intentional, reckless, or repeated incompetence a disciplinable offense. Respondent's conduct, which was invited by the client, in leaving his client open to a possible lawsuit by the medical lienholder, was not so extreme as to constitute recklessness.

[13 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
106.40 Procedure—Pleadings—Amendment
119 Procedure—Other Pretrial Matters
136 Procedure—Rules of Practice
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Duplicative allegations of misconduct serve little, if any purpose. It should be apparent by the time of the pretrial conference which charges are most apt, which other charges might show additional misconduct, and which are simply duplicative and unnecessary. Amendment or dismissal of charges, particularly at the time of filing the pretrial statement (rule 1222(k), Provisional Rules of Practice), serves the interest of litigant and judicial economy. Thus, where respondent failed to ensure payment of a medical lien when settling a personal injury case, there was no benefit to charging respondent with failing to act competently, when the charge that respondent violated the rule requiring proper payment of entrusted funds addressed the alleged misconduct far more aptly and supported identical or greater discipline.

[14] **130 Procedure—Procedure on Review**
139 Procedure—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous

Where, due to the dismissal of all charges, a disciplinary hearing had included a culpability phase but not a sanction phase, and where the review department found respondent culpable of misconduct, it would be inappropriate for the review department to recommend or impose any sanction even if the State Bar wished to waive its opportunity to introduce evidence regarding aggravation, because respondent wanted and was entitled to the opportunity to offer evidence in mitigation.

[15] **199 General Issues—Miscellaneous**
204.90 Culpability—General Substantive Issues
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
791 Mitigation—Other—Found

Where respondent settled a personal injury claim on behalf of a Medi-Cal beneficiary without ensuring the payment of the applicable Medi-Cal lien, an issue to be addressed on remand was the effect, if any, on the appropriate degree of discipline of the policy adopted by the Office of the Chief Trial Counsel, with the approval of a committee of the Board of Governors, against prosecuting future health care provider "collection" cases, at least for private lienholders.

ADDITIONAL ANALYSIS

Culpability

Found

280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

213.15 Section 6068(a)
220.05 Section 6103, clause 1
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

OPINION

PEARLMAN, P.J.:

We review the decision by a hearing judge of the State Bar Court to dismiss all of the disciplinary charges against respondent,[1] **[1 - see fn. 1]** who represented a Medi-Cal beneficiary in a personal injury matter and distributed the settlement funds to his client without first allowing for the satisfaction of the outstanding Medi-Cal lien. We affirm the dismissal of all but one of the charges. Because we conclude, under applicable Supreme Court precedent, that respondent did have a fiduciary obligation to the State Department of Health Services ("DHS") to ensure DHS an opportunity to collect the money due under the Medi-Cal lien under former rule 8-101(B)(4) of the Rules of Professional Conduct and that such obligation was breached by respondent's distribution of the settlement funds to his client, we must remand the proceeding for a disciplinary hearing and recommendation or imposition of an appropriate disposition.

I. FACTS

As the hearing judge and the parties observed, the facts of this proceeding are not in significant dispute. We accept the factual findings in the hearing judge's decision and in some respects amplify them on the basis both of documents of undisputed validity and of testimony which the hearing judge found credible.

Ms. A suffered personal injuries in a car accident in April 1983. She was a passenger in a car driven by Mr. B, who had uninsured motorist coverage issued by a subsidiary of an insurance group ("Insurance Group"). The driver of another vehicle caused the accident, but had no insurance.

Ms. A employed respondent to represent her on a contingent fee basis. Learning that A had received medical treatment at county health facilities in connection with her receipt of funds from the county department of public social services, respondent wrote to the DHS in September 1983 that the Medi-Cal program may have paid for her treatment and, if so, that he wished to know the amount of the Medi-Cal lien.

In November 1983, the DHS sent respondent a document entitled "Notice of Lien." This notice stated the following:

(1) Ms. A was a Medi-Cal program beneficiary and had received health care benefits.

(2) Respondent and A were required to report to the DHS pursuant to Welfare and Institutions Code section 14124.70 et seq.

(3) The DHS claimed a lien upon the proceeds or satisfaction of any judgment, or upon the proceeds of any settlement negotiated with or without suit, in favor of A. No rights under Welfare and Institutions Code section 14124.70 et seq. were waived.

(4) Medi-Cal payment records would be researched, and respondent would be notified of the amount required to satisfy the DHS's lien.

Accompanying the notice of lien was a form seeking further information. Respondent promptly completed, signed, and returned this information form to the DHS. He stated that the case was pending, that no complaint had been filed, that he needed to know the amount of the Medi-Cal lien, and that he did not know whether any medical payments coverage was available or whether A was covered by any form of health insurance.[2]

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1. **[1]** This proceeding has been a public matter before the State Bar Court and remains so. We do not, however, publicize respondent's name because the disposition at the hearing level was a dismissal of the action, which would not result in publication of respondent's name, and because at this stage we cannot determine what the ultimate disposition will be. (See *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1; *In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 258, fn. 2.)

2. The hearing judge found that neither respondent nor A consented to the Medi-Cal lien. Although the record supports this factual finding, such agreement or consent was unnecessary because the Medi-Cal lien arose by operation of law. (See *post*, section III.D.)

In January 1984, the DHS sent respondent an itemization of payments made by the Medi-Cal program for medical services to A. The DHS's letter stated the total amount of the lien as $2,197.84 and asked respondent to contact the DHS when A's claim neared settlement, so that the DHS could furnish respondent with a further itemization. Also, the letter advised respondent that payment in satisfaction of the Medi-Cal lien had to be sent to the DHS in Sacramento.

In February 1984, respondent replied to the DHS. His reply stated that he had reviewed the DHS's January letter, that medical payments insurance up to $5,000 covered A for the accident in which she was involved, that the carrier was the Insurance Group, and that the policy number was 96-110249532.

At the disciplinary hearing, respondent testified that A had told him about the medical payments coverage in the policy, although he had no "independent source" to establish whether the policy actually included medical payments coverage, which could have satisfied the Medi-Cal lien separate from B's uninsured motorist coverage. Mr. S, a litigation claims representative with the Insurance Group, testified that the Insurance Group's file regarding A's claim had been destroyed, but that he had reviewed the file prior to its destruction and had noticed medical payments coverage up to $5,000 in B's policy. Thus, we find that such coverage was available.

More than a month later, in March 1984, without providing further notice to the DHS and without filing an action, respondent settled A's claim. Respondent did not discuss the Medi-Cal lien with the Insurance Group. Nor did he negotiate a payment for A under the medical payments coverage of B's policy. He asserted that he had only settled A's uninsured motorist claim.

The Insurance Group sent respondent a $10,000 check made payable to A and respondent. The DHS was not listed as a payee on the check, nor does any evidence in the record suggest that the Insurance Group asked respondent to pay the Medi-Cal lien out of the check. A cover note described the check as "full settlement" of the matter involving B.[3] Enclosed with the check were an uninsured motorist release and proof of claim form to be executed by A and returned to the Insurance Group.

Upon receiving the $10,000 settlement check, respondent had his client sign it and the release and deposited the check in his trust account. According to his testimony before the hearing judge, respondent told A, "'DHS has a lien.'" Showing A his letter of February 1984 to the DHS about the medical payments coverage under B's policy, respondent said, "'I've notified [the DHS], . . . but this is your money. You tell me what you want me to do.'" Ms. A replied that she wanted the money and would "deal with" the lien. Respondent then distributed $3,362.72 to himself for fees and costs and the remaining $6,637.28 to A.

At the hearing, respondent testified that he had specialized in handling personal injury claims for almost his entire 18-year career and had routinely settled cases involving notification of the DHS. According to respondent, his practice was to notify the DHS as soon as he found out that a Medi-Cal beneficiary had medical payments coverage. He testified that such coverage was "very easy to collect" and that collection occurred "within a week or two" of notification.

When he settled A's claim, respondent made no inquiries to determine whether the DHS had obtained any reimbursement of expenditures by the Medi-Cal program on A's behalf. The record does not establish exactly when the DHS received respondent's February 14, 1984, letter or exactly when respondent negotiated the settlement with the

3. S testified that when the Insurance Group made a full settlement, it did not expect to make any payments under medical payments coverage because its policies contained a provision whereby it deducted from any final settlement such medical payments as were defrayed. According to S, the Insurance Group's standard procedure was for adjusters to write "lien pending" or "leave Med-Pay open" if the Insurance Group intended to pay a Medi-Cal lien, but A's file contained no such notation.

Insurance Group, although the date of the cover note accompanying the settlement check was March 23, 1984.

In September of 1986 the DHS wrote to the Insurance Group to ascertain what had happened regarding the Medi-Cal lien for services rendered to A. In August 1987, the DHS asked respondent for more information. In September 1987, he replied that he had settled A's uninsured motorist claim for $10,000 and that A had medical payments coverage under B's policy. Apparently, A could not be located. In 1989, the DHS sought payment of the Medi-Cal lien from respondent, who refused to pay it.

II. PROCEEDINGS BELOW

In February 1990, the DHS filed a complaint with the State Bar against respondent. In September 1991, the Office of the Chief Trial Counsel ("OCTC") filed a one-count notice to show cause, charging respondent with the violation of Business and Professions Code section 6068 (a) and former rule 6-101(A)(2) of the Rules of Professional Conduct.[4] In October 1992, the OCTC filed an amended notice to show cause, adding to the existing charges the allegation that respondent had violated Business and Professions Code section 6103 and former rule 8-101(B)(4). A hearing occurred in November 1992. After the hearing, respondent discharged the attorney who had represented him and became his own attorney in propria persona. The decision dismissing the charges against respondent was filed in January 1993, and the deputy trial counsel sought review in February 1993.

III. DISCUSSION

Because the hearing judge found that no statutory obligation to DHS existed, as a preliminary matter, we discuss the means whereby the DHS may have recovered its expenditures on behalf of Medi-Cal beneficiaries. We then examine the allegations against respondent.

A. Two Systems Available to the DHS for Recovering Medi-Cal Expenditures

Under the Medi-Cal program, California makes payments to health care providers who render medical care and treatment to Medi-Cal beneficiaries. (Welf. & Inst. Code, § 14000 et seq.; *Kizer* v. *Ortiz* (1990) 219 Cal.App.3d 1055, 1058.) The DHS has two separate and distinct systems for recovering such payments: (1) "other coverage" recovery and (2) "third party liability" recovery. (*Palumbo* v. *Myers* (1983) 149 Cal.App.3d 1020, 1027, 1033-1034.)

Welfare and Institutions Code section 14024 permits "other coverage" recovery. In relevant part, section 14024 states: "When health care services are provided to a person . . . who at the time of the service has any other contractual or legal entitlement to such services, the director [of the DHS] shall have the right to recover from the person . . . who owes such entitlement, the amount which would have been paid to the person entitled thereto, or to a third party in his behalf, or the value of the service actually provided, if the person entitled thereto was entitled to services." As construed by the DHS, "other contractual or legal entitlement to [health care] services" is "other coverage." Recovery from "other coverage" is available if a person, at the time of applying for Medi-Cal assistance, had another means of obtaining the services paid for by the Medi-Cal program. (*Palumbo* v. *Myers*, *supra*, 149 Cal.App.3d at p. 1027.) According to the testimony of the chief hearing officer for the DHS, such "other coverage" includes "coverage under an uninsured motorist policy," when an insured has paid more for automobile insurance to get medical care. (*Id.* at p. 1032, fn. 12.)

Welfare and Institutions Code sections 14124.70 through 14124.92 deal with "third party liability" recovery. These sections allow the DHS to obtain reimbursement for Medi-Cal expenditures by pursuing a lawsuit on its own behalf or by satisfying a lien against a Medi-Cal beneficiary's recovery from a

4. All further references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

third party. (See Welf. & Inst. Code, §§ 14124.71-14124.79.) Unlike the "other coverage" provisions, the "third party liability" provisions permit recovery by lien. (*Palumbo* v. *Myers*, *supra*, 149 Cal.App.3d at p. 1033.)

Citing Welfare and Institutions Code section 14019.4, subdivision (a), and section 14024 and *Palumbo* v. *Myers*, *supra*, 149 Cal.App.3d at p. 1027, respondent's counsel characterized "other coverage" recovery as "primary" and "third party liability" recovery as "only secondary." The deputy trial counsel and the hearing judge did not address this characterization, nor does the law cited by respondent's counsel support it. The two systems of recovery apply in different situations and confer upon the DHS separate and distinct rights. (*Palumbo* v. *Myers*, *supra*, 149 Cal.App.3d at pp. 1031, 1033-1034.)

At the disciplinary hearing, respondent expressed the belief that he had satisfied his obligation with respect to the Medi-Cal lien by sending his February 1984 letter to the Insurance Group and that he had a good faith belief that the lien was not outstanding at the time of the settlement. However, he also testified that he told his client "DHS has a lien," that he followed her instructions to distribute the settlement fund, and that she told him she would "deal with" the lien.

At oral argument, respondent contended that he was entitled to take the position on behalf of his client that *Palumbo* v. *Myers*, *supra*, 149 Cal.App.3d at p. 1027, required the DHS to pursue "other coverage" recovery, if available. Yet *Palumbo* v. *Myers*, *supra*, sets out no such requirement. Further, Welfare and Institutions Code section 14024 provides that the DHS "shall have the right" to pursue recovery from "other coverage," not that it must do so.

B. No Violation of Business and Professions Code Section 6068 (a)

The deputy trial counsel argues that by failing to comply with the notification requirements of Welfare and Institutions Code sections 14124.76 and 14124.79, respondent violated Business and Professions Code section 6068 (a). We agree that respondent failed to comply with Welfare and Institutions Code section 14124.76, but do not conclude that he failed to comply with Welfare and Institutions Code section 14124.79. Nor, for reasons we shall explain, does respondent's level of scienter constitute a violation of Business and Professions Code section 6068 (a).

Welfare and Institutions Code section 14124.76 broadly provides that "No judgment, award, or settlement in any action or claim by a [Medi-Cal] beneficiary to recover damages for injuries, where the director [of the DHS] has an interest, shall be satisfied without first giving the director notice and a reasonable opportunity to perfect and satisfy his lien."

Welfare and Institutions Code section 14124.79 provides that "In the event that the [Medi-Cal] beneficiary . . . brings an action against the third person who may be liable for the injury, notice of institution of legal proceedings, notice of settlement and all other notices required by this code shall be given to the director [of the DHS] in Sacramento except in cases where the director specifies that notice shall be given to the Attorney General." Further, section 14124.79 contains the specific provision that "All such notices shall be given by the attorney retained to assert the beneficiary's claim, or by the injured party beneficiary . . . if no attorney is retained."

[2] As the hearing judge concluded, respondent had no obligation under Welfare and Institutions Code section 14124.79 to provide the DHS with notice of the March 1984 settlement since section 14124.79 applies only if an action has been filed.

Welfare and Institutions Code section 14124.76 does not contain a provision analogous to the provision of Welfare and Institutions Code section 14124.79 explicitly requiring the attorney representing the Medi-Cal beneficiary to provide required notices. The hearing judge concluded that Welfare and Institutions Code section 14124.76 operated "only against the 'beneficiary' and not against the attorney for the beneficiary since the section refers only to the beneficiary." (Decision pp. 11-12.) We disagree.

In concluding that respondent also had no obligation under Welfare and Institutions Code section 14124.76 to notify the DHS of the impending settlement with the Insurance Group, the hearing judge relied upon *Brian* v. *Christensen* (1973) 35 Cal.App.3d 377, interpreting the then-applicable provision of Welfare and Institutions Codes section 14117. The hearing judge concluded that *Brian* v. *Christensen* "held in a situation almost identical to the [current] one . . . that there was no statutory requirement for an attorney to give notice of a settlement of a personal injury action involving a Medi-Cal recipient . . . . The Court of Appeal specifically held that the only fiduciary relationship was between the attorney and his client and that no duty arose notwithstanding the attorney's knowledge of the Medi-Cal lien and notwithstanding the client's liability to the Director of the DHS." (Decision p. 11.) Without explaining his reasoning, the hearing judge added that he was "not persuaded" by the argument that *Brian* v. *Christensen* "is no longer good law . . . ." (*Ibid.*)

As the deputy trial counsel suggests, current Welfare and Institutions Code section 14124.79, which was enacted in 1976, has superseded former section 14117. Because section 14124.79 requires that notice of a settlement be given if an action has been filed and that the attorney retained to assert the beneficiary's claim give such notice, *Brian* v. *Christensen* is no longer controlling law.

Brian v. *Christensen* also appears inconsistent with subsequent Supreme Court case law regarding attorneys' fiduciary duties to lienholders. (See, e.g., *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979.) We addressed a similar situation involving the duty of an attorney to communicate to the DHS as a lienholder in *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 200. Nunez settled a personal injury action for a Medi-Cal beneficiary after the beneficiary had filed a bankruptcy petition. Believing that the bankruptcy would eliminate the Medi-Cal lien, the attorney failed to answer two letters from the DHS concerning the action. In *In the Matter of Nunez*, we upheld the dismissal of the count because the failure to communicate to DHS had not been charged, but stated our view that Nunez had a fiduciary obligation to the DHS with respect to its lien and therefore a duty to answer the letters from the DHS. The hearing judge properly characterized these statements as dicta, but assumed that we had failed to consider Nunez's obligations to his client. Also, the hearing judge stated that the duty of communication articulated in *In the Matter of Nunez* was consistent with the dismissal of the current proceeding because respondent answered the inquiries which he received from the DHS.

We disagree. **[3]** We have previously ruled, based on Supreme Court precedent, that an attorney's obligation to his or her client is limited by the attorney's and the client's obligation to third parties. (See, e.g., *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 27-28; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10.) Here, respondent did not timely notify the DHS of a crucial development in A's matter: the impending settlement in March 1984 of her claim against the Insurance Group. His client had a statutory obligation to provide such notice under Welfare and Institutions Code section 14124.76, and we hold he also had a fiduciary obligation to do so under decisional law.

[4] The reference to the beneficiary in section 14124.76 does not limit the responsibility for notification. The beneficiary's attorney is in an appropriate position not only to notify the DHS of the existence of a claim potentially subject to a DHS lien, as respondent did, but also to carry out the beneficiary's duty to notify the DHS of the proposed settlement prior to distribution. As discussed above, section 14124.79 expressly provides that the attorney representing the Medi-Cal beneficiary in a filed action must notify the DHS of an impending settlement. To construe section 14124.76 as absolving the attorney of responsibility for such notification merely because no action has been filed would frustrate the "third party liability" recovery system. It would also be in derogation of the attorney's general fiduciary responsibility to lienholders against funds in the attorney's possession. Thus, we construe section 14124.76 as requiring that the attorney representing the Medi-Cal beneficiary give the DHS notice of an impending settlement so that the DHS has a reasonable opportunity both to perfect and to satisfy the Medi-Cal lien.

By advising the DHS in September 1983 that it might have a Medi-Cal lien against any recovery by A, respondent gave proper notice for perfection of the lien. The DHS then perfected the Medi-Cal lien simply by sending respondent the notice of lien in November 1983. (See *Brown* v. *Stewart* (1982) 129 Cal.App.3d 331, 342-343 [no formal procedure necessary for protecting a Medi-Cal claim for reimbursement].) This notice unequivocally informed respondent that the DHS claimed a lien upon any settlement in favor of A and that the DHS waived none of its rights under the "third party liability" statutes. Respondent, however, did not give the DHS notice for satisfaction of the Medi-Cal lien. In March 1984, he settled A's claim against the Insurance Group and distributed the funds which were the subject of the lien without advising the DHS and in disregard of its rights.

[5a] This brings us to the charged violation of Business and Professions Code section 6068 (a). Pursuant to Business and Professions Code section 6068 (a), an attorney has the duty to support the constitution and laws of the United States and California. Section 6068 (a) constitutes a conduit whereby attorneys may be disciplined for violating laws which are not otherwise disciplinable under the State Bar Act (i.e., Business and Professions Code section 6000 et seq.). If the notice to show cause charges an attorney with the violation of a statute not containing its own disciplinary provision and if the attorney committed the violation, the circumstances may support a determination of disciplinable misconduct under section 6068 (a). (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487, and cases cited therein.)

[5b] Neither of the parties has addressed the issue of whether a negligent mistake made in good faith constitutes a violation of Business and Professions Code section 6068 (a), although respondent seeks to have us affirm the dismissal of this charge. Cases decided under Business and Professions Code section 6067, which requires that every attorney take an oath "faithfully to discharge the duties of an attorney at law to the best of his knowledge and ability," establish that making a negligent mistake in good faith does not amount to violating broad duties under the State Bar Act. "[M]ere ignorance of the law in conducting the affairs of a client in good faith" does not violate the attorney's statutory oath to discharge his or her duties faithfully. "The good faith of an attorney is a matter to be considered in determining whether discipline should be imposed for acts done through ignorance or mistake." (*Call* v. *State Bar* (1955) 45 Cal.2d 104, 110-111.) "[S]ection 6067 recognizes that attorneys are not infallible and cannot at their peril be expected to know all of the law." (*Zitny* v. *State Bar* (1966) 64 Cal.2d 787, 793.) The Supreme Court "has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." (*Lewis* v. *State Bar* (1981) 28 Cal.3d 683, 688.) Thus, a mistake of law made in good faith may be a defense to an alleged violation of section 6067. (*Abeles* v. *State Bar* (1973) 9 Cal.3d 603, 610; *Millsberg* v. *State Bar* (1971) 6 Cal.3d 65, 75; *Zitny* v. *State Bar*, *supra*, 64 Cal.2d at p. 793.) We hold that Business and Professions Code section 6068 (a), which, like section 6067, broadly sets out duties of an attorney, must be similarly construed.[5]

[6] On this issue of good faith, we must give great weight to the credibility determinations of the hearing judge. (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240.) In addition, we must resolve all reasonable doubts about culpability in favor of the accused attorney and must choose the inference leading to innocence if equally reasonable inferences may be drawn from the facts. (*In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 240, and cases cited therein.)

[5c] At the hearing, respondent testified that he believed he had satisfied his obligation to DHS by sending his February 1984 letter. He also asserted the

5. Although the Supreme Court has indicated in some cases that "wilful" failure to perform legal services constituted a disciplinable breach of an attorney's fiduciary duty, such failure resulted from intentional wrongdoing or gross negligence. (See, e.g., *Lester* v. *State Bar* (1976) 17 Cal.3d 547, 549, 551 [intentional and repeated misconduct]; *Selznick* v. *State Bar* (1976) 16 Cal.3d 704, 708-709 [intentional misconduct or gross negligence].)

belief that the DHS would pursue "other coverage" recovery from the Insurance Group. According to his testimony, although he informed A of the extant Medi-Cal lien, he believed that A was entitled to all of the $10,000 settlement which remained after the payment of attorney's fees and costs. The hearing judge found respondent's testimony to be credible. The hearing judge then expressly determined that even if his statutory analysis were "found to be incorrect and that there was an obligation on respondent's part to have paid DHS rather than his own client, respondent's failure to have paid DHS would still not appear to be an 'intentional' or 'reckless' failure to act competently...." (Decision p. 16.) A culpability determination is therefore not appropriate under Business and Professions Code section 6068 (a) because respondent's failure to inform the DHS of the impending settlement in March 1984 constituted a negligent mistake, based on the good faith, erroneous belief that he was entitled to distribute the settlement funds to his client and let her deal with the issue.

C. No Violation of Business and Professions Code Section 6103

[7] It is not clear from the record why the notice to show cause was amended to charge respondent with violating Business and Professions Code section 6103, which authorizes discipline to be imposed upon an attorney who violates a court order, but otherwise is not a basis for charged misconduct. (See *Read* v. *State Bar* (1991) 53 Cal.3d 394, 406; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 575.) The deputy trial counsel at the hearing below conceded that the current proceeding involved no court order. Respondent clearly did not violate section 6103.

D. Violation of Former Rule 8-101(B)(4)

The deputy trial counsel argues that by failing to ensure that the DHS's Medi-Cal lien claim was honored, respondent wilfully violated former rule 8-101(B)(4). We agree.

The hearing judge asserted that no violation of former rule 8-101(B)(4) occurred because the DHS had "no contractual or statutory right" to payment of the Medi-Cal lien. (Decision p. 7; see also *id.* at p. 12.) He did not, however, address Welfare and Institutions Code section 14124.78, which establishes such a right. Pursuant to Welfare and Institutions Code section 14124.78, "the entire amount of any settlement of the injured beneficiary's... claim, with or without suit, is subject to the [DHS] director's claim for reimbursement of the [Medi-Cal] benefits provided and any lien filed pursuant thereto . . . ." Thus, by operation of law, the $10,000 settlement obtained from the Insurance Group was subject to the Medi-Cal lien of $2,197.84.

[8] An attorney holding funds for a person who is not the attorney's client must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed. (See *Hamilton* v. *State Bar* (1979) 23 Cal.3d 868, 879; *Crooks* v. *State Bar* (1970) 3 Cal.3d 346, 355; *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156; *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr 185, 191; *In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 27.) Where an attorney represents a Medi-Cal beneficiary in a personal injury matter and has received notice of the Medi-Cal lien, the attorney has a fiduciary obligation toward the DHS as to its advancement of funds for the beneficiary and the Medi-Cal lien. (See *In the Matter of Nunez, supra*, 2 Cal. State Bar Ct. Rptr. at p. 200.) In the current proceeding, respondent had a fiduciary obligation to the DHS with regard to the $2,197.84 Medi-Cal lien by operation of law because he had received the DHS's notice of lien.

[9a] Former rule 8-101(B)(4) required that an attorney "promptly pay... to the client as requested by a client the funds... in the possession of the [attorney] which the client is entitled to receive." It is no defense that respondent acted at his client's request, because she was not entitled to receive all of the funds. An improper request was likewise made by a client in *In the Matter of Respondent F, supra*, in which we upheld the attorney's obligation to keep settlement funds in trust pending the client's signing of a release which was the agreed basis for distribution of the funds. We similarly discussed the conflict between a client's instructions and an attorney's duty to the opposing party and the court in *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 470.

[9b] Former rule 8-101(B)(4) not only applied to the attorney's obligations to clients, but the attorney's obligation to pay third parties out of funds held in trust, including the obligation to pay holders of medical liens. (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.) By disbursing the $10,000 settlement without ensuring that the DHS's request for payment of the $2,197.84 Medi-Cal lien was honored, respondent wilfully violated former rule 8-101(B)(4).[6]

The hearing judge observed that the recovery of the $2,197.84 Medi-Cal lien was frustrated because the DHS did not timely proceed against the Insurance Group or A and because the Insurance Group did not require respondent to pay the lien as a condition of the settlement. Yet respondent also is responsible. He failed to verify his assumption that the DHS would seek reimbursement from the medical payments coverage of B's policy. Knowing that the DHS had an existing Medi-Cal lien against the settlement, he failed to ensure that DHS had been otherwise reimbursed when he negotiated and completed the settlement in violation of section 14124.76.

[10] Unlike a violation of the State Bar Act, proof of a wilful violation of the Rules of Professional Conduct merely has to demonstrate "'that the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it.'" (*King* v. *State Bar* (1990) 52 Cal.3d 307, 313-314, quoting *Zitny* v. *State Bar*, *supra*, 64 Cal.2d at p. 792.) Clear and convincing evidence in the record establishes that respondent knew he was settling A's claim without ensuring the payment of the Medi-Cal lien and that he intended to do so. Thus, respondent acted wilfully, and a determination of culpability under former rule 8-101(B)(4) is appropriate even if he acted in good faith. (Cf. *In the Matter of Respondent F*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 25-26.) We therefore reverse the hearing judge's ruling on this charge. **[11]** However, the hearing judge would have been entitled to consider the lack of judicial precedent in 1984 clearly establishing respondent's duty to DHS under Welfare and Institutions Code section 14124.76 on the issue of possible mitigation of respondent's misconduct. (See *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 602.)

E. No Violation of Former Rule 6-101(A)(2)

The hearing judge concluded that respondent did not violate former rule 6-101(A)(2) on the grounds that respondent had no statutory or contractual obligation to the DHS. Although we conclude that respondent had a statutory and fiduciary obligation to the DHS, we agree that no violation of former rule 6-101(A)(2) occurred.

[12a] Former rule 6-101(A)(2) provided that an attorney "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." According to the deputy trial counsel, respondent violated former rule 6-101(A)(2) by not giving notice to the DHS of the $10,000 settlement and not taking steps to honor the Medi-Cal lien. The failure to provide notification is the same conduct which underlies the alleged violation of Business and Professions Code section 6068 (a); and the failure to ensure payment of the Medi-Cal lien is the same conduct which underlies the alleged violation of former rule 8-101(B)(4). As already discussed, these failures were found to have been negligent mistakes. The record does not contain clear and convincing evidence that respondent intentionally, recklessly, or repeatedly engaged in wrongdoing. Thus, respondent's failure to give notice of the $10,000 settlement and to honor the Medi-Cal lien did not constitute a violation of former rule 6-101(A)(2).

6. Relying on Welfare and Institutions Code sections 14124.70 and 14124.71, the hearing judge asserted that only the insurance carrier, not the attorney representing the Medi-Cal beneficiary, is responsible for honoring the Medi-Cal lien. Section 14124.70 defines the terms "carrier" and "beneficiary," and section 14124.71 deals with the DHS's right to recover Medi-Cal expenditures by pursuing a lawsuit on its own behalf against the insurance carrier. Sections 14124.70 and 14124.71 do not address the issue of whether the attorney representing the Medi-Cal beneficiary may also be responsible for satisfying a lien against the beneficiary's settlement with the insurance carrier.

[12b] The deputy trial counsel also argues that respondent violated former rule 6-101(A)(2) by recklessly leaving A open to a subsequent lawsuit by the DHS. The deputy trial counsel, however, does not explain why respondent's conduct—which was invited by his client—was so extreme as to constitute recklessness; and the record does not support such characterization. Thus, no determination that respondent violated former rule 6-101(A)(2) is appropriate under the deputy trial counsel's second theory.

[13a] At oral argument, the deputy trial counsel on review invited us to address and clarify the propriety of the overlapping and duplicative charges of statutory and rule violations. In *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060, the Supreme Court stated that "little, if any, purpose is served by duplicative allegations of misconduct." We likewise see no benefit to duplicative charges such as the charge that respondent violated former rule 6-101(A)(2) in addition to the charge that he violated former rule 8-101(B)(4). The latter charge addresses the same alleged misconduct far more aptly and supports identical or greater discipline. (See Bus. & Prof. Code, § 6077; compare standard 2.2(b) of the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("the standards") with standard 2.4(b); cf. *Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060.)

[13b] If it is not apparent at the time of filing of the notice to show cause, it should be apparent by the time of the pretrial conference which charges are most apt, which other charges might show additional misconduct, and which are simply duplicative and unnecessary. At any time prior to a decision, the OCTC may dismiss charges in the notice to show cause. Rule 1222(k) of the Provisional Rules of Practice specifically provides that the pretrial statement is an opportunity to amend the pleadings or dismiss charges in order to focus the hearing on the true gravamen of the charges. Such amendment or dismissal of charges serves the interest of litigant and judicial economy and would clearly have been of benefit here.

F. No Recommendation or Imposition of a Sanction

We turn now to the issue of the appropriate disposition. The deputy trial counsel requests that we impose an "appropriate" sanction. Although this would serve the interests of judicial and litigant economy, we must decline the request.

[14] To recommend or impose any sanction at this stage of the proceeding would be inappropriate even if the State Bar wished to waive its opportunity to introduce evidence regarding aggravation, because, as noted at oral argument, respondent wants the opportunity to offer evidence in mitigation which he is entitled to do. This has not yet occurred because the disciplinary hearing included a culpability phase, but not a sanction phase.[7] **[15 - see fn. 7]**

IV. CONCLUSION

We conclude that respondent violated only former rule 8-101(B)(4). Accordingly, we remand this proceeding to allow the parties to put forward evidence regarding aggravation and mitigation and the hearing judge to recommend or impose an appropriate disposition.

We concur:

NORIAN, J.
STOVITZ, J.

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7. **[15]** Another issue, raised at oral argument, which might be addressed on remand is the effect, if any, on the appropriate degree of discipline of the OCTC's new policy against prosecuting future health care provider "collections" cases. We take judicial notice that on November 5, 1993, approximately two weeks following oral argument, at the request of the OCTC, the Board of Governors Committee on Discipline and Client Assistance adopted the following resolution: "RESOLVED: The Board Committee on Discipline and Client Assistance concurs in the exercise of prosecutorial discretion by the Chief Trial Counsel to decline to investigate complaints limited to the enforcement of health care provider liens and that health care providers be referred to other available remedies." The deputy trial counsel suggested at oral argument that liens held by public entities such as Medi-Cal might be distinguishable from liens held by private lienholders addressed by his office's new policy.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT B. SCAPA AND
MICHAEL S. BROWN

Members of the State Bar

Nos. 88-O-12498 and 88-O-12499 (consolidated)

Filed October 27, 1993; as modified, November 3, 1993,
and as modified on denial of reconsideration, January 28, 1994

SUMMARY

Respondents, partners in a plaintiff personal injury practice, set up a branch office in which non-lawyer independent contractors, acting without attorney supervision, were responsible for signing up clients and were paid in cash for this service based on the value of the client's case. Respondents' form fee agreement provided that if their clients discharged them, they would be entitled to their full contingent fee, or at least to a minimum of three hours paid at a high hourly rate, regardless of the amount of work actually performed. In several cases, after their clients hired new counsel, respondents improperly claimed liens on their clients' recoveries and threatened to sue for punitive damages if the liens were not honored.

Respondents were found culpable of employing their non-lawyer agents to engage in prohibited in-person solicitation of clients; conspiring to violate the solicitation rules; dividing legal fees with their non-lawyer agents, and attempting to charge unconscionable legal fees. The hearing judge concluded that respondents' actions violated several Rules of Professional Conduct and constituted moral turpitude, and recommended that each respondent receive a 30-month stayed suspension, 4 years probation, and 15 months actual suspension. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondents sought review, raising several procedural contentions, contesting the hearing judge's findings, and asserting that the recommended suspension was excessive. The review department rejected respondents' procedural claims and concluded that the findings were supported by clear and convincing evidence and decisional law. Guided by comparable case law, the review department concluded that an even greater actual suspension was appropriate in view of respondents' overreaching practices, particularly in regard to their unethical fee practices. Accordingly, the review department modified the hearing judge's discipline recommendation to include an 18-month actual suspension. (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: Donald R. Steedman

For Respondents: Daniel Drapiewski

HEADNOTES

[1 a-d] **106.20 Procedure—Pleadings—Notice of Charges**
113 Procedure—Discovery
119 Procedure—Other Pretrial Matters
192 Due Process/Procedural Rights
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)

Where notice to show cause charging client solicitation did not identify clients allegedly solicited, but did name persons who were alleged to have performed such solicitations and fixed the period of charged misconduct, and where respondents were informed of identities of allegedly solicited clients well before most pre-trial discovery was completed, and at least six months before trial, respondents' motion to dismiss notice to show cause based on alleged vagueness, which was not made until first day of trial, was properly denied.

[2] **106.40 Procedure—Pleadings—Amendment**
106.90 Procedure—Pleadings—Other Issues
135 Procedure—Rules of Procedure
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)

The purpose of the notice to show cause in a disciplinary proceeding is to serve as a determination that probable cause exists to warrant formal charges. (Trans. Rules Proc. of State Bar, rule 510.) Accordingly, statements of probable cause, which identified clients allegedly involved in solicitation charged in notice to show cause, served as equivalent of amendments to notice to show cause.

[3] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
135 Procedure—Rules of Procedure
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)

A State Bar disciplinary matter does not deal with civil responsibility where a party might be under a duty to mitigate harm or damages. The State Bar is entitled to investigate whatever information it acquires about misconduct without notifying the attorney involved contemporaneously, and it did not act improperly by failing to notify attorneys promptly when it learned of solicitation of clients by attorneys' agents. State Bar rules require only that attorneys be given an opportunity to explain or deny matters under investigation prior to issuance of notice to show cause. (Trans. Rules Proc. of State Bar, rule 509(b).)

[4] **204.90 Culpability—General Substantive Issues**

Attorneys have a personal duty to obey the State Bar Act and Rules of Professional Conduct and to reasonably supervise their agents and employees to that end.

[5] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
159 Evidence—Miscellaneous
192 Due Process/Procedural Rights
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)

Where respondents' non-lawyer agents solicited a client who, unknown to them, was a State Bar attorney, and invited that attorney to respondents' office, that attorney did not improperly search respondents' law office by reading papers spread out on table in front of him by respondents' staff, without touching papers or opening any cabinets, drawers, or files. Such conduct would not have been improper if committed by a police agency in collecting evidence in a criminal case.

[6] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
148 Evidence—Witnesses
162.20 Proof—Respondent's Burden
191 Effect/Relationship of Other Proceedings

State Bar prosecutors have statutory authority to apply to superior court to grant immunity from criminal prosecution to a witness in an attorney disciplinary proceeding. Where such procedures were properly invoked, and respondents showed no prejudice to themselves on account of the procedures followed in seeking such immunity, respondents were not entitled to relief based on asserted error in such procedures.

[7] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**

Where State Bar demonstrated that Board of Governors policy had been properly observed with regard to State Bar investigators' interviews of respondents' current clients who had not made complaints against them, respondents were not entitled to relief based on occurrence of such interviews.

[8 a, b] **135 Procedure—Rules of Procedure**
142 Evidence—Hearsay
194 Statutes Outside State Bar Act

In State Bar disciplinary proceedings, the formal rules of evidence apply as in civil cases, with the proviso that no error in admitting or excluding evidence invalidates a finding or decision unless the error deprived the party of a fair hearing. (Trans. Rules Proc. of State Bar, rule 556.) Accordingly, hearsay evidence is not admissible unless the opposing party agrees to its admission or otherwise waives any hearsay objections, or the evidence is subject to an exception to the hearsay rule. Where facts needed to establish past recollection recorded exception were shown, hearsay statements in witness's notebooks were properly admitted, and admission of notebooks themselves, even if error, did not prejudice opposing parties.

[9] **120 Procedure—Conduct of Trial**
148 Evidence—Witnesses
159 Evidence—Miscellaneous

Testimony of expert witness who did not know facts of specific case but could only give opinion as to respondents' practices was proper expert testimony. Where hearing judge limited expert's testimony to proper opinion testimony on subjects of his qualifications, fair hearing was ensured.

[10] **162.19 Proof—State Bar's Burden—Other/General**
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues
253.00 Rule 1-400(C) [former 2-101(B)]

Culpability can be established in attorney disciplinary proceedings either by direct or circumstantial evidence, and circumstantial evidence has been considered on a regular basis in cases involving improper client solicitation by an attorney's agents. Culpability findings regarding charge of improper client solicitation were proper where, in addition to circumstantial evidence, there was inculpatory direct evidence in the record, and hearing judge properly evaluated and weighed witness testimony.

[11 a-e] **162.11 Proof—State Bar's Burden—Clear and Convincing**
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)

Where respondents set up distant branch office with intent to be present only one day per week; authorized non-lawyer independent contractors to explain complex and unusual fee agreements to prospective clients; did not review cases or speak with clients until after clients had signed fee agreements; paid contractors in cash based on viability of cases, and implausibly characterized contractors as investigators; ignored indications of excessive non-lawyer control of cases; chose to disbelieve clients' reports that contractors had solicited them, and did not present convincing explanation about how they believed clients had come to retain them, hearing judge's findings that respondents knew of contractors' solicitation of clients were supported by clear and convincing evidence.

[12 a, b] **193 Constitutional Issues**
253.00 Rule 1-400(C) [former 2-101(B)]
253.20 Former rule 2-101(C) (no current rule)

Solicitation of clients may be constitutionally protected under the First Amendment depending on the occupation or profession involved and certain other circumstances. Free speech guarantees have been held not to prevent enforcement of California's rules governing in-person solicitation, and solicitation of clients for lawyers has long been illegal in California. Where accident victims were tempted by persuasiveness of respondents' non-lawyer agents who had superior access to police reports, and in one instance a victim was solicited minutes after returning from the hospital, such facts showed constitutional justification for prohibition of such in-person solicitation.

[13 a, b] **221.00 State Bar Act—Section 6106**
253.00 Rule 1-400(C) [former 2-101(B)]
253.10 Rule 1-400(D) [former 2-101(A)]
253.20 Former rule 2-101(C) (no current rule)

Where respondents made a shared decision to operate a distant branch office using non-lawyer independent contractors paid in cash to sign up clients, respondents committed acts of moral turpitude by violating the client solicitation rules and conspiring to violate such rules; their involvement in repeated client solicitation constituted "corruption" within the meaning of the moral turpitude statute.

[14 a, b] **253.10 Rule 1-400(D) [former 2-101(A)]**
253.20 Former rule 2-101(C) (no current rule)
290.00 Rule 4-200 [former 2-107]

582.10 Aggravation—Harm to Client—Found
871 Standards—Unconscionable Fee—6 Months Minimum
1093 Substantive Issues re Discipline—Inadequacy

Where respondents seriously disregarded their fiduciary duty to clients, including leaving it to non-lawyer contractors to explain complex retainer agreement without allowing clients to review it over time or discuss it with respondents, and where such retainer agreement, though purporting to be for contingent fees, contained unconscionable provision for minimum fee upon discharge, and where respondents' acts in seeking to enforce such provision damaged clients, respondents' conduct warranted greater actual suspension than 15 months recommended by hearing judge. Respondents' involvement in client solicitation alone warranted one-year actual suspension; their remaining offenses deserved an additional six months.

ADDITIONAL ANALYSIS

Culpability

Found

221.19 Section 6106—Other Factual Basis
252.31 Rule 1-320(A) [former 3-102(A)]
252.41 Rule 1-320(B) [former 3-102(B)]
253.01 Rule 1-400(C) [former 2-101(B)]
253.11 Rule 1-400(D) [former 2-101(A)]
253.21 Former rule 2-101(C) (no current rule)
290.01 Rule 4-200 (former 2-107)

Not Found

221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
430.05 Breach of Fiduciary Duty

Aggravation

Found

521 Multiple Acts
551 Overreaching
586.11 Harm to Administration of Justice
691 Other

Mitigation

Found but Discounted

710.35 No Prior Record
740.32 Good Character
740.33 Good Character
750.32 Rehabilitation

Declined to Find

710.53 No Prior Record

Standards

833.90 Moral Turpitude—Suspension
901.30 Miscellaneous Violations—Suspension

Discipline

1013.08 Stayed Suspension—2 Years
1015.07 Actual Suspension—18 Months
1017.10 Probation—4 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

STOVITZ, J.:

Respondents Scapa and Brown request review of a decision of a State Bar Court hearing judge recommending that they each be suspended from the practice of law for 30 months, that the suspension be stayed and that they be placed on a 4-year probation on various conditions including 15 months actual suspension.

The hearing judge's recommendation is based on a 77-page decision after 23 days of trial. The judge found that between February and September 1988 respondents committed acts of moral turpitude and wilfully violated rules of professional conduct by using others to engage in prohibited in-person solicitation, conspiring to violate the solicitation rules, dividing legal fees with non-lawyers and attempting to charge unconscionable legal fees.

In urging us to overturn the hearing judge's decision, respondents press several procedural attacks, claim that the findings do not support the decision and some are contrary to law and assert that the recommended suspension is excessive discipline. At most, respondents contend that they are culpable of inadequate supervision of their non-lawyer independent contractors. Opposing all of respondents' claims, the Office of the Chief Trial Counsel (OCTC) has submitted a most thorough brief contending that even greater discipline would be warranted for respondents.

Upon our independent review of this voluminous record, we have concluded that respondents' procedural claims are without merit and the hearing judge's findings and conclusions are supported by clear and convincing evidence and guiding decisional law. The record shows that respondents set up a branch law office in which they knew that their independent contractors, acting on their own, and without any attorney supervision, would be responsible for explaining to accident victims respondents' sophisticated attorney-client retainer agreement and seek to have clients sign those agreements. The evidence clearly shows that respondents paid these contractors in cash for viable cases brought to respondents' office by unlawful, in-person solicitation. Moreover, the solicitations here were patently corrupt for they involved bribes by respondents' independent contractors to police officers for the favorable channeling of police accident reports to the contractors although there is no clear evidence that respondents were aware of this police corruption. They were also unaware that their contractors were getting kickbacks for referral of clients to the same medical clinic. The record also shows that when several of respondents' clients who were solicited by their independent contractors changed counsel, respondents threatened their new counsel with assertions of liens and threatened relevant insurers with punitive damage actions if liens were not honored in circumstances where the record shows that the agreements were known by respondents to be unenforceable and, in any event, provided for an unconscionable minimum fee if respondents were discharged in light of the fact that respondents' office staff did only the most perfunctory work for the clients in opening a file and in sending initial form letters.

Guided by decisions in comparable cases, we conclude that an even greater actual suspension than recommended by the hearing judge is appropriate in view of not only the solicitation of prospective clients but respondents' overreaching particularly by their assertion of unethical fee practices. Accordingly, we shall recommend an 18-month actual suspension on the same conditions as the hearing judge.

I. FACTS, FINDINGS AND CONCLUSIONS.

A. Introduction.

Although respondents dispute that they are culpable of illegal solicitation and other serious charged misconduct, the essential facts which occurred are not disputed including that several agents of respondents solicited professional employment for respondents from numerous prospective clients in the period from February to September 1988.

Following is a summary of the evidence. Respondent Scapa was admitted to practice law in California in 1977 and respondent Brown was admitted in 1982.

Their practice was largely plaintiff personal injury and was in Southern California. To get a larger client base, in late 1987 respondents opened a Northern California office in San Bruno. They staffed it with secretaries and paralegals. Except for one of the respondents visiting the San Bruno office about one day a week, there were no attorneys in that office working for respondents. Respondents decided to engage the services of several people to "sign up" clients. These independent contractors also worked for other attorneys. Although respondents might have engaged as many as four or five independent contractors to "sign up" clients, most clients in the proceeding we review were solicited by two of these contractors: Robert Buchanan and Joseph Gumban.

Buchanan had been a salesperson and was the principal in a sign and ladder business. Gumban was a retired police officer whose wife was a nurse. Respondents thought that Gumban and Buchanan would each be able to refer a number of clients to the San Bruno office and sign up clients referred. Respondents took the position in this proceeding that they were not only unaware that Gumban and Buchanan were soliciting prospective clients but counseled Gumban and Buchanan not to do so. OCTC presented clear evidence that Gumban and Buchanan solicited over 30 prospective clients for respondents' San Bruno practice between about February and September 1988. Twelve clients testified below as to their solicitation by respondents' agents. Respondents do not dispute that these clients were solicited but dispute that they are culpable of professional misconduct in connection therewith. We deem it unnecessary to repeat the details of each client's solicitation experience recounted in the hearing judge's lengthy decision. Rather, we shall focus on the facts in the record and findings common to several or all of the solicitations.

B. Illegal source of solicitation targets.

The solicitation activities of Gumban and Buchanan followed a pattern as did their obtaining prospective clients' signatures on respondents' retainer agreements.[1] Gumban and Buchanan made an illegal arrangement with two employees of the San Francisco Police Department record bureau to pay for police accident reports pre-screened for personal injury case value. Gumban and Buchanan would generally pay a flat sum, such as $500 to $1,000, for a week's worth of reports. With the personal information from the reports they would then call the victims to recommend respondents' services. If the victims were interested in retaining respondents, Gumban or Buchanan would meet the victim at the victim's home or a nearby restaurant and present the client with respondents' retainer agreement for signature. There is no clear evidence to show that respondents knew of the illegal police report arrangement.

No clients were solicited at an accident scene or hospital and most were called several days or a week or more after their accidents. However, one prospective client, Michelle Behrman Fiorsi, was called by another independent contractor of respondent at her home minutes after returning from treatment at a hospital emergency room while still groggy from pain medication.

C. Delegation by respondents to non-lawyers of signing of complex attorney-client retainer contract.

The evidence below was clear and convincing that respondents knew that their non-attorney independent contractors were explaining respondents' fee agreements to prospective clients and getting their signatures on those agreements without any member of the State Bar being involved. The record shows that the agreements and accompanying papers were not routine nor internally consistent. Respondents' fee agreement was a legal-sized page of 11 paragraphs. Although acknowledging that the client understood that contingent fees were negotiable by law, it provided for attorney fees of 33 and one-third percent of all amounts recovered if the case was settled before filing of suit or claim and 40 percent of

1. Gumban and Buchanan did not work for respondents at all the same times in 1988. Gumban started working for respondents in early 1988, and trained Buchanan and Buchanan worked for respondents during the spring and summer of 1988.

all sums recovered if the case was settled after suit or claim and start of discovery.[2] Respondents' agreement also provided for their entitlement to the full contingent fee on all parts of the client's recovery, including medical pay and uninsured motorist coverage, even if the client discharged respondents against their wishes (except for their misconduct or incapacity) in violation of the agreement. If the full contingent fee did not apply in case of wrongful discharge, the agreement provided for a minimum of three hours of respondents' time as compensation. Most of the agreements introduced in evidence had the hourly rate of $200 filled in. Thus in the latter cases, the clients had committed themselves to at least $600 of fees if they discharged respondents against respondents' wishes. There was never any dispute below that respondents knew at all times that if they were discharged by their client for any reason, they would be limited to an attorney fee recovery based on the reasonable value of their services up to the time of discharge under *Fracasse* v. *Brent* (1972) 6 Cal.3d 784, 792. Moreover, since 1939, the State Bar Act has rendered void any fee contract procured by runners or cappers such as Gumban and Buchanan. (Bus. & Prof. Code, § 6154.)

OCTC produced the testimony of Arne Werchick, Esq., a past president of the California Trial Lawyers Association and an expert in plaintiff personal injury cases. Werchick was critical about several aspects of respondents' retainer agreement, including the provision which gave them a share of all parts of the client's recovery including that based on medical pay insurance coverage when most attorneys would incur no time or expense to acquire that item of recovery for the client. Werchick was also critical of the minimum figure of a $600 fee owed on discharge of respondents. He termed such a minimum fee "unconscionable" and testified that the $200 per hour figure on which it was based was an excessive charge for respondents' practice. Respondents offered no contrary expert evidence.

Also presented to the clients for signature by respondents' agents was the usual authorization form for seeking medical report data and one additional document which, according to Werchick, was most unusual. It was a declaration under penalty of perjury in which the prospective client stated that his or her decision to retain respondents was not the result of any promises, offer or solicitation. Werchick saw no legitimate use in a personal injury practice for asking a client to sign such a statement. He testified that he could not see any purpose other than to "paper" a file when the lawyer might have a suspicion that the client was in fact solicited.

D. Respondents' cash payments to non-lawyers for signing up clients.

The evidence is undisputed that respondents paid Gumban and Buchanan almost entirely in cash for their work. Buchanan testified that respondents' cash payments for cases brought to the law office ranged from zero to $1,000 depending on the settlement or recovery value of the case. Similarly, Buchanan testified that if he did some work on a case but the prospective client was without insurance or respondents rejected it for some other reason, he was not paid. Buchanan had little recollection of the number of cases he brought to respondents but OCTC produced a record book Buchanan maintained which showed that respondents paid Buchanan in about 75 cases and these payments were often in two stages per case, shortly after Buchanan brought the case to respondents and at a later time. Respondent Brown testified that Gumban and Buchanan performed a number of investigative tasks on their cases but conceded that they were not licensed private investigators.[3] In any event, respondents kept no records of the cash payments to Gumban and Buchanan.

Respondents personally reviewed the cases in which their agents signed up clients and testified that they reserved the right to accept or decline represen-

2. Because of the internal inconsistency of respondents' fee agreement provisions, it was not clear whether a case which settled after filing suit but before discovery would earn respondents a 33 and one-third percent fee or a 40 percent fee.

3. As pertinent to this case, Business and Professions Code section 7522 provides that to be exempt from private investigative licensure, persons performing investigative duties working for another must be doing so in an "employer-employee relationship." As noted, Gumban and Buchanan were independent contractors.

tation. Respondents frequently spoke with the clients personally once they decided to accept the case.

E. Referrals by Gumban and Buchanan of clients to the same medical clinic which gave kickbacks to them.

The evidence shows that if a client did not have a treating doctor, Gumban and Buchanan would recommend a specific medical clinic which would "kick back" $250 to Gumban or Buchanan. Although there is no evidence to show that respondents were aware of Gumban and Buchanan receiving kickbacks, respondents' office files reflected the great number of clients evaluated and treated by the same medical provider. This was another practice highly criticized by OCTC's expert witness, Werchick. He testified that an insurer would likely become suspicious of referrals of many different clients to the same medical provider and that that practice would not be in the best client interest.

The testimony of Alex Lavita is pertinent here. Lavita was in an auto accident in San Francisco on March 11, 1988. He was "a little bit shaken up" but was not sure at the time if he was injured. About two or three days later, he was solicited for respondents by Buchanan, whom he had never met before. Buchanan referred Lavita to the favored medical clinic for treatment. Shortly thereafter, he met with respondent Scapa who suggested that Lavita's recovery might depend on the number of weeks he treated at the clinic. After about 11 clinic visits over 2 weeks, involving a series of physiotherapy treatments, Lavita stopped going to the referred clinic. Scapa called Lavita a few days later and asked him why he stopped treatment. He told Scapa that he was not injured. Scapa told Lavita that he might be injured and that if he did not take a certain number of clinic treatments, Lavita would not have as big of a case and respondents would not be able to represent him. Scapa's talk with Lavita did not change his mind about further treatment. Respondents then terminated their representation of Lavita and Lavita dealt directly with the insurer of the person whose vehicle struck his, telling the insurer that he had not been injured and had only lost one day of employment.

F. When some clients sought new counsel, respondents asserted liens on their future recoveries, including against their own insurers, although respondents performed only perfunctory work in those cases.

Several clients testified below that they were induced to sign respondents' retainer agreements by Gumban or Buchanan telling them that they could cancel their contract with respondents at any time or on short notice. Some found that when they discharged respondents and hired new counsel, respondents asserted attorney-fee liens on their future recoveries including against their own insurers. Some of these liens were for far more than the value of services performed.

In June 1988 Robert J. Seronio, who had been solicited as a client of respondents by an independent contractor other than Gumban or Buchanan, decided to hire a new attorney. Seronio's main concern was property damage to his vehicle. After Seronio discharged respondents, respondent Brown sent Seronio's new attorney and the opposing party's insurer letters insisting that they preserve respondents' equitable liens for attorney fees and advanced costs. Brown insisted that respondents' firm be named on all settlement drafts. To the insurer, Brown threatened legal action if his firm was not named on every settlement draft. In that instance, wrote Brown, he would deem it appropriate to seek punitive damages.

Seronio's new attorney wrote back to Brown, requesting Seronio's file and an itemization of time spent and costs advanced. Brown did not provide this information. Seronio's new counsel concluded that the only work respondents had performed was the opening of a file and certain initial "form" correspondence signed by respondents' secretary. Seronio settled his own property damage claim with the other driver's insurer and Seronio's new attorney recovered a small settlement for either medical pay or personal injuries.

In April 1988 Fiorsi, who had been solicited for respondents as soon as she returned home from emergency medical treatment, decided to change lawyers and hire an attorney who had been recom-

mended by a friend. A few days later, she contacted respondents' office to report that she had chosen another lawyer to represent her. In June 1988 Fiorsi's new attorney wrote respondents of this change. Respondent Brown sent Fiorsi's new attorney and Fiorsi's and the opposing party's insurer letters insisting that they preserve the equitable liens for attorney fees and advanced costs and threatened both insurers with a punitive damage legal action if respondents' firm was not named on every settlement draft. Fiorsi's new attorney attempted unsuccessfully for several months to obtain from respondents the amount of their claimed lien for attorney fees and supporting documentation. Meanwhile, because of respondents' lien, Fiorsi could not get her damaged car repaired.

In October 1988 respondents' staff sent Fiorsi's new attorney the requested information. It listed services respondents performed valued at $1,425.02.[4] The first $900 of billed services were claimed for the first five days of respondents' representation in April 1988 for an initial interview, file review, creation of three standard letters to insurers, preparation of an "SR-1" form and four phone calls. The remaining $525.02 of billed services were incurred after Fiorsi's new attorney had told respondent of the change of counsel. These charges were attributed to review of the file, the preparation of the letters insisting that respondents' lien be honored and the preparation of other correspondence regarding the substitution of counsel. Fiorsi's new attorney objected to the excessive fee claimed by respondents and testified at the State Bar Court hearing that, to his knowledge, the dispute over respondents' lien had still not been resolved. Fiorsi testified that after a number of phone calls to respondents' office and insurers, she was able to get her car fixed.

In February 1988 Kenneth Tashiro was in an auto accident. Gumban and Buchanan together solicited him for respondents' practice and they recommended he see a particular chiropractor. Tashiro signed respondents' retainer agreement but declined to visit the recommended chiropractor and declined to make an appointment to visit with either respondent. Instead, about one or two weeks after he signed respondents' retainer agreement, Tashiro hired a lawyer of his choice, Illson New. New wrote to respondent Scapa on March 21 to advise that he (New) was now representing Tashiro and that Tashiro was uncertain whether respondents were his lawyers. In mid-May 1988 respondent Brown sent similar letters to New and the insurer as he had sent in the Seronio and Fiorsi cases asserting a lien. In June 1988, after Brown discussed the matter further with respondent Scapa, respondents chose not to pursue a lien in Tashiro's case.

Donald and Barbara Tate were injured in an auto accident in March 1988. They originally retained respondents to represent them but in May 1988, selected another attorney. In June 1988 respondent Brown wrote the Tates' new counsel that he would cooperate in turning over the file. However, in August 1988, Brown wrote both to the Tates' new counsel and an insurer the same type of letters he had written to counsel and insurers in the three cases discussed *ante* asserting his lien. The outcome of this asserted lien is unclear.

G. In 1988 respondents learned from clients or successor attorneys that non-attorneys were soliciting business for respondents.

The record shows that from three different sources during 1988, respondents received information that their clients had been solicited by their non-attorney independent contractors. In one case, involving client Tashiro, his later counsel, New, had two conversations with respondents' staff in March 1988 about the solicitation of Tashiro. The first conversation was with respondents' secretary Arlene Gamit. Gamit checked into New's information and called him back later to explain that his concern could not be valid since office records showed that Tashiro initiated contact with respondents' office. Not satisfied with that answer in view of Tashiro's specific information as to how he was approached by Gumban and Buchanan, New spoke directly with

4. Respondents' invoice understated the total itemized services as $1,145.02.

respondent Scapa to repeat his concern over the solicitation of his client. New testified that Scapa seemed quite interested in how aggressive Gumban and Buchanan had been with Tashiro. New's testimony supports the hearing judge's finding that Scapa seemed more concerned with mollifying New. According to Scapa, he questioned Gumban and Buchanan about New's claim. When they insisted that Tashiro was a "legitimate referral," he took no further action.

On April 20, 1988, a few days after Fiorsi was solicited to sign respondents' retainer agreement, she wrote to respondents: "I would like you to know that I got my own attorney. Thank you for your consideration anyway." Rather than taking this as evidence that Fiorsi had not voluntarily chosen respondents to represent her initially, respondent Brown took it as a sign of a client unappreciative of the efforts of his office. In September 1988, while attempting to resolve respondents' lien claim, Fiorsi's successor attorney wrote to respondent Brown detailing the information Fiorsi gave him about how an investigator had solicited her case for respondents in April.

Janice Sandles was involved in an auto accident in April 1988. About seven or ten days later, Buchanan solicited her by phone for respondents. She signed respondents' retainer agreement. In a meeting with respondent Brown about a month later, Sandles told him how Buchanan had approached her to hire respondents. She testified that Brown described Buchanan as his "agent" and told Sandles that she and Buchanan would be working very closely together.

Respondent Brown testified that in about June 1988, he had an inkling that Gumban and Buchanan might have solicited cases for respondents. However, after Scapa voluntarily looked into the matter and questioned Gumban and Buchanan, Brown was no longer concerned. Brown testified also that no client had ever told him of being solicited by Gumban and Buchanan.

H. Events leading to the end of the solicitation acts.

Several prospective clients were upset that when they were solicited by respondents' agents, those agents had copies of the relevant police accident reports even before the subjects could get them themselves from the police records bureau. One person's complaint to police department management led to an internal affairs investigation of the police officers who were selling reports to Gumban and Buchanan. The senior police officer involved was convicted of a crime and, in about September 1988, this source of accident victims stopped.

At the same time, the State Bar had begun an investigation based on several complaints it had received about some of respondents' practices discussed *ante*.[5]

Respondent Brown testified that he terminated the relationship with Buchanan in summer 1988 when Buchanan was unable to explain satisfactorily to Brown how a police report which appeared to be an "original" and not a copy found its way into respondents' files.

I. Hearing judge's findings and conclusions.

The hearing judge made findings as to the conduct outlined above and concluded that respondents were culpable of professional misconduct of several different types. As to count 1 which charged respondents with accepting representation of clients who had been solicited in an intrusive manner, the judge

5. Coincidentally, in March 1988 Buchanan solicited Alan Cohen, a senior trial counsel employed by the State Bar, who had been in a four-car auto accident a few days earlier and whose name was on a police report Buchanan had purchased through his arrangement with police officers. Unaware of Cohen's job, Buchanan persuaded Cohen to sign respondents' retainer agreement. Cohen played along and met Buchanan at respondents' Bay Area office. He brought along a State Bar investigator he introduced as his wife. While at respondents' law offices, Cohen met only with Buchanan. No attorney appeared to be in the office at the time. Cohen asked to take the blank retainer agreement package home to study but Buchanan refused the request. When Buchanan left the room for a while, Cohen studied the names of other accident victims on police reports which were spread "open-faced" on the table in front of him and made notes of the names of the victims.

concluded there was no question that clients were solicited for respondents' law practice between February and September 1988. Based on the judge's findings as to the nature and weight of testimony of a number of witnesses, including respondents, the judge's assessment of witness credibility and consideration of documentary evidence, he concluded that respondents knew that Gumban and Buchanan were soliciting employment for respondent from prospective clients.[6] Consequently, the hearing judge concluded that respondents wilfully violated rule 2-101 of the Rules of Professional Conduct,[7] wilfully violated rule 3-102(B) by compensating lay persons for recommending respondents' employment to prospective clients and engaged in moral turpitude or corruption proscribed by section 6106 of the Business and Professions Code.[8]

Finding that respondents shared legal fees with Gumban and Buchanan by paying them on a per-case basis with no fixed rate for certain services, the hearing judge concluded that respondents violated rule 3-102(A). He also concluded that since the division of fees was part of an illegal scheme, respondents violated section 6106. Recognizing that he had already so concluded as to the solicitation aspect of the case, he treated this violation of section 6106 as duplicative for purposes of assessing discipline. The hearing judge found no culpability on a count that respondents were grossly negligent in supervising their lay employees within the meaning of section 6106 and rules 6-101(A) and 6-101(B). He did so on the ground that these charges were made as an alternative to the charges of involvement in unlawful solicitation. The hearing judge noted that, had he not found respondents culpable of improper solicitation activities, he would have found them culpable of gross carelessness in supervision of office staff.

The hearing judge concluded that respondents violated section 6106 by conspiring to violate rules 2-101 and 3-102(B) and that this was a more serious act than the moral turpitude found incident to the solicitation charge. Finally, the hearing judge found that since respondents sought in their fee contracts to bind clients to fixed minimum fees if they changed counsel without respondents' consent and thereafter, when the clients did change counsel, threatened punitive damage actions to assert lien claims for fees they were unlikely to be entitled to receive, they sought to charge an unconscionable fee as proscribed by rule 2-107 and its successor, rule 4-200.

In weighing the degree of discipline, the hearing judge gave some mitigating weight to respondents' lack of prior discipline in 10 and 5 years of practice, respectively, prior to the acts of misconduct. Also considered mitigating was impressive character testimony from other clients who were completely satisfied with respondents' services and very favorable testimony from other attorneys, business people, doctors and a retired superior court judge. The hearing judge discussed this evidence in detail including its being tempered by several factors: one witness not being aware of the findings against respondents and testifying that those findings did not show honorable conduct; another testifying that the use of cash to pay investigators was "sloppy"; and two others testifying, respectively, that solicitation was a "victimless crime" or one which did not impugn honesty or trust. Additionally, the hearing judge noted the testimony of two rebuttal witness presented by the deputy trial counsel, each a newly-admitted lawyer, who testified as to the poor reputation of respondents and the unsatisfactory practices in which one witness believed respondents' office engaged.

The hearing judge found that one of the rebuttal witnesses had had limited sources of information on which to base her opinion. The hearing judge also gave some mitigating weight to respondents' testimony as to steps that had been taken in their relocated

6. The hearing judge devoted 20 pages of his decision to his assessment of the evidence bearing on the charge of solicitation.

7. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

8. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

Northern California office to prevent client solicitation and to serve clients better. These steps include revision of the attorney-client retainer agreement, discontinuance of the form asking clients to declare that they have not been solicited, ceasing of cash payments to investigators, and tightened control over investigators and intake of cases to ensure that an attorney spoke directly with the client before respondents accepted the case. The hearing judge tempered the mitigation he accorded this evidence of changed practices because of respondents' lack of recognition at trial that they had committed misconduct of more than a minimal nature.

The hearing judge considered as an aggravating factor respondents' multiple acts of misconduct in paying persons to solicit numerous cases over an eight-month period. While giving respondents the benefit of the doubt as to whether or not they were aware of police bribery and medical clinic kickbacks, the hearing judge concluded that respondents' misconduct resulted in harm to the administration of justice, invasion of privacy of accident victims, overreaching of clients and encouragement of unnecessary litigation.

After comparing this record with those in other solicitation cases considered by the Supreme Court or this court, the hearing judge recommended that each respondent be suspended for 30 months, stayed, on conditions of a 4-year probation and 15 months of actual suspension.

II. DISCUSSION.

A. Procedural contentions.

Before discussing the merits of the charges and issues bearing on discipline, we review respondents' several procedural contentions.

1. Adequacy of the notice to show cause.

[1a] Respondents have attacked broadly the notice to show cause ("notice"), claiming it lacks adequate specificity. Our review of the record shows that even though the original notice lacked the identity of specific clients allegedly solicited, respondents were given such information by OCTC well before trial and well before most pre-trial discovery was completed. Respondents have made no case for any relief based on their claim.

[1b] The notice was filed in November 1989. The charges of count 1 of the notice named Gumban and Buchanan, identified their relationship to respondents and fixed the period of charged misconduct as between about February through September 1988. The notice charged that Gumban and Buchanan bought police reports and telephoned "numerous persons" whose names appeared on the reports. It alleged that respondents accepted clients solicited by Gumban and Buchanan and that respondents paid money to these two and knew they and others were soliciting clients for them. Specific additional counts incorporated by reference the charges in count 1 and alleged additional specific statutory or rule violations.

In respondents' December 1989 answer to the notice, they claimed insufficient notice of the charges. At a February 1990 State Bar Court status conference, trial was set for May 29, 1990, but it was later continued to October 1, 1990, except for the taking of Gumban's testimony in May 1990. In March 1990, when the State Bar sought certain discovery as to agents other than Gumban and Buchanan, the hearing judge prohibited it unless OCTC first filed a statement of probable cause to believe that these other persons were respondents' employees or were involved in soliciting clients for respondents. Also in March 1990, the hearing judge prohibited the State Bar from using any information obtained from respondents as to their clients to prove the charges of failure to adequately supervise without identifying those clients by name. The judge prohibited use of information gleaned from respondents to prove the charge of attempting to collect an unconscionable fee without OCTC first filing a statement of probable cause that respondents had committed the alleged violation against named clients.

On March 23, 1990, nearly two months before the initial trial date, the deputy trial counsel filed statements of probable cause identifying clients Seronio, Tashiro, Tate and Fiorsi. **[2]** Since the purpose of the notice to show cause itself is to serve as a determination that probable cause exists to

warrant formal charges (Trans. Rules Proc. of State Bar, rule 510), the March 1990 statements of probable cause served as the equivalent of amendments to the notice. Moreover, on April 9, 1990, OCTC filed its pretrial statement listing witnesses it planned to call, separately classified as to twenty-one named clients alleged to have been illegally solicited by respondents, five named attorneys representing respondents' former clients in matters in which respondents demanded fees without legal basis, nine named agents or employees of respondents and other named witnesses.

The record shows that between May and July 1990 the parties engaged in extensive discovery including propounding interrogatories, taking depositions, and seeking production of documents. **[1c]** On the first day of trial, October 1, 1990, respondents made an oral motion to dismiss because of the alleged vagueness of the notice. The hearing judge found it unpersuasive, noting especially that counsel were aware that any such issue was to be raised earlier. Respondents' reiteration of the same argument on review is similarly unpersuasive.

Respondents rely on our decision in *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. However, that case does not support their claim for relief. In *Glasser*, the notice to show cause failed to afford the accused attorney notice as to which of potentially hundreds of financial transactions over a seven-year period, involving twelve different trusts, were at issue. When Glasser sought a more definite notice than the less-than-two-page pleading, OCTC declined to amend and the hearing judge granted Glasser's timely motion to dismiss before trial, without prejudice. In the case now before us, we have a very different situation. **[1d]** The original notice fixed the eight-month time period involved and identified Gumban and Buchanan as agents involved with respondents in unethical activity. OCTC provided statements of probable cause to identify additional agents and several clients. About six months before trial respondents knew the identity of all the persons OCTC would produce to support the charges. Respondents had an abundant opportunity to conduct discovery with that knowledge, they had a timely opportunity to challenge the notice if they thought it was improperly vague and they have shown no prejudice as a result of the procedures followed.

2. Alleged misconduct by OCTC.

On review, respondents urge five different grounds of misconduct by OCTC or its agents. We have reviewed them and find them to be without merit. **[3]** First, respondents claim that OCTC failed to notify respondents promptly of the solicitation of State Bar attorney Cohen and therefore failed to take steps to prevent later solicitations. Their contention, unaccompanied by any citation of legal authority, is frivolous. In this proceeding we do not deal with civil responsibility where a party might be under a duty to mitigate harm or damages. Rather, this is an attorney disciplinary matter and the State Bar was entitled to investigate whatever information it acquired about alleged professional misconduct without notifying respondents contemporaneously. All that was required was that prior to issuance of the notice, respondents be given an opportunity to explain or deny the matters under investigation. (Trans. Rules Proc. of State Bar, rule 509(b).) Respondents have not shown that OCTC failed to comply with this rule.

[4] Respondents' complaint in their brief that the State Bar failed to "deactivate" Gumban and Buchanan promptly after learning in 1988 that they were engaged in improper solicitation efforts completely misunderstands that respondents had a personal duty to obey the State Bar Act and Rules of Professional Conduct and to reasonably supervise their agents and employees to that end. As the record shows, when respondents learned from their clients or their new counsel that respondents' agents had originally solicited them, respondents chose to believe Gumban and Buchanan rather than the clients or attorneys who told them of the capping activities.

[5] A more serious charge urged by respondents, but one unaccompanied by any citation of authority, is that OCTC attorney Cohen improperly searched respondents' law office when invited there upon being solicited to become respondents' client. We see no evidence in the record to support this charge. All that this record shows Cohen did to gather information was to read the names of persons on police reports which Buchanan or another of respondents'

agents had already spread on the table in front of Cohen. Cohen opened no cabinets, drawers, files or folders nor did he touch any other paper not given him by Buchanan. If the challenged conduct had been committed by a police agency, in collecting evidence in a criminal case, it would not have been an improper search. (See 4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Exclusion of Illegally Obtained Evidence, § 2379, pp. 2809-2812.)

[6] Respondents also contend that OCTC failed to comply with proper procedures for the grants of immunity from criminal prosecution extended to Gumban and Buchanan. Since 1987, the State Bar Act has specifically authorized OCTC to apply to a superior court to grant immunity from criminal prosecution to a witness in an attorney disciplinary proceeding. (§ 6094 (b).) These procedures were properly invoked here and respondents had the opportunity to litigate before trial the propriety of the specific procedures used or representations made. While they made similar objections at trial, they have not shown any legal cause for relief and very significantly have shown no prejudice to *themselves* on account of the immunity procedures followed by OCTC as to witnesses Gumban and Buchanan. Accordingly, respondents' claim must fail. (See, e.g., *Calvert* v. *State Bar* (1991) 54 Cal.3d 765, 778; *Goldstein* v. *State Bar* (1989) 47 Cal.3d 937, 949-950 [need for showing of prejudice or denial of a fair hearing before relief will be granted on claim of procedural error].)

[7] Respondents next claim error because OCTC investigators interviewed respondents' current clients who had not made complaints against them. Respondents suggest that such conduct was contrary to policy adopted by the Board of Governors of the State Bar. Both parties have cited the appropriate authority but OCTC demonstrated to the hearing judge in a timely manner that the Board of Governors policy was properly complied with.

Finally, respondents have inflated a speculative claim that OCTC improperly spread information about the charges into a Fourth Amendment violation. Respondents' claim lacks any support in the record or even in their own brief to show that any impropriety occurred.

3. Objections to admissibility of evidence.

Respondents claim that the hearing judge erred in admitting certain evidence. They claim first that two notebooks kept by Buchanan reflecting payments to him by respondents for clients he signed up were not admissible. The hearing judge admitted Buchanan's statements in these two notebooks under the "past recollection recorded" exception to the hearsay rule. (Evid. Code, § 1237.) While acknowledging the foregoing statutory exception to the hearsay rule, respondents fail to show that the elements required for the exception were not met. Instead, by broad brush strokes of doubt, respondents seek to raise enough questions about the hearing judge's ruling to have us reverse it. We see no basis for doing so.

[8a] The rules governing this proceeding apply generally the formal rules of evidence as in civil cases, with the important proviso that no error in admitting or excluding evidence shall invalidate a finding or decision unless the error deprived the party of a fair hearing. (Trans. Rules Proc. of State Bar, rule 556.) Accordingly, under the general rule, hearsay evidence was not admissible in this proceeding unless respondents agreed to its admission (see *In re Ford* (1988) 44 Cal.3d 810, 818) or otherwise waived any hearsay objections (see *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 793) or the evidence was subject to an exception to the hearsay rule. (See *Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 108 [adoptive admission].)

[8b] As pertinent here, for the past recollection recorded exception to the hearsay rule to apply, the statements made by Buchanan recorded in his notebooks must have been admissible if made while testifying, Buchanan must have lacked adequate recollection at trial about the matters to make the statement and the notebook entries must have been made contemporaneous to the fact recorded or at a time while fresh in Buchanan's mind, and must have been made by him and offered after Buchanan testified that the entries were true statements of such fact. (Evid. Code, § 1237; see *In re Berman* (1989) 48 Cal.3d 517, 525, fn. 5; *Frio* v. *Superior Court* (1988) 203 Cal.App.3d 1480, 1492.) Buchanan was subject to lengthy direct and cross examination on the facts

bearing on this exception to the hearsay rule as well as to his conduct generally in his dealings with respondents and the judge ruled correctly that the statements in the notebooks were admissible under this exception. As an indication of the hearing judge's fairness in making this ruling, he indicated that the weight of the evidence was greater as to those notebook entries Buchanan recalled. Moreover, we agree with the deputy trial counsel that the physical admission of the Buchanan notebooks themselves (as opposed to the statements contained therein), even if error under Evidence Code section 1237, subdivision (b), has not prejudiced respondents. (See *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 844-845.) Finally, although the notebooks tended to show the magnitude of the scheme and amounts of payments respondents made to Buchanan, abundant other evidence not subject to any hearsay objection was offered to prove the charges.

[9] Citing no legal authorities, respondents contend that testimony of OCTC's expert witness, Werchick, was improperly received. We disagree. Respondents appear to criticize Werchick's testimony because he knew of no facts about the solicitations and could offer only his opinion as to respondent's practices. According to the authorities on point, that is precisely the proper subject for expert testimony. (See Evid. Code, § 801; 1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 474, pp. 445-446.) The hearing judge ensured a fair hearing by limiting Werchick's opinion testimony to the subjects of his qualifications and taking care that the questions put to him by the parties sought to elicit proper opinion testimony. Although Evidence Code section 805 allows an expert to opine on matters embracing the ultimate issue to be decided by the hearing judge, the judge did not allow Werchick to opine on whether respondents' conduct violated the charged rules.

We have reviewed the other contentions made by respondents that testimony of Gumban and Buchanan was inadmissible and that evidence of solicitations of Fiorsi and Seronio was inadmissible. These contentions, unsupported by any legal authorities, are without merit. Respondents' attempts to charge OCTC with having "poisoned" the record are similarly without merit. OCTC was entitled to present all relevant, admissible evidence, and make appropriate offers of proof. The rules of evidence and proper standards of ethical conduct appear to have been followed in presenting the evidence, and, in any event, respondents' concern about OCTC's trial presentation was completely resolved by the hearing judge's demonstrated fairness in ruling on motions and evidentiary objections during the lengthy, sharply contested pretrial and trial proceedings.

B. Record support for the findings and conclusions.

Before us, respondents offer several arguments that the record does not support the hearing judge's findings and conclusions by the requisite standard of clear and convincing evidence. (See, e.g., *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725.) After an independent review of this lengthy record, we cannot agree with respondents' claims.

[10] Respondents center their attack on the culpability findings concerning the charge of improper solicitation. Their attack is simple: the only direct evidence showed that respondents were not participants in solicitation and the hearing judge disregarded this evidence to concentrate on a number of circumstances which led him to conclude that respondents were culpable. Respondents' argument is flawed in several aspects. First, it ignores the inculpatory direct evidence in the record. Second, it ignores the proper role of the hearing judge in evaluating the demeanor of witnesses and character of their testimony and in assigning weight to testimony based on that assessment. (See *Arden* v. *State Bar*, *supra*, 43 Cal.3d at p. 725.) Finally, it disregards the well-established principle that culpability can be established in these proceedings either by direct or circumstantial evidence and the fact that circumstantial evidence has been considered on a regular basis in cases involving the type of conduct before us. (See *Geffen* v. *State Bar* (1975) 14 Cal.3d 843, 853, and cases cited therein.)

[11a] The evidence shows without dispute that respondents, Southern California practitioners, set up their Northern California office to expand their client base but with the intent that one of them would be present only about one day a week. They deliber-

ately authorized non-lawyer independent contractors to have office space and access to respondents' attorney-client retainer agreements, and to explain the complex details of respondents' fee agreements and accompanying documents to prospective clients. As OCTC's expert witness, Werchick, testified, several of these details were unusual provisions in plaintiff personal injury fee agreements such as the provision for a minimum hourly fee upon the client's unauthorized discharge of respondents and the recital which clients were asked to sign stating that they had not been solicited. Werchick also testified that in his opinion an attorney, not a non-lawyer, should decide whether or not to accept responsibility for a case, particularly when the attorney has yet to inspect a police accident report. Yet, by their own practice respondents did not review the cases until after their agents had signed up the clients and the testimony of several clients who were solicited showed that when they asked to study the retainer agreement before signing or to first speak with respondents, the agents declined to let them do so.

[11b] There is also no dispute that respondents paid their contractors, notably Gumban and Buchanan, almost entirely in cash and respondents produced no records to substantiate the purpose of the payments.[9] Buchanan testified that he thought respondent Brown knew of his obtaining clients by solicitation through the use of purchased police reports for he reported one conversation with Brown in which Brown told Buchanan that their relationship would end if Buchanan continued the practices of which he assumed Brown was aware. Buchanan also testified that respondents only paid him if he brought them cases with viable recovery prospects. Gumban testified that he was only paid for cases he referred to respondents and that they would pay him a bonus at year end based on the number of cases referred to respondents which remained active in the office.

[11c] When respondents were told by some clients and their newly-chosen lawyers about how they had come to be signed up as clients of respondents, respondents chose to prefer the explanation of their agents. Respondents' own attention to their files would have shown that a large number of clients were referred to the same medical clinic, a practice also questioned by the State Bar's expert witness as not in the clients' best interest given the variety of injuries and the clients' different home addresses. Although this latter circumstance does not directly establish that respondents knew of solicitation, it should have placed respondents on notice of excessive non-lawyer control of cases within their office. One of respondents' own witnesses characterized respondents' multiple referrals to the same clinic as a poor practice.

[11d] The hearing judge properly considered additional inculpatory circumstances. These included the highly unlikely theory that respondents, relying on remote independent contractors, would not be aware of the source of clients coming to their firm and that respondents' explanation that they advertised for cases in certain communities was not a convincing defense in light of any support in the record for how that explanation could have accounted for the clients coming to respondents' practice. Moreover, neither Gumban nor Buchanan had a background in personal injury or accident investigation and there was evidence that no investigation had been done in many cases beyond obtaining the police report. Thus, the argument that they were being employed as investigators rather than cappers is implausible at best.

[11e] We conclude that the hearing judge's findings are supported by clear and convincing evidence and we adopt them except we find no mitigation in respondent Brown's short period of prior practice and under the circumstances very little mitigation in respondent Scapa's period of prior practice. We now turn to the judge's conclusions.

[12a] Without citation of authority, respondents state that solicitation is "not per se wrong." They argue that their conduct was protected under the First Amendment to the United States Constitution. We agree with respondents' argument only insofar as

9. Although the amounts of the payments were disputed, they were not insignificant. Respondents estimated that they paid Gumban and Buchanan a total of $5,000 to $10,000. Buchanan testified that respondents paid him $25,000 to $35,000.

solicitation may be constitutionally protected depending on the occupation or profession involved and certain other circumstances. Last term, the United States Supreme Court affirmed a federal district court's ban on enforcing Florida's rules against in-person solicitation of business by certified public accountants. (*Edenfield* v. *Fane* (1993) __ U.S.__ [113 S.Ct. 1792, 123 L.Ed.2d 543].) The Court distinguished the state interest in prohibiting solicitation by lawyers trained to persuade prospective clients who might be vulnerable with the more objective environment in which solicitation by accountants might occur by "cold calls" to business executives and concluded that Florida's ban on accountant solicitation had none of the same dangers as in-person solicitation by lawyers in cases in which the Court had upheld state regulation. The Court stated in part that "The typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik* [v. *Ohio State Bar Assn.* (1978) 436 U.S. 447]." (*Edenfield* v. *Fane*, *supra*, __ U.S. at p. __ [113 S.Ct. at p. 1803].)

[12b] The California Supreme Court has held that free speech guarantees do not prevent enforcement of California's rules prohibiting in-person solicitation. (See *Kitsis* v. *State Bar* (1979) 23 Cal.3d 857, 863-864.) Also, solicitation of clients for lawyers has long been illegal in California. (See *Goldman* v. *State Bar* (1977) 20 Cal.3d 130, 134, fn. 4, 141, fn. 8.) The facts of this case showed that many accident victims were tempted by the persuasiveness of respondents' agents, armed with police accident reports the victims wanted and often could not obtain themselves as quickly from the police department, and that one of the victims, Fiorsi, was solicited minutes after returning from the hospital, while still under medication. These facts show the constitutional justification for California's rules prohibiting in-person solicitation of the type proven here.

[13a] This record also supports the hearing judge's conclusion that respondents committed acts of moral turpitude in the manner in which they violated the solicitation rules and conspired to surreptitiously violate the rules against improper client solicitation. Respondents made a shared decision to operate their Northern California branch office with independent contractors such as Gumban and Buchanan having free rein as to client sign-ups and paid in cash for that activity.

In *Younger* v. *State Bar* (1974) 12 Cal.3d 274, 288, the Supreme Court rejected a disciplinary board finding that there was a "common plan, scheme, and modus operandi" for that attorney's agents to solicit clients for the attorney. The Court noted that the hearing referees found untrue charges of some individual solicitations which would support the challenged finding, and that the disciplinary board did not make findings on those three counts and the Court was unwilling to make a contrary finding solely on the basis of the printed record. We do not have a comparable situation here as the hearing judge who saw and heard all testimony made abundant factual findings supporting his conclusion of the conspiracy, which factual findings we adopt.

[13b] In *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 187, we observed that that attorney's conduct of involvement in repeated solicitation violated section 6106 if for no other reason than that it constituted an act of corruption. The same could be said for respondents' conduct. We agree with the deputy trial counsel that respondents' reliance on *Rose* v. *State Bar* (1989) 49 Cal.3d 646 to claim that moral turpitude was not involved is not persuasive in view of Rose's far more minimal conduct in just one transaction involving solicitation.

We also adopt the hearing judge's conclusions that respondents wilfully violated the rules of professional conduct prohibiting attempts to charge an unconscionable fee and improper division of fees with and improper payments to non-attorneys. As we observed earlier this year in another case involving serious delegation of an attorney's duties of professional responsibility to a non-attorney, *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, the ethical ban against improper fee division between lawyer and non-lawyer was "directed at the risk posed by the possibility of control of legal matters by the non-lawyer, interested more in personal profit than the client's welfare." (*Id.* at p. 420, citing *In re Arnoff* (1978) 22 Cal.3d 740, 748, fn. 4; *Gassman* v. *State Bar* (1976) 18 Cal.3d 125, 132.) There is abundant evidence that the harm envisioned

by the cited cases occurred here, particularly with regard to bribery, kickbacks and client overreaching.

C. Recommended discipline.

The hearing judge observed correctly the wide range of discipline choices under the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) for respondents' misconduct. As we observed in *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 421, acts of moral turpitude could warrant recommendation of either disbarment or suspension depending on the magnitude of the violation and the degree to which it related to respondents' law practice. (Std. 2.3.) In contrast, with one exception, respondents' wilful violations of the Rules of Professional Conduct could warrant reproval or suspension depending on the gravity of the offense or degree of harm to victims. (Std. 2.10.) Standard 2.7 provides for a minimum six-month actual suspension for an attorney's charging or collecting of an unconscionable fee.

We look first at the misconduct of solicitation of prospective clients. In the past 20 years, the Supreme Court has written a number of opinions disciplining attorneys for such improper conduct. We reviewed those opinions in *In the Matter of Nelson*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 190, noting that the discipline ranged from six months actual suspension for isolated acts of solicitation using lay agents to a two-year actual suspension or disbarment for the most aggravated cases of widespread solicitation with additional aggravated misconduct. In arriving at his recommendation, the hearing judge reviewed almost all of those decisions as well as our *Nelson* decision.

Our *Nelson* decision involved an attorney who set up a law partnership with a non-lawyer and divided fees with that person and whose entire law practice over a six-month period came from improper solicitation acts of the non-lawyer. We found extensive mitigation in *Nelson* not only from the attorney's decisive withdrawal from the illegal conduct, but his regret and remorse over it as well as the long passage of time since his acts (five years) accompanied by strong evidence of undisputed, complete rehabilitation. We recommended a two-year suspension, stayed, on conditions of a two-year probation and a six-month actual suspension. The Supreme Court adopted our recommendation. (*In re Nelson*, order filed April 1, 1991 (S019296).)

The hearing judge considered this case closely analogous to *Goldman* v. *State Bar*, *supra*, 20 Cal.3d 130, although the judge noted differences from *Goldman* as well. In *Goldman*, the two attorneys opened a branch office about 100 miles from their principal law office with one of the attorneys taking turns staffing the office one day per week. The attorneys had a full-time and several part-time investigators in the branch office. The Supreme Court found that the attorneys culpable of misconduct involving six specific clients known to have been solicited over a period of several months and of a general count of pursuing a course of conduct to solicit prospective clients who were auto accident victims. It appears that respondents were also found culpable of conduct involving moral turpitude, dishonesty or corruption in violation of section 6106 as a result of their solicitation activities. As did respondents, Goldman and his partner claimed no knowledge of improper solicitation activities. The Supreme Court did not discuss any evidence of mitigating circumstances but found the State Bar disciplinary board recommendation of a one-year actual suspension warranted, noting that the hearing committee had recommended a stayed suspension with only six months actual suspension. We agree with the hearing judge's analysis here that, although the mitigation appeared greater than in *Goldman*, respondents' solicitation activities lasted longer and their misconduct extended into unconscionable fee practices.

At the same time, we deem this case to warrant somewhat less actual suspension than we recommended in *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. 411, where an attorney's abdication of professional duties spanned several years, commencing with his establishment of a "moonlight" practice without any adequate supervision of a non-lawyer partner. The attorney, through recklessness or gross negligence, permitted that partner to act on his own to operate a large-scale personal injury practice in the attorney's name including capping, forgery and other illegal and fraudulent practices involving millions of

dollars. To his credit, shortly after Jones discovered the extensive criminal conduct of his partner, he turned his partner in to the police and himself in to the State Bar. Nevertheless, due to lack of sufficient evidence of rehabilitation, we increased the recommended discipline to a three-year stayed suspension on conditions including actual suspension for two years and until the attorney established his rehabilitation, fitness and legal learning.

We also agree with the hearing judge that this case warrants less severe discipline than the more massive instances of illegal and even more intrusive misconduct found in *Kitsis* v. *State Bar*, *supra*, 23 Cal.3d 857 and *In re Arnoff*, *supra*, 22 Cal.3d 740.

On review, OCTC urges that respondent Brown's actions warrant greater discipline than those of respondent Scapa. The hearing judge viewed the respective culpability of each respondent as warranting the same degree of discipline and we agree with the hearing judge, concluding that OCTC has not shown sufficient differences between the respondents' respective conduct to warrant a difference.

[14a] Nevertheless, we conclude that respondents' misconduct warrants somewhat greater actual suspension than recommended by the hearing judge because of the seriousness of respondents' broad practices of disregard of fiduciary duties to their clients. From the very time their clients were solicited, respondents left it to non-lawyer contractors to explain their complex retainer agreement. These "gatekeeper" agents would not even allow prospective clients to study the agreement for a day or two before signing it nor would they allow prospective clients to speak to respondents about the contract until the clients bound themselves to it. Instead, they told clients that they could cancel the contract at any time. But the contract itself, although purporting to be a contingent fee agreement, committed most clients to a minimum of $600 of legal fees if they discharged respondents involuntarily and regardless of whether any work was done to justify this minimum fee. Respondents were always aware that, on discharge, they were limited to a recovery of the reasonable value of services rendered. When respondents' clients changed counsel, some very soon after signing respondents' contract, respondents sought to hold clients and the affected insurers to liens, threatening insurers with punitive damage actions if the liens were not honored. Although the clients' new counsel showed willingness to honor respondents' liens up to the reasonable value of their services, despite their being void due to their being the product of solicitation, respondents delayed inordinately in supporting their lien claims or did so by charging exorbitant amounts for perfunctory services performed almost entirely by support staff. These delays prevented some clients from settling simple accident cases or from just getting their own damaged car repaired promptly. Even though respondents did not know of medical clinic kickbacks to their agents, they knew or should have known that their many clients were disserved by referral to the same medical clinic for identical types of repeated, serial physiotherapy treatments.

In viewing the entire manner in which many of respondents' clients were overreached by respondents' practices, their current claim that what they did in bringing accessible counsel to victims of small accident cases was justified by the First Amendment, is a most hollow claim indeed. This record reveals just why the public continues to press attorneys to be subject to the same specific consumer protection duties as those who operate an ordinary business.

Our Supreme Court has condemned the conduct of attorneys who overreached clients because of unethical fee practices. In *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, the Court observed that the legal profession is "more than a mere 'money-getting trade.'" (*Id.* at p. 449, quoting canon 12, former ABA Canons of Ethics.) Twice over 40 years, the Court has observed that "the right to practice law 'is not a license to mulct the unfortunate.'" (*Bushman* v. *State Bar* (1974) 11 Cal.3d 558, 564, quoting *Recht* v. *State Bar* (1933) 218 Cal. 352, 355.)

[14b] Viewing the solicitation aspect of this case as generally comparable to *Goldman* v. *State Bar*, *supra*, so as to warrant a one-year actual suspension for that aspect alone, we conclude that the remainder of respondents' offenses which showed their manifest disregard of client interest deserve an additional six months actual suspension. As we noted, the standards would provide for a minimum six-

month actual suspension for respondents' unconscionable fee offense, standing alone.

III. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondents each be suspended from the practice of law in the State of California for a period of thirty (30) months, that execution of such suspension be stayed and that respondents be placed on probation for a period of four (4) years on the condition that they each be actually suspended from the practice of law for a period of eighteen (18) months and that they comply with conditions 2 through 11 contained in the hearing judge's decision.

We further recommend that prior to the expiration of the period of actual suspension, each respondent be required to pass the California Professional Responsibility Examination administered by the Committee of Bar Examiners.

We also recommend that each 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.

Finally, we recommend that costs be awarded the State Bar pursuant to the provisions of Business and Professions Code section 6086.10.

I concur:

NORIAN, J.

PEARLMAN, P.J., concurring:

I fully concur with the opinion of the court, but wish to address specifically respondents' argument that solicitation should no longer be a crime and that their misconduct is essentially only malum prohibitum in a constitutionally questionable area of the law—the product of "innovative practitioners who market their legal skills creatively and aggressively and by doing so provide those services to a group of clients whose cases would otherwise be neglected." To the contrary, even on their own version of the facts, respondents engaged in egregious misconduct.

As pointed out in this court's opinion, the very recent decision of the United States Supreme Court in *Edenfield* v. *Fane* (1993) __ U.S. __ [113 S.Ct. 1792, 123 L.Ed.2d 543] emphasized the dangers of fraud and overreaching by overly aggressive lawyers in distinguishing regulations prohibiting solicitation of accident victims from the Florida Board of Accountancy's rule prohibiting certified public accountants (CPAs) from engaging in "direct, in-person, uninvited solicitation" to obtain new clients. The latter was struck down as violative of the First Amendment because of the CPAs' right to engage in commercial speech.

Here, in contrast to the situation in *Edenfield*, we are not confronted with a simple "cold call" by professionals on sophisticated potential clientele. Rather, it is undisputed that respondents entirely abdicated to independent "investigators" the establishment of the attorney-client relationship; that they paid these "investigators" in unrecorded cash transactions for obtaining the signatures of numerous accident victims they had never met; and that for this purpose they drafted standardized fee agreements with illegal provisions attempting to benefit respondents at their clients' expense.

Contrary to respondents' altruistic claim, respondents did not show that the persons so solicited would have been unable to find adequate counsel but for respondents' opening a branch office with no attorneys on site several hundred miles from their principal office. Nor did respondents on their visits to the office even purport to interview potential clients themselves or through supervised employees to ensure that there was no actual overreaching.

As the decision below and the opinion of the court herein have found, two of the cappers (Gumban and Buchanan) engaged in extensive criminal activity involving kickbacks and illegally obtained police reports to get clients in respondents' door. Respondents were not found to have actual knowledge of any of the kickbacks or the practice of obtaining police reports illegally, although there was ample

evidence that they should have been on notice of at least some incidents of these illegal practices of Gumban and Buchanan.

Had respondents been actively involved in every facet of the criminal activities engaged in by Gumban and Buchanan, the State Bar would in all likelihood be asking for their disbarment. But respondents cannot be sanguine about their more limited role because it was in and of itself very serious. Respondents unquestionably knew that *any* business procured for them by Gumban or Buchanan as their agents was a void solicitation by a "runner" or "capper" under Business and Professions Code sections 6151 and 6154 regardless of their personal belief that solicitation should not be prohibited.

It is not possible to credit even for the sake of argument respondents' alleged good intentions, because they did not take any steps whatsoever to ensure that potential clients understood the terms of the attorney-client fee agreement, or understood that the terms were truly negotiable as required by Business and Professions Code section 6147 (a)(4) as opposed to a mere recitation of negotiability in a contract expected to be presented on a take-it-or-leave-it basis.[1]

Obviously, if respondents were willing to pay a portion of the fee to illegal cappers, the same services rendered by respondents should theoretically have been available for less cost to the clients either from respondents directly (eliminating the middleman) or other attorneys who did not make illegal payments for receipt of the clients' business. Also, according to the State Bar's expert witness, who was a former president of the California Trial Lawyers Association, most attorneys would incur no time or expense to recover medical pay insurance coverage and thus could be expected not to bargain for a share of such proceeds in the contingent fee agreement. No opportunity was given respondents' clients to negotiate this provision out of the agreement.

Most despicably, in derogation of their professional responsibilities, respondents put in each agreement two other unusual and highly repugnant provisions: (1) language purporting to entitle respondents to their full contingent fee if the client discharged the respondents without cause and against respondents' wishes and (2) a liquidated damage provision purporting to prevent clients from withdrawing from the agreement, in any event, unless they paid a minimum fee equivalent to three hours' legal services at an hourly rate.[2] This was unquestionably unconscionable as found by the court. Clients have the power and the right at any time to discharge their attorney with or without cause and the attorney is limited to recovery of the reasonable value of services actually rendered to the time of discharge. (*Fracasse* v. *Brent* (1972) 6 Cal.3d 784, 792.) Thus, a client who changed his or her mind the next day, before any work was undertaken, should have no liability for services not yet rendered.

Respondents' attempt to obtain a minimum fee from every case when clients subjected to potentially high-pressure tactics of unsupervised agents might be anticipated to change their minds[3] was patently the result not of misjudgment in a few instances, but of systematic overreaching. Indeed, most despicable of all was the highly unusual separate form on which respondents had their cappers obtain clients' signatures—a declaration under penalty of perjury that the prospective client was not solicited. Such tactics might have left unsuspecting clients open to charges of perjury if they subsequently wished to repudiate the fee agreement on the basis that it was in fact a void solicitation.

When the fee agreements were later challenged by new lawyers for various clients, respondents

1. As the opinion of the court points out, clients were not given the opportunity to talk to respondents before signing the fee agreement or to hold the agreement overnight before signing it.

2. The minimum fee was generally $600 based on a stated fee of $200 per hour. In a few instances, the minimum fee was set at $150 per hour for a total of $450.

3. For this very reason, consumer legislation protects individuals from a wide range of door-to-door salespeople by allowing rescission without penalty for three days following home solicitation. (Civ. Code, § 1689.6.) That statute is expressly inapplicable to services of attorneys, who, as discussed herein, are barred by other provisions of the law from similar uninvited solicitation of new business from members of the public.

compounded their overreaching by asserting invalid liens against some of the clients, adding insult to injury by threatening suit against at least one insurer for punitive damages if respondents were not named on all settlement drafts. Moreover, when told that Gumban and Buchanan had used improper tactics to get the clients to sign the agreements, respondents ignored the warning signals and proceeded for several months thereafter with reckless indifference toward the rights of clients who charged that they had been illegally solicited.

Thus, the inability of the State Bar to prove respondents' actual knowledge of the scope and sorry details of Gumban and Buchanan's kickback scheme does not absolve respondents from complicity in the improper solicitation of clients and from unconscionable fee agreements systematically resulting therefrom. Contrary to respondents' counsel's argument, respondents' misconduct does warrant zealous condemnation. Indeed, their lack of recognition of the seriousness thereof and their attempt to characterize themselves as merely technical transgressors who were taken advantage of by unscrupulous independent contractors is itself cause for grave concern. Respondents engaged in despicable "marketing" practices that members of the public dread—generation of "gotcha" agreements designed as traps for the unwary. These agreements were foisted on unsuspecting accident victims through unsupervised tactics of cappers. Respondents' legalistic attempt to shield themselves with deniability by use of forms disseminated by the very same unsupervised cappers is the type of slick conduct that gives attorneys a bad name. If this is how they treat clients, what kind of conduct can they be expected to engage in with adversaries and the court?

Respondents' conduct is all the more pernicious because it is sanctimoniously characterized as intended to benefit persons who otherwise might not receive proper legal representation. The truth is that unsophisticated persons were in fact improperly pressured into using respondents' services and systematically intimidated from withdrawing from the fee agreements by unenforceable documentation purporting to penalize them for exercising their right to discharge an unwanted attorney. Some benefit! This left the clients in the position of needing another attorney to help the clients discover their true rights to terminate respondents' void attorneys' fee contract without penalty.

Respondents' misconduct appears motivated solely by greed. Under the standards and case law, 18 months suspension of both respondents is amply justified on the facts established in this proceeding.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOSEPH ANTHONY MESCE

A Member of the State Bar

No. 93-TE-16421

Filed November 9, 1993; as modified, January 12, 1994

SUMMARY

The State Bar sought respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007 (c) based on his guilty plea to misdemeanor contempt arising out of a missed court appearance; two Vehicle Code violations; the evidence produced at his preliminary hearing on felony charges of possession, possession for sale, and transportation of methamphetamine, as well as a misdemeanor charge for being under the influence of a controlled substance; and the pendency of criminal charges against him for attempted bribery of a witness and soliciting perjury. Focusing exclusively on the issue of threat of harm to clients, the hearing judge found insufficient evidence of potential harm to justify inactive enrollment. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar moved for relief from the hearing judge's decision. The review department found that the evidence from the preliminary hearing on the drug charges demonstrated a reasonable probability that the State Bar would prevail in a disciplinary matter based on those charges, and that respondent's misconduct demonstrated a clear likelihood of harm both to his clients and to the public. Concluding that the hearing judge erred in failing to consider the substantial threat of harm to the public and in finding inadequate evidence of client harm, the review department ordered respondent enrolled inactive.

COUNSEL FOR PARTIES

For Office of Trials: Julie W. Stainfield

For Respondent: No appearance

HEADNOTES

[1 a, b] 130 Procedure—Procedure on Review
139 Procedure—Miscellaneous

Review department's general practice is not to publish opinions in matters where oral argument has not been heard. However, where the only party which had appeared in a proceeding requested publication of an order issued without oral argument, and the order dealt with a situation which had

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.

not been addressed in review department's prior published opinions, the request for publication was granted. The effective date of the order was not affected by its modification due to the request for publication.

[2] **2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues**

In order to impose involuntary inactive enrollment on an attorney pursuant to Business and Professions Code section 6007 (c), the court must find that the attorney poses a substantial threat of harm to the attorney's clients or the public. The following elements must be shown by clear and convincing evidence: that the attorney has caused or is causing substantial harm to clients or the public; that clients or the public are likely to suffer greater injury from denial of inactive enrollment than the attorney is likely to suffer if it is granted or there is a reasonable likelihood that the harm will reoccur and continue; and that there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter.

[3 a, b] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues

It would have been inappropriate in involuntary inactive enrollment proceeding for judge to draw any inference from pending criminal charges in and of themselves. However, testimony offered under oath and subject to cross-examination in preliminary hearings on such criminal charges supported judge's findings regarding facts of respondent's criminal conduct. This evidence was sufficient to demonstrate a reasonable probability that State Bar would prevail on merits of disciplinary charges brought thereon.

[4] **142 Evidence—Hearsay**
2210.30 Section 6007(c)(2) Proceedings—Declarations as Evidence

Declarations offered in support of application for involuntary inactive enrollment did not provide an evidentiary basis to find clear and convincing evidence of respondent's likelihood of causing substantial harm, where declarants simply identified themselves as authors of unverified reports without vouching for the truth of the reports or establishing a business records exception to the hearsay rule.

[5 a, b] **165 Adequacy of Hearing Decision**
167 Abuse of Discretion
2221 Section 6007(c)(2) Proceedings—Inactive Enrollment Ordered

Where respondent had missed a court appearance on behalf of a client shortly after stipulating to discipline based in part on similar past conduct; had brought an illegal drug to court, attempted to visit an incarcerated client with the drug in his possession, and thrown the drug on the floor after refusing to be searched; had been stopped on another occasion with the drug in his car; and had been observed to be under the influence of a controlled substance while with a client, there was a clear likelihood of harm to both respondent's clients and the public if respondent were allowed to practice law pending adjudication of criminal and State Bar proceedings, and hearing judge erred in focusing exclusively on threat of harm to clients and finding insufficient evidence thereof to justify inactive enrollment.

[6] **141 Evidence—Relevance**
513.90 Aggravation—Prior Record—Found but Discounted
2290 Section 6007(c)(2) Proceedings—Miscellaneous

Respondent's record of prior discipline did not warrant great weight in involuntary inactive enrollment proceeding, where respondent's first prior disciplinary matter was unrelated to present conduct, and State Bar had stipulated in second prior matter that respondent's misconduct was only worthy of a short suspension not requiring client notification.

[7] **141 Evidence—Relevance**
2290 Section 6007(c)(2) Proceedings—Miscellaneous

In involuntary inactive enrollment proceeding, evidence showing very substantial likelihood that respondent had substance abuse problem could be considered as risk to the public of future professional misconduct even absent evidence of current client harm.

[8] **165 Adequacy of Hearing Decision**
167 Abuse of Discretion
2221 Section 6007(c)(2) Proceedings—Inactive Enrollment Ordered

Where there was uncontroverted evidence of repeated client harm and other violations of law by respondent, and no evidence of recognition by respondent of substance abuse problem, hearing judge erred in denying involuntary inactive enrollment of respondent without considering substantial harm which public was likely to suffer from such denial.

ADDITIONAL ANALYSIS

[None.]

ORDER GRANTING INACTIVE ENROLLMENT

PEARLMAN, P.J.:

This is a motion under rule 1400(c)(iii), Provisional Rules of Practice, seeking relief from a decision denying the Office of the Chief Trial Counsel's ("OCTC") application for inactive enrollment of respondent Joseph Anthony Mesce ("Mesce") pursuant to Business and Professions Code section 6007 (c). It was referred by the Presiding Judge for consideration by the review department in bank by order filed October 21, 1993, and considered by the review department on the moving papers.[1] **[1a - see fn. 1]** Respondent did not participate in the proceedings below or file any opposition papers on review.

We have been asked to overrule the decision below as contrary to law and an abuse of discretion and immediately to enroll respondent inactive.

[2] In order to impose involuntary inactive enrollment upon a member of the State Bar of California pursuant to Business and Professions Code section 6007 (c), the court must find that the member "poses a substantial threat of harm to the interests of the attorney's clients or to the public." The burden of proof is by clear and convincing evidence. (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1126.) The elements necessary for a successful application were correctly stated by the hearing judge: clear and convincing evidence that respondent has caused or is causing substantial harm to his clients or the public; that his clients or the public are likely to suffer greater injury from the denial of the application than respondent is likely to suffer if it is granted or there is a reasonable likelihood that the harm will reoccur and continue; and that there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter. (Bus. & Prof. Code, § 6007 (c)(2).)

Respondent has a prior record of two disciplinary suspensions, the first of which was stayed and the second of which included 60 days of actual suspension and until restitution is made to a former client. Respondent was placed on the latter suspension by the Supreme Court on August 19, 1993, pursuant to a stipulation entered into between respondent and the State Bar in January of 1993 resolving two pending State Bar proceedings. Respondent is currently not entitled to practice law both pursuant to that suspension order and for failure to pay State Bar fees. His more recent misconduct includes his guilty plea on July 27, 1993, to violating Penal Code section 166, subdivision 1 (misdemeanor contempt) for failure to appear on behalf of a client for sentencing in a criminal matter on March 15, 1993, and his failure to contact the court regarding his nonappearance. It also includes two violations of Vehicle Code section 12500, subdivision (a) (driving without a valid driver's license).

In addition, as a result of two separate incidents, respondent is awaiting trial on charges of felony possession of methamphetamine (Health and Safety Code section 11377, subdivision (a)), felony possession of methamphetamine for sale (Health and Safety Code section 11378), felony transportation of methamphetamine (Health and Safety Code section 11379, subdivision (a)), and the misdemeanor of being under the influence of a controlled substance (Health and Safety Code section 11550). He is also awaiting trial on charges of violating Penal Code section 137, subdivision (a) for allegedly attempting to bribe a client who was a witness and two charges of soliciting perjury from the same witness in violation of Penal Code section 653f, subdivision (a).

1. When it was originally filed on November 9, 1993, this order was not designated for publication. **[1a]** This court's general practice has been to refrain from publishing opinions in matters in which oral argument has not been heard. However, in this matter, by timely motion filed November 29, 1993, OCTC—the only party which has appeared in this proceeding—requested that the court reconsider its decision not to publish this order. The motion requested publication by analogy to rule 976(b) of the California Rules of Court, noting, inter alia, that the order granted section 6007 (c) inactive enrollment based on facts and testimony relating to pending criminal proceedings, a situation which has not been addressed in this court's prior published opinions. Good cause appearing, we hereby grant the motion for reconsideration and have accordingly modified the order filed November 9, 1993, by adding two footnotes and designating the order for publication.

[3a] It would have been inappropriate for the hearing judge to draw any inference from the pending criminal charges in and of themselves. However, OCTC obtained and offered in support of its application, among other things, several declarations and certified copies of the transcript of two preliminary hearings conducted in April of 1993 on the pending criminal charges.

[4] The declarations unfortunately do not provide an evidentiary basis under Transitional Rules of Procedure, rule 793.1(c) for finding clear and convincing evidence of respondent's likelihood of causing substantial harm to the public because the declarants simply identify themselves as authors of unverified reports without vouching for the truth of the reports or establishing a business records exception to the hearsay rule. (Cf. *Ancora-Citronelle Corp.* v. *Green* (1974) 41 Cal.App.3d 146, 150 ["It is the clear policy of the law that the drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury."].)

[3b] Nonetheless, the testimony of various officials under oath and subject to cross-examination in the two preliminary hearings does support the hearing judge's findings as to evidence of respondent's possession of methamphetamine on two occasions; the circumstances under which the methamphetamine was discovered on both occasions; the fact that a briefcase identified as respondent's contained a large quantity of methamphetamine (13.305 grams net weight); and his being under the influence of a controlled substance on the second occasion. This evidence was sufficient to demonstrate a reasonable probability that the State Bar will prevail on the merits of disciplinary charges brought thereon.

There was, however, insufficient evidence presented in this record that respondent attempted to bribe a witness or sought to suborn perjury. Although this conduct was allegedly tape recorded by the victim client, the alleged victim did not testify and no transcript of the tape recording was produced at the preliminary hearing or before this court.

[5a] The hearing judge focused exclusively on the issue of threat of harm to clients without discussing the threat of harm to the public and found insufficient evidence of potential harm to the former to justify inactive enrollment of respondent. We cannot uphold this determination on the facts as found by the hearing judge. **[6]** We understand her reluctance to place too great a weight on either record of prior discipline. The first was unrelated and in the second the State Bar stipulated that it involved misconduct only worthy of a short suspension not requiring client notification.

[5b] Nonetheless, there is clearly a likelihood of harm to both respondent's clients and the public if respondent is allowed to resume practicing law while awaiting final adjudication of the pending State Bar and criminal proceedings. Respondent admittedly missed yet another court appearance on behalf of a client in March of this year just two months after stipulating to discipline based in part on several incidents of similar conduct in the past. Far more disturbing is the evidence that on another date in March of 1993, after stipulating to discipline for prior misconduct, he brought a concealed canister of methamphetamine to court and was attempting to visit an incarcerated client with the methamphetamine in his possession. After refusing to be searched, he disbursed the methamphetamine on the courthouse floor in an apparent attempt to destroy evidence of his crime. This incident at the courthouse, standing alone, presents very troubling evidence of substantial risk to the public in respondent's continued ability to practice law. A few weeks thereafter he was in a car stopped for a traffic violation with an even larger quantity of methamphetamine found by the arresting police officer in a briefcase with respondent's flyers in it where respondent had been sitting. An arrest warrant had already been issued against him for the earlier incident. On the latter occasion he was traveling with another client and was observed by the police officer to be under the influence of a controlled substance. The foregoing facts were established by clear and convincing evidence.

Respondent has not participated in this proceeding to contradict any of the evidence offered by

OCTC against him. Although respondent is currently on suspension, it is within his power to terminate it upon proof of payment of restitution and payment of his bar fees. **[7]** There is a very substantial likelihood based on the evidence that was introduced below that respondent has a substance abuse problem which the court would have been entitled to consider as a risk to the public of future professional misconduct even if there were no evidence of current client harm. (See *In re Kelley* (1990) 52 Cal.3d 487, 498.)

[8] Here there is evidence of repeated client harm and other violations of law and no evidence of recognition by respondent of a substance abuse problem. In *Conway* v. *State Bar*, *supra*, Conway's offer of evidence of rehabilitation, including that he no longer suffered from cocaine addiction, was rejected as "insufficient to overcome the strong showing that [he] posed a substantial threat of harm to his clients and the public" in light of "past lapses and history of recurring wrongs." (*Conway* v. *State Bar*, *supra*, 47 Cal.3d at p. 1126.) Given the uncontroverted record in this proceeding of past lapses and recurring wrongs, we must find that the hearing judge erred in denying inactive enrollment of respondent without considering the substantial threat of harm the public is likely to suffer from the denial.

IT IS HEREBY ORDERED that JOSEPH ANTHONY MESCE be enrolled inactive pursuant to Business and Professions Code section 6007 (c) effective five days after the service of this order[2] **[1b - see fn. 2]** and that appropriate notice be given respondent and the Supreme Court pursuant to Business and Professions Code section 6081. IT IS FURTHER ORDERED that respondent shall comply with the provisions of rule 795.5, Transitional Rules of Procedure.

We concur:

NORIAN, J.
STOVITZ, J.

2. This order was originally filed and served on November 9, 1993, and became effective five days from such service. **[1b]** The effective date of respondent's inactive enrollment is not affected by the present modification of this order due to OCTC's request that it be designated for publication.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAMES ALAN TWITTY

A Member of the State Bar

Nos. 88-O-15237, 89-C-16261, 89-C-16262, 90-C-16527, 90-O-15541, 90-O-15712

Filed January 19, 1994

SUMMARY

Respondent and the State Bar reached an agreement to resolve five of the six disciplinary matters in a consolidated proceeding. In the sixth matter, respondent, while representing a defendant in a criminal case, and knowing that another lawyer represented another defendant in the same case, had communicated with the other defendant about a plea bargain in the case without the other lawyer's consent. The parties submitted the sixth matter for a culpability determination to a hearing judge pro tempore, who concluded that respondent had violated the rule against communicating with a party represented by counsel. (Philip L. Johnson, Judge Pro Tempore.)

The parties included this culpability determination in a comprehensive stipulation, which recommended two years stayed suspension and four years probation, conditioned on thirty days actual suspension. The parties agreed that if respondent had not been found culpable in the sixth matter, the recommended discipline would have called for three years, rather than four years, probation. Further, the stipulation stated that the parties intended to preserve the right to seek review even though they were entering into a stipulation. The hearing judge approved the stipulation.

Respondent requested review, contesting his culpability in the disputed count. The review department granted the request, but cautioned the parties that the entire proceeding was subject to independent review. The review department affirmed the culpability finding, and held that given respondent's serious improper communications and other stipulated wrongdoing, the recommended discipline was inconsistent with decisional law and insufficient. Because the parties had agreed to a highly unusual stipulation to preserve time and resources and had not contemplated that seeking review would result in discipline more severe than the discipline recommended in the order approving the stipulation, the review department relieved the parties from their stipulation and remanded the proceeding to allow them to reach a new stipulation or to try the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: R. Gerald Markle

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-c] **119 Procedure—Other Pretrial Matters**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
166 Independent Review of Record

Where parties to a disciplinary proceeding reached a stipulation but agreed to preserve right to seek review as to one contested culpability issue, review department construed order approving stipulation and hearing judge's partial decision as together constituting a decision for the purpose of review. However, review department was obligated to review entire record independently and had authority to make findings, conclusions, and a disciplinary recommendation at variance with those of hearing department. (Trans. Rules Proc. of State Bar, rule 453(a).) Agreement between parties could not restrict review department's obligation of independent review. Accordingly, review department declined to limit its review to contested culpability decision, and was not bound by stipulated discipline recommendation.

[2] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
159 Evidence—Miscellaneous

Where parties jointly requested augmentation of record with exhibits which they had provided to hearing judge for consideration in rendering decision and had intended to make part of record, and which hearing judge had relied on in reaching decision, and which were vital to review, record would have been incomplete without exhibits, and request to augment was granted. (Prov. Rules of Practice, rule 1304.)

[3] **135 Procedure—Rules of Procedure**
146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act

Rules of evidence in civil cases are generally applicable in State Bar proceedings (Trans. Rules Proc. of State Bar, rule 556) and include taking judicial notice of records of any federal court of record. Where neither party specifically requested augmentation of record with federal court's opinion on appeal in related matter, but respondent attached copy of such opinion to review brief, review department took judicial notice of such opinion.

[4] **162.11 Proof—State Bar's Burden—Clear and Convincing**
166 Independent Review of Record

The State Bar must prove culpability by clear and convincing evidence. Where respondent requested review department to make supplementary finding concerning culpability, but record clearly and convincingly established a fact inconsistent with such proposed finding, review department declined to adopt proposed finding.

[5] **162.20 Proof—Respondent's Burden**
166 Independent Review of Record

Respondent must establish mitigating circumstances by clear and convincing evidence. Where respondent requested review department to make supplementary findings pertaining to mitigating circumstances, but did not present clear and convincing evidence in support of such proposed findings, review department declined to adopt them.

[6 a, b] **257.00 Rule 2-100 [former 7-103]**

An attorney who is representing a client may not communicate directly or indirectly about the subject of the representation with a party whom the attorney knows to be represented by another lawyer in the matter, unless the attorney has the consent of the other lawyer. Where respondent represented a defendant in a criminal case, and a co-defendant's lawyer had authorized respondent to communicate with the co-defendant only for the purpose of preparing a joint defense, respondent's communication with the co-defendant about a plea bargain without the other lawyer's consent was improper.

[7 a, b] **257.00 Rule 2-100 [former 7-103]**

When a party already represented by counsel seeks advice from an independent lawyer of the party's choice in order to hire new counsel or obtain a second opinion, attorneys may communicate with such party. However, where respondent represented a defendant in a criminal case, knew that another lawyer represented another defendant in the case, and conceded that a potential conflict existed between the interests of the two defendants, this potential conflict prevented respondent from acting as an independent attorney whom the other defendant might consult for an unbiased second opinion.

[8] **151 Evidence—Stipulations**
162.20 Proof—Respondent's Burden
795 Mitigation—Other—Declined to Find

Where respondent's declaration attached to stipulation suggested mitigating circumstances, but stipulation did not specify whether State Bar accepted statements in declaration as true and hearing judge did not indicate whether statements were found to be persuasive, review department declined to reach conclusion regarding possible mitigating factors suggested by declaration.

[9] **119 Procedure—Other Pretrial Matters**
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
165 Adequacy of Hearing Decision
802.69 Standards—Appropriate Sanction—Generally

When judges are asked to approve stipulations, they cannot rely solely on State Bar's acquiescence in proposed discipline, but must exercise their independent judgment in carrying out their obligation to examine stipulation, admitted facts, and proposed discipline for fairness to parties and for extent to which public will be adequately protected thereby. (Trans. Rules Proc. of State Bar, rule 407(a).)

[10 a, b] **257.00 Rule 2-100 [former 7-103]**
584.10 Aggravation—Harm to Public—Found
1091 Substantive Issues re Discipline—Proportionality
1093 Substantive Issues re Discipline—Inadequacy

Where respondent engaged in serious improper communications with a represented party, exposing the party to serious risks of harm, some of which occurred, and committed other stipulated wrongdoing, recommended discipline of four years probation conditioned on thirty days actual suspension was inconsistent with decisional law and insufficient.

[11 a, b] 119 Procedure—Other Pretrial Matters
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
166 Independent Review of Record
1093 Substantive Issues re Discipline—Inadequacy

Where parties agreed to highly unusual stipulation expressly preserving right to seek review, but did not contemplate that review department would recommend discipline more severe than that set forth in order approving stipulation, parties' expectation that review department would be bound by stipulated discipline was unjustified. However, it was appropriate to relieve parties from stipulation due to their mutual mistake. Accordingly, review department vacated order approving stipulation and remanded proceeding for new stipulation or trial.

ADDITIONAL ANALYSIS

Culpability
Found
257.01 Rule 2-100 (former 7-103)

Aggravation
Found
521 Multiple Acts
541 Bad Faith, Dishonesty
561 Uncharged Violations
691 Other

Mitigation
Found
710.10 No Prior Record
Found but Discounted
735.30 Candor—Bar

Standards
801.30 Effect as Guidelines
802.30 Purposes of Sanctions
802.61 Appropriate Sanction
844.13 Failure to Communicate/Perform
863.90 Standard 2.6—Suspension
901.30 Miscellaneous Violations—Suspension

Other
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1554.10 Conviction Matters—Standards—No Moral Turpitude

OPINION

PEARLMAN, P.J.:

In this unusual consolidated proceeding, at the request of respondent, James Alan Twitty, we review a decision on culpability in one matter and an order approving a stipulation as to all of the consolidated matters. The stipulation incorporated the hearing judge pro tempore's decision concluding that respondent violated rule 2-100 of the Rules of Professional Conduct by communicating with a party whom respondent knew to be represented by another lawyer without the other lawyer's knowledge and consent. We affirm the conclusion of culpability, but we vacate the order approving the stipulation because it recommends an inadequate sanction based on the current record. Given the mutual mistake of the parties as to the effect of their stipulation in the event of review, we relieve the parties of their stipulation and remand the consolidated cases for further proceedings consistent with this opinion.

I. PROCEDURAL POSTURE

We turn our attention first to the unusual procedural posture of the current proceeding.

In early 1992, after several settlement conferences, the parties were able to reach agreement on five of six pending matters. In case number 90-O-15541, the parties had not been able to agree on culpability but had agreed to incorporate into their global settlement the court's resolution of the disputed issue. The hearing judge pro tempore assigned to the case was not asked to hold a hearing, but to rely solely upon evidence offered in the trial of *United States* v. *Lopez* (N.D.Cal. 1991) 765 F.Supp. 1433, order vacated by *United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455 ("*Lopez*"), and upon United States District Judge Marilyn Hall Patel's opinion in *Lopez*. In May 1992, the hearing judge filed a decision determining respondent's culpability in case number 90-O-15541. In reaching his underlying decision regarding respondent's communication with a separately represented criminal defendant, the hearing judge found that respondent had communicated with the criminal defendant outside the presence of the defendant's counsel on a subject not authorized by the defendant's counsel and without the knowledge and consent of the defendant's counsel, that he had interfered with the attorney-client relationship, and that he was culpable of communicating with a represented party.

The parties had sought to limit the resulting discipline by prior agreement between themselves. Pursuant thereto, they agreed, among other things, to thirty days actual suspension for all other matters and three years of probation. They further agreed in advance that the total period of probation would be lengthened to four years if respondent were found culpable in case number 90-O-15541. If the hearing judge had not found respondent culpable in case number 90-O-15541, the length of the recommended stipulated probation for the consolidated proceeding would have remained three years under the terms of the parties' agreement.

On December 2, 1992, the parties filed a stipulation covering all six cases: 88-O-15237, 89-C-16261, 89-C-16262, 90-C-16527, 90-O-15541, and 90-O-15712. In case number 88-O-15237, respondent stipulated that he had failed to return a file upon the request of a client and the client's new attorney, to communicate with clients, to refund the unearned portions of advanced fees in two matters, and to cooperate with the State Bar in its handling of case number 88-O-15237. In cases number 89-C-16261, 89-C-16262, and 90-C-16527, respondent acknowledged several convictions for drunk driving and stipulated that by these convictions he had violated his duties as an attorney. The parties apparently concluded that these convictions did not constitute acts of moral turpitude, but did not expressly so indicate.[1] In case number 90-O-15712, respondent

1. The parties were unable to reach a stipulation with respect to the charge of an act of moral turpitude in count three of case number 88-O-15237 and submitted that question to the hearing judge who determined that respondent did not violate section 6106 of the Business and Professions Code in that count. No issue has been raised herein regarding that determination which we conclude was appropriately reached on the current record. However, in light of our determination to relieve the parties of their stipulation and remand the proceeding, the parties are free to readdress this issue, among others.

stipulated that he failed to reply promptly to reasonable requests for information from clients.

Based on all of the stipulated facts and the court findings in case number 90-O-15541, the parties' stipulation recommended that respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that respondent be placed on four years probation on various conditions, including actual suspension for thirty days. The stipulation stated that the parties intended to preserve the right to seek review even though they were entering into a stipulation. On December 11, 1992, the hearing judge filed an order approving the stipulation.

[1a] Respondent requested review. We granted the request because the parties specifically provided in their stipulation that the right to seek review would be preserved. However, we informed the parties that we would construe the order approving the stipulation, coupled with the hearing judge's partial decision, as together constituting a decision for the purpose of review. Citing rule 453(a) of the Transitional Rules of Procedure, we cautioned the parties that we are obligated to review the entire record independently when a proceeding is brought before us and that we may adopt factual findings, legal conclusions, and a disciplinary recommendation at variance with those of the hearing department.

II. AUGMENTATION OF THE RECORD

[2] The parties jointly seek to augment the record with eleven exhibits pertaining to two transcripts of proceedings before then United States Magistrate Judge Claudia Wilken, five transcripts of proceedings before United States District Judge Marilyn Hall Patel, a stipulation correcting a transcript of proceedings before Judge Patel, the opinion filed by Judge Patel, a memorandum issued by former United States Attorney General Thornburgh, and a declaration by attorney Barry Tarlow. The parties provided these documents to the hearing judge pro tempore for consideration in rendering his partial decision and intended to make them part of the record on review. Because the hearing judge relied on the eleven exhibits in reaching his partial decision and because they are vital to our review, the record would be incomplete without them. We therefore grant the joint request for augmentation of the record pursuant to rule 1304 of the Provisional Rules of Practice.

[3] The parties have not specifically requested that we augment the record of the current proceeding with the circuit court opinion in *Lopez*, although respondent attached a copy of the original version of this opinion to his opening brief on review. The rules of evidence in civil cases are generally applicable in State Bar proceedings (Trans. Rules Proc. of State Bar, rule 556) and include taking judicial notice of the records of any federal court of record. (Evid. Code, § 452, subd. (d)(2).) In order to have a complete record before us, we take judicial notice of the final version of the circuit court opinion in *United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455.

III. FACTS OF CASE NUMBER 90-O-15541

Neither the factual findings nor the legal conclusions of cases number 88-O-15237, 90-C-16527, 89-C-16261, 89-C-16262, and 90-O-15712 are in dispute. We therefore focus on case number 90-O-15541.

Although respondent challenges the legal conclusions of the decision below in case number 90-O-15541, he asserts that he accepts the factual findings of that decision. Nor does the deputy trial counsel dispute these findings. Because clear and convincing evidence supports these findings, we adopt them as our own.

As discussed above, we have granted the request by both parties that we augment the record with Judge Patel's opinion in *Lopez*. Respondent stated at oral argument that he did not quarrel with Judge Patel's factual findings, and the deputy trial counsel has not disagreed with those findings. In the following statement of the facts pertaining to case number 90-O-15541, we adopt a few factual findings from Judge Patel's opinion where such findings rest on uncontroverted evidence and clarify significant points. As specifically indicated below, we also adopt one finding of fact which respondent disputed during the federal trial before Judge Patel, but which rests on clear and convincing evidence.

In December 1989, the federal government charged Jose Lopez ("Lopez"), Antonio Escobedo ("Escobedo"), and Alfredo Olivas ("Olivas") with distribution of cocaine and heroin, conspiracy to distribute these drugs, and aiding and abetting. The case was assigned to United States District Judge Fern Smith, who denied bail to Lopez and Escobedo.

At the beginning of the case, respondent made several appearances on behalf of all three defendants, primarily at bail and detention proceedings. Eventually, attorney Barry Tarlow ("Tarlow") became counsel for Lopez, respondent became counsel for Escobedo, and attorney Harold Rosenthal ("Rosenthal") became counsel for Olivas.

Before Tarlow became Lopez's counsel, respondent had initially discussed possible disposition of the charges against Lopez and Escobedo with attorney John Lyons ("Lyons"), the federal prosecutor assigned to the case. Lyons made it clear to respondent that Lyons would consider a disposition of the case only if both Lopez and Escobedo entered into a plea agreement.

In representing Lopez, Tarlow took the position that his client had a viable entrapment defense. Discussions with Lyons about a plea agreement ended after Tarlow became Lopez's lawyer.

Tarlow, Rosenthal, and respondent divided responsibility for the preparation of the case. Tarlow authorized respondent to speak with Lopez only for the purpose of preparing a joint defense for trial. Tarlow did not authorize respondent to meet or confer with the government on behalf of Lopez. Because respondent had responsibility for investigating the case against Lopez and Escobedo, he spoke with both defendants during his visits to the jail where they were incarcerated.

In March or April 1990, Escobedo telephoned respondent and expressed an interest in the possibility of reopening plea negotiations with the government. Lopez, as well as Escobedo, wanted respondent to come to the jail to discuss this possibility. Both Lopez and Escobedo were concerned about their children and wished to obtain early release in order to be closer to their children.

Without informing Tarlow, respondent went to the jail and met with Lopez and Escobedo, both of whom asked respondent to arrange a meeting with Lyons to discuss a negotiated plea. Lopez requested that respondent not inform Lopez's attorney, Tarlow, about Lopez's desire to meet with Lyons or about the anticipated meeting with Lyons. Although the record contains conflicting evidence about the reason for this request, the record establishes that Lopez informed respondent that Lopez was not terminating Tarlow's services and wanted Tarlow to represent Lopez if the case went to trial.

Respondent had several telephone conversations with Lopez and Escobedo about meeting with Lyons and made a second trip to the jail to discuss plea negotiations with the two defendants. Respondent did not inform Tarlow about any of these communications with Lopez.

Respondent then contacted the government on behalf of Lopez and Escobedo without informing Tarlow. During the trial before Judge Patel, respondent denied that he encouraged Lopez or Escobedo to enter into negotiations with the government. Instead, respondent contended that he did not want to explore the alternative of negotiating a plea and that he preferred to try the case.

Judge Patel described this contention as not credible because respondent initiated the contact with the government on behalf of Lopez and Escobedo, concealed his ongoing communications about plea negotiations from Tarlow, went to considerable lengths to ensure that the meetings with the government occurred, and asked Rosenthal not to tell Tarlow about the meetings. Judge Patel found that such actions did not constitute the conduct of an attorney with no interest in plea negotiations. (*Lopez*, 765 F.Supp. at p. 1440, fn. 12.) Although the hearing judge in the current disciplinary proceeding did not address this finding, we agree that clear and convincing evidence supports the finding and adopt it as our own.

At the request of Lopez and Escobedo, respondent told Lyons that Lopez and Escobedo wished to meet with Lyons to discuss a possible plea agreement and that Lopez did not want Tarlow to be present at,

or aware of, the meeting. Lyons believed that Lopez feared for the safety of Lopez's family if Tarlow learned of the negotiations with the government. This belief was allegedly supported by government information that a drug source had threatened the families of Lopez and Escobedo. Lyons assumed that Lopez was part of a drug ring paying Tarlow's fees for representing Lopez.

Because Lopez wanted to meet without Tarlow, Lyons arranged a hearing on May 21, 1990, before then Magistrate Judge Claudia Wilken, who conducted an in camera hearing in which she interviewed Lopez. Tarlow was not present at, or aware of, this hearing; respondent did not attend the hearing; and Lyons did not appear until the end of the hearing. Although Lyons testified that he did not inform Magistrate Judge Wilken of his suspicion about the source of Tarlow's fees, her remarks apparently reflected an assumption that someone else was paying Tarlow's fees. Lopez informed Magistrate Judge Wilken that Lopez wanted to ask the government two questions. Magistrate Judge Wilken warned Lopez about the danger of entering into plea negotiations without counsel, offered Lopez the opportunity to retain counsel other than Tarlow, and explained that respondent represented Escobedo, not Lopez. Lopez signed a waiver prepared by the government. This waiver stated that Tarlow represented Lopez, that Lopez wanted to speak to the government outside of Tarlow's presence, that Lopez did not believe Tarlow represented Lopez's best interests, and that Lopez waived the right to have Tarlow present at the meeting. When Lyons appeared, Magistrate Judge Wilken stated that Lopez had waived the right to have Tarlow present for the purpose of asking two questions and that she would conduct another in camera hearing if Lopez wanted to proceed with plea negotiations after receiving answers to the two questions.

Immediately thereafter, Lyons met with respondent, Lopez, and Escobedo in Lyons's office. Lyons explained that the government would not use any information from the meeting against Lopez or Escobedo. Tarlow was not present at, or aware of, this meeting. Although respondent made it clear that he was only representing Escobedo, it was understood that Lopez was to have the benefit of respondent's advice to Escobedo. At the meeting, respondent gave Escobedo advice which was intended for the benefit of Lopez, as well as Escobedo. In reply to a question from Lyons about the source of Tarlow's fees, respondent asserted that Lopez and Lopez's family were paying the fees. Lopez asked whether he could be released to be closer to his children and whether his safety and his family's safety could be guaranteed if he cooperated with the government. Although Lopez did not supply information to the government, he indicated that he might be willing to do so.

Without Tarlow's knowledge or consent, respondent had subsequent discussions with Lopez and Escobedo about the possibility of a plea agreement. Respondent then arranged a second meeting with Lyons.

On May 30, 1990, Magistrate Judge Wilken held another in camera hearing alone with Lopez and verified that Lopez wished to meet again with the government without Tarlow present. After Lopez again waived the right to have Tarlow present, Lyons immediately met with respondent, Escobedo, and Lopez in Lyons's office. Under pressure from Lyons to provide some significant information, Lopez supplied Lyons with the names of others allegedly involved in drug trafficking. Tarlow was not present at, or aware of, the second hearing or the second meeting.

After the second meeting, Lyons sent respondent a proposed plea agreement for Escobedo and indicated that the same sort of agreement might be available for Lopez if Lopez obtained a lawyer to represent him for the purpose of plea negotiation. Eventually, Lopez and Escobedo rejected the proposed plea agreement.

In early August 1990, Lyons told Rosenthal that the government had been negotiating a possible plea agreement involving Lopez and Escobedo without Tarlow's knowledge or consent. Rosenthal contacted respondent, who initially denied the occurrence of plea negotiations and later asked Rosenthal not to inform Tarlow about the negotiations because such information would ruin the possible plea agreement. Rosenthal, however, informed Tarlow.

Tarlow promptly filed papers indicating that he had learned about the secret communications between Lopez and the government. On August 15, 1990, Tarlow withdrew as counsel of record for Lopez. According to Tarlow, such withdrawal was necessary because the government communications with Lopez had undermined Tarlow's ability to present an entrapment defense, which Tarlow believed was meritorious, and had destroyed the trust and confidence essential to an attorney-client relationship.

Lopez subsequently retained William Osterhoudt ("Osterhoudt") to represent him. Arguing that Lyons had violated Lopez's Sixth Amendment right to counsel and rule 2-100 of the California Rules of Professional Conduct,[2] Osterhoudt filed a motion to dismiss the indictment against Lopez. Judge Smith, to whom the case had originally been assigned, referred this motion to Judge Patel and recused herself. Judge Patel took testimony from Lyons, Lopez, and respondent and considered declarations by Lyons and Tarlow. Concluding that Lyons had violated rule 2-100, but not the Sixth Amendment, Judge Patel granted Lopez's motion. Judge Patel declined to hold Lyons in contempt or to refer Lyons for disciplinary proceedings because Lyons was following the dictates of a policy commonly known as the Thornburgh Memorandum put forward by the Attorney General of the United States.[3] The same, however, was not true of respondent, whom Judge Patel referred to the State Bar of California for disciplinary proceedings. (*Lopez*, 765 F.Supp. at p. 1462, fn. 50.)

The Ninth Circuit Court of Appeals accepted the conclusion that Lyons had violated rule 2-100, but rejected the determination that the extreme sanction of dismissal of the indictment was the appropriate remedy for Lyons's misconduct. Accordingly, it vacated the order dismissing the indictment and remanded the case. (*United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455.)

IV. DISCUSSION

A. Independent Review of the Record

[1b] In the order granting review, we informed the parties that we would construe the order approving the stipulation, coupled with the hearing judge's decision on culpability in case number 90-O-15541, as together constituting a decision for the purpose of review. Respondent urges us to limit our construction of what constitutes the decision to the decision on culpability in case number 90-O-15541. He asserts that the parties expended substantial time and resources in negotiating a stipulation and that neither side should be deprived of the benefit of their bargain.

[1c] Respondent concedes that he understood the Supreme Court would not be bound by the stipulated discipline, but suggests that he thought we would nonetheless be bound by the stipulated discipline in making our recommendation to the Supreme Court. To the contrary, rule 453(a) of the Transitional Rules of Procedure, cited in our order as the basis for our acceptance of review, not only requires an independent review of the entire record, but also authorizes findings, conclusions, and a disciplinary recommendation at variance with the hearing department. Because review was sought, the entire proceeding is before us. An agreement between the parties cannot restrict our obligation of independent review.

B. Respondent's Request for Supplementary Findings

Respondent asserts that he does not quarrel with the factual findings of the partial decision, but requests us to make the following supplementary findings:

(1) Tarlow did not tell respondent that any particular subject matter was off limits in respondent's communications with Lopez.

2. The Northern District of California has adopted the California Rules of Professional Conduct as the applicable standards of professional conduct for the district. Unless otherwise indicated, all further references to rules are to the Rules of Professional Conduct.

3. Tarlow independently filed a complaint against Lyons with the Arizona State Bar, to which Lyons belonged. (*Lopez*, 765 F.Supp. at p. 1462, fn. 49.) There is no information in this record as to the outcome of that proceeding.

(2) Respondent encouraged Lopez to tell Tarlow that Lopez wanted to speak with Lyons or alternatively to accept representation by other counsel.

(3) Lopez told respondent that Tarlow informed Lopez that Tarlow would withdraw from representing Lopez if Lopez sought to cooperate with the government.

(4) Tarlow withdrew from representing Lopez upon learning of Lopez's meetings with Lyons, and such withdrawal is consistent with Tarlow's general practice of never representing criminal defendants who cooperate with the government because such cooperation is personally, morally, and ethically offensive to Tarlow.

(5) Lopez instructed respondent to maintain Lopez's interest in meeting with Lyons in strictest confidence and under no circumstances to reveal such interest to Tarlow.

The deputy trial counsel asserts that the record does not support these proposed supplementary findings and notes that respondent failed to ask the hearing judge to reconsider the decision and make the proposed supplementary findings.

[4] Proposed supplementary finding (1) concerns an issue of culpability: whether respondent communicated with Lopez, whom he knew to be represented by Tarlow, without Tarlow's consent. With regard to culpability issues, the deputy trial counsel must prove culpability by clear and convincing evidence. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239-240, and cases cited therein.) As set forth above in the statement of facts and as discussed below in the subsection dealing with rule 2-100 of the Rules of Professional Conduct, the record clearly and convincingly establishes that Tarlow authorized respondent to confer with Lopez only for the purpose of preparing a joint defense. We therefore decline to adopt respondent's proposed supplementary finding (1).

[5] The rest of respondent's proposed supplementary findings do not concern issues of culpability. Instead, they pertain to mitigating circumstances, which respondent must establish by clear and convincing evidence. (See Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct ("stds."), std. 1.2(e); *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 360.) Proposed supplementary findings (2), (3), and (5) rest upon selective, self-serving testimony by respondent during the trial of *Lopez*; proposed supplementary finding (4) rests upon part of Tarlow's declaration. Proposed supplementary findings (2), (3), and (5) are inconsistent with testimony by Lopez, and proposed supplementary finding (4) ignores the remainder of Tarlow's declaration and is misleading about Tarlow's position. Because respondent has not presented clear and convincing evidence in support of proposed supplementary findings (2), (3), (4), and (5), we decline to adopt them.

C. Violation of Rule 2-100

[6a] Rule 2-100 provides that an attorney who is representing a client "shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the [attorney] has the consent of the other lawyer." In the decision on culpability in case number 90-O-15541, the hearing judge determined that respondent violated rule 2-100 by communicating with Lopez about a plea bargain without Tarlow's consent when respondent knew that Tarlow represented Lopez. We agree.

Respondent argues that this culpability determination is erroneous because respondent had broad authority from Tarlow to communicate with Lopez and that discussion of cooperation with the government was within the scope of such authority. According to respondent, Tarlow should have restricted the scope of the authority if Tarlow intended to limit it.

[6b] Respondent's argument is inconsistent with his professed acceptance of the hearing judge's factual findings in the partial decision. The hearing judge found: "Tarlow authorized Respondent to meet and confer with defendant Lopez for the purpose of preparing a joint defense *only*. Tarlow did not authorize Respondent to meet or confer with the government on behalf of defendant Lopez." (Partial Decision,

finding 5, p. 3, emphasis added.) The hearing judge reiterated this finding in the final paragraph of the partial decision, which stresses that Tarlow authorized respondent to communicate with Lopez "for the purpose of preparing a joint defense *only*. Tarlow did not authorize Respondent to discuss with Lopez a change of plea and/or any form of cooperation with the government . . . ." (*Id.* at p. 9, emphasis added.)

Respondent mischaracterizes the hearing judge's crucial finding. According to respondent's brief on review, the hearing judge found: "Tarlow authorized [respondent] to meet and confer with Lopez for the purpose of preparing a joint defense on behalf of the three defendants. Tarlow did not *specifically* authorize [respondent] to meet or confer with the government on behalf of Lopez." (Emphasis added.) Respondent's omission of the word "only" and addition of the word "specifically" fundamentally alter the hearing judge's finding.

Clear and convincing evidence supports the hearing judge's finding. Although respondent claims that he had authority from Tarlow to discuss with Lopez the option of cooperating with the government, respondent assiduously concealed such discussions. According to respondent's own testimony, respondent initially lied to Rosenthal, counsel for codefendant Olivas. Respondent told Rosenthal that Lopez and Escobedo had not met with Lyons when respondent knew that a meeting had occurred and when respondent himself had arranged and attended the meeting. Respondent testified that he later admitted the meeting to Rosenthal and asked Rosenthal not to tell Tarlow because Tarlow would ruin the plea negotiations.

Also, respondent testified that Tarlow did not tell respondent that respondent had the authority to negotiate anything with the government on behalf of Lopez. According to Tarlow, respondent had permission from Tarlow to speak with Lopez in order to prepare for trial, but respondent "had no express, implied or apparent authority, or permission to discuss or arrange informant activities" with Lopez.

Respondent contends that if he had told Lopez to discuss government cooperation with Tarlow and had refused to have any further involvement in the matter, he would have "cast Lopez adrift in a sea in which [Lopez's] interests would not have been served . . . by anyone." According to respondent, the disclosure to Tarlow of Lopez's interest in government cooperation would have left Lopez without a lawyer because "Tarlow would have immediately withdrawn."

Respondent's contentions pertain to mitigation rather than culpability and are not supported by clear and convincing evidence in the record. Lopez testified that Tarlow did not threaten to withdraw from representing Lopez if Lopez sought to cooperate with the government, and that respondent told Lopez that Lyons believed it would be easier to reach a plea agreement if Tarlow were not present. According to Lopez, Lopez kept the plea negotiations secret from Tarlow because of the expense of involving another lawyer and because of representations from respondent that Tarlow did not need to be present at negotiations and would make such negotiations difficult.

Tarlow's declaration also contradicts respondent's contentions. According to Tarlow, it was *not* a condition of Tarlow's representing Lopez that Lopez refrain from cooperating with the government. Tarlow asserted that a condition of this sort would be improper. Also, Tarlow stated that he agreed to convey any government offer of cooperation to Lopez, but not to be involved personally in any continuing negotiations with the government. Tarlow offered three reasons for such noninvolvement: (1) such "conduct is personally morally and ethically offensive to" him; (2) a competent attorney could be brought in to negotiate a plea for "a low and reasonable fee"; and (3) his adversarial style and relationships with prosecutors would generally prevent his "participation in finalizing informant arrangements" from being in the best interest of a client, whereas an "independent lawyer who has a closer and friendly . . . relationship with the prosecutor's office, should be able to negotiate a better informer deal . . . ."

Tarlow stated that pursuant to his agreement with Lopez, if Lopez wanted to become an informer and if another lawyer successfully negotiated a plea for Lopez, Tarlow's services would no longer be necessary. In addition, Tarlow maintained that if

negotiations proved unsuccessful, Tarlow would resume his representation of Lopez "and would try the case unless matters had occurred during the negotiations that compromised [Tarlow's] ability to defend [Lopez]." Because a lawyer would have handled the negotiations on behalf of Lopez, Tarlow stated in his declaration that he did not consider it likely that unsuccessful plea negotiations would hurt his ability to take the case to trial.

Tarlow stressed that he in no way sought to discourage or dissuade Lopez "from exploring an informer arrangement" if Lopez found such an arrangement to be in Lopez's best interest, that Tarlow's agreement with Lopez served to "preserve the integrity of the attorney-client relationship and the trust and confidence upon which it is based," and that the agreement made it unlikely that Lopez would undermine Tarlow's ability to defend Lopez. Although Tarlow asserted his personal objection to informer arrangements, he stated that he did not intend to demean a lawyer who is involved in such arrangements. Tarlow stated that he would have conveyed any government offer to Lopez and, at Lopez's request, would "have inquired of the prosecutor about a deal . . . ." According to Tarlow, Lopez knew that merely expressing an interest in negotiating with the government would not lead Tarlow to withdraw.

[7a] Respondent claims that rule 2-100(C)(2) protects his receiving information about Lopez's desire to speak with Lyons and his relaying this information to Lyons. Pursuant to rule 2-100(C)(2), rule 2-100 shall not prohibit "Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice." The discussion accompanying rule 2-100 explains that rule 2-100(C)(2) "is intended to permit [an attorney] to communicate with a party seeking to hire new counsel or to obtain a second opinion."

[7b] Rule 2-100(C)(2) does not protect respondent. In *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 424, the Supreme Court observed, "Existing case law as of 1976 clearly informed attorneys of their duty to refrain from representing multiple defendants in any criminal case where there was a possibility of conflicting defenses." Respondent concedes that a potential conflict existed between the interests of his client, Escobedo, and the interests of Tarlow's client, Lopez. This potential conflict prevented him from acting as an independent attorney whom Lopez might consult for an unbiased second opinion.

Respondent testified that he *could not* represent Lopez and advised Lopez of this fact. According to respondent, he told Lopez several times that Escobedo was his client, that he had to protect Escobedo's interest, and that Lopez was on Lopez's own if Lopez talked with the government. As respondent acknowledged, Lyons repeatedly asserted that Lyons would consider disposing of the case only if both Escobedo and Lopez entered into a plea agreement. Although respondent later testified that he was not sure that he believed Lyons's assertions, his conduct and Lyons's conduct reflect their understanding that a plea agreement would have had to include Lopez. Respondent knew, however, that Tarlow considered Lopez to have a valid entrapment defense and planned to take the case to trial. Thus, clear and convincing evidence establishes that respondent did not qualify as an independent lawyer from whom Lopez might seek a second opinion under rule 2-100(C)(2).

D. Other Stipulated Misconduct by Respondent

The record contains no evidence to support changes in the determinations about respondent's other acts of stipulated misconduct.

E. Aggravating and Mitigating Circumstances

1. Aggravating circumstances

The stipulation correctly identifies two aggravating circumstances: (1) that respondent's acknowledged misconduct evidences multiple acts of wrongdoing (see std. 1.2(b)(ii)) and (2) that in addition to his drunk driving convictions, respondent was convicted of fighting in a public place. The stipulation, however, does not take into account the fact that respondent's improper communications with Lopez were followed by acts of dishonesty. (See std. 1.2(b)(iii).) In the trial of *Lopez*, respondent admitted that he initially lied to Rosenthal about the plea negotiations involving Lopez.

2. Mitigating circumstances

The stipulation correctly lists as a mitigating circumstance that respondent was admitted to the California State Bar in May 1974 and has no prior record of discipline. (See std. 1.2(e)(i).) Also, the stipulation states without qualification as a mitigating circumstance that respondent was candid and cooperative with the State Bar during the current disciplinary proceeding. (Std. 1.2(e)(v).) This statement requires correction. In case number 88-O-15237, respondent stipulated that he failed to cooperate with the State Bar. Thus, a finding of mitigation under standard 1.2(e)(v) cannot include case number 88-O-15237. **[8]** Other mitigating circumstances are suggested by a declaration which respondent made on December 1, 1992, and which is attached to the stipulation. We reach no conclusion as to these factors because the stipulation does not specify whether the Office of the Chief Trial Counsel accepts as true any or all of the statements in respondent's declaration and because the hearing judge pro tempore did not indicate in his order approving the stipulation whether he found any of the unopposed statements persuasive.

F. Discipline

The question we must address is whether, upon de novo review, we can recommend to the Supreme Court the stipulated discipline of 30 days actual suspension for the multiple acts of wrongdoing acknowledged in the stipulation and established in the record before us.

The deputy trial counsel asserted at oral argument that respondent's improper communications with Lopez alone constituted "very serious" misconduct. Indeed, it is obvious from the federal district court opinion in *Lopez* and majority and concurring opinions on appeal therefrom that the district and circuit court judges before whom the criminal case was pending viewed the secret communications with Lopez by Lyons and respondent as very serious ethical breaches. Nonetheless, the deputy trial counsel agreed with respondent's contention that the violation of rule 2-100 warranted only an extra year of probation in connection with the stipulated 30 days actual suspension for all of the other matters in which respondent had stipulated to culpability.

Neither the parties, in seeking approval of the stipulation, nor the hearing judge pro tempore, in approving the stipulation, cited any specific authority for the recommended discipline. Nor did the parties cite any authority to this review department in seeking its review of this consolidated proceeding. Only after the review department called relevant cases to the parties' attention and requested supplemental briefing thereon were any authorities cited by either party.

[9] When judges are asked to approve stipulations they cannot rely solely on the State Bar's acquiescence in the proposed discipline, but must exercise their independent judgment in carrying out their obligation under rule 407(a) of the Transitional Rules of Procedure to "examine the stipulation and its admitted facts and proposed disposition for fairness to the parties and the extent to which the public will be adequately protected thereby."

The determination of the appropriate sanction begins with the standards, which serve as guidelines. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) The sanction must ultimately be determined by a balanced consideration of all relevant factors (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 35) and must be consistent with the discipline imposed in similar proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The standards relevant to the current proceeding call for discipline of reproval or suspension depending upon the extent of the misconduct and degree of harm. (See stds. 1.6, 2.4, 2.6, 2.10, 3.4.) In focusing on the particular level of discipline appropriate here we must also bear in mind the primary purposes of disciplinary proceedings: the protection of the public, courts, and legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (See std. 1.3.) In reaching a decision to approve a stipulation, the court must also conclude that the order is justified under applicable precedent.

In examining relevant case law, we focus here on respondent's most serious misconduct as established by this record: his improper communications with a represented party. "If two

or more acts of professional misconduct are found or acknowledged . . ., the sanction imposed shall be the more or most severe of the different applicable sanctions." (Std. 1.6(a).) In older cases, the sanction for an attorney who communicated with a represented party was usually three months actual suspension. (See *Turner* v. *State Bar* (1950) 36 Cal.2d 155; *Carpenter* v. *State Bar* (1930) 210 Cal. 520.) Also, in *Mitton* v. *State Bar* (1969) 71 Cal.2d 525, 535, an attorney's communication with a represented party "alone" justified three months actual suspension, although the attorney had two prior records of discipline (a three-month actual suspension and a private reproval).

In *Turner* v. *State Bar*, *supra*, 36 Cal.2d 155, a former defense counsel in a civil action helped the plaintiffs in their attempt to settle on appeal without the knowledge or consent of the plaintiffs' counsel, whom Turner knew to be opposed to the settlement. Because of Turner's active involvement in assisting the plaintiffs and communicating with them on a subject of controversy, the Supreme Court determined that Turner had violated former rule 12 of the Rules of the California State Bar, which provided that an attorney "'shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel . . . .'" (*Id.* at p. 155.) Ordering three months actual suspension, the Supreme Court observed, "it cannot be said that a suspension of three months is too harsh." (*Id.* at p. 159.)

In *Crane* v. *State Bar* (1981) 30 Cal.3d 117, 124, the Supreme Court adopted the former State Bar Court's recommended sanction of one year's stayed suspension, one year's probation, and no actual suspension, although it was "arguable that the penalty imposed [was] actually lenient." Crane not only had communicated directly with represented parties, but also had threatened them and had committed an act of moral turpitude and dishonesty.

In *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 659, the Supreme Court disbarred an attorney for two "serious" unexplained and unmitigated acts of misconduct: (1) misappropriation of almost $20,000 of client trust funds, as well as failure to account to the client, and (2) communication with an adverse party without the knowledge and consent of the party's counsel.

In *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, the Supreme Court imposed a sanction of three years stayed suspension, three years probation, and six months actual suspension on an attorney who committed misconduct in two matters. In the one matter, Levin did not employ means consistent with truth, attempted to deceive opposing counsel and a court by false statements of fact, and communicated with a party whom he knew to be represented by counsel. In the other matter, he settled a personal injury claim without the knowledge or consent of his client, did not deliver settlement funds, did not provide a proper accounting, and misrepresented to the settling insurance company that his client had signed the release. In aggravation, he attempted to conceal his dishonest acts. In mitigation, he had no prior record of discipline, suffered prejudicial delay, was candid and cooperative with the State Bar, and had been the subject of no further disciplinary complaints since his misconduct.

Two reproval cases have also been cited to this court. In *Abeles* v. *State Bar* (1973) 9 Cal.3d 603, the Supreme Court publicly reprimanded an attorney who directly communicated with a represented party. The Supreme Court explained that the attorney had no prior record of discipline and that his misconduct may have reflected only an error of judgment based on the attorney's misinterpretation of the applicable disciplinary rule and based on the party's statement that the party's counsel of record did not represent the party.

In *Shalant* v. *State Bar* (1983) 33 Cal.3d 485, the Supreme Court publicly reproved an attorney who improperly withdrew disputed funds from a trust account, failed to communicate with a client, and communicated with a represented party. Shalant had a prior record of discipline, a private reproval. Justice Mosk, joined by Chief Justice Bird, would have dismissed the proceeding on the ground that it arose from trivial matters and was basically a dispute between two attorneys over the reasonable amount of a fee. (*Id.* at p. 490 (dis. opn. of Mosk, J.).)

[10a] The State Bar acknowledges that here respondent's improper communications were serious; this fact clearly distinguishes the instant case from *Abeles* v. *State Bar*, *supra*, 9 Cal.3d 603 and *Shalant* v. *State Bar*, *supra*, 33 Cal.3d 485. In seeking to obtain a plea agreement for his own client, Escobedo, respondent involved Tarlow's client, Lopez, in secret plea negotiations with the government although respondent knew that Tarlow believed Lopez to have a valid defense and planned to try the case. Respondent thereby exposed Lopez to two serious risks if the plea negotiations failed: (1) that Lopez would destroy the trust and confidence necessary for Lopez to maintain an attorney-client relationship with Lopez's counsel of choice and (2) that Lopez would compromise the entrapment defense. The former occurred, and the latter may have happened. Respondent's misconduct is worse than the misconduct of Lyons, who was following the dictates of the former United States Attorney General and approached Judge Smith regarding the proposed plea negotiations. (See *Lopez*, 765 F.Supp. at p. 1462, fn. 50.) Also, the secret meetings arranged by respondent resulted in the consumption of considerable judicial time and effort and the lengthening of the criminal case against Lopez by about three years.

[10b] In addition to his improper communications with Lopez, respondent engaged in other stipulated wrongdoing. In view of the seriousness of his violation of rule 2-100 and the number and range of his other stipulated acts of misconduct we must vacate the order approving the stipulation. On the basis of the record before us, the recommended sanction is inconsistent with decisional law and clearly insufficient to protect the public, to maintain high professional standards by attorneys, and to preserve public confidence in the legal profession.

G. Request for Remand

[11a] In the event that we decided to vacate the order approving the stipulation, respondent requested that we remand the current proceeding rather than recommend a different degree of discipline to the Supreme Court. He argues that the parties agreed to a highly unusual stipulation to preserve time and resources and that they did not contemplate that we would recommend more severe discipline than the discipline recommended in the order. The State Bar agrees with respondent's position. Nonetheless, when the parties reached their stipulation, they admittedly knew that the Supreme Court could increase the discipline, and they expressly agreed to reserve the right of intermediate review before the Review Department. Their expectation that we would not examine the recommended discipline in the consolidated proceeding while otherwise conducting independent de novo review was unjustified.

[11b] We recognize, however, that the parties would have been relieved of all effects of the stipulation if the hearing judge had disapproved it (Trans. Rules Proc. of State Bar, rule 407(d)) and that at the time they entered into the stipulation they did not realize the import of preserving a right of review. We therefore deem it appropriate in the unusual circumstances of this proceeding to relieve the parties from their stipulation because of their confusion about the requirements of our independent review. Given the mutual mistake of the parties, remand appears to be appropriate to allow them to reach a new stipulation or to try the remaining matters. In either event, the hearing judge will be in a position to recommend to the Supreme Court the appropriate discipline for all of respondent's acts of misconduct in light of established aggravating and mitigating factors and the relevant case law.

V. CONCLUSION

We conclude that respondent violated rule 2-100 and that the sanction recommended by the order approving the stipulation is clearly inadequate on the basis of the record before us. Accordingly, we affirm the decision on culpability, vacate the order approving the stipulation, and remand the consolidated cases for further proceedings consistent with this opinion.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ERNEST LEE BRAZIL

No. 89-C-12837

Filed February 7, 1994; reconsideration denied, March 9, 1994

SUMMARY

While serving as the principal officer of a mortgage banking company, respondent misapplied over $1 million loaned to the company by an investor by using the money to reduce the company's debt rather than to fund specific transactions. He also forged the signature and seal of a notary public on six documents, and gave the investor documents which falsely indicated that the company had an interest in certain property. As a result of this conduct, respondent was convicted of forgery and grand theft.

In the ensuing State Bar disciplinary proceeding, the hearing judge concluded that respondent's offenses were very serious but that his misconduct was the aberrational result of a confluence of personal and financial pressures. Based on this conclusion, the hearing judge recommended that respondent receive a five-year stayed suspension, with five years probation on conditions including actual suspension for three and one-half years, retroactive to the date of his interim suspension, and continuing until respondent demonstrated his fitness to practice. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar requested review, arguing that the hearing judge erred in excluding rebuttal evidence regarding the revocation of respondent's real estate license, and contending that respondent should be disbarred. The review department agreed that the real estate license revocation constituted proper rebuttal, but declined to reach questions regarding its admissibility and preclusive effect which had not been addressed by the parties at trial or by the hearing judge. Even without this evidence, the review department concluded that respondent's showing of mitigating circumstances was not sufficient to outweigh the seriousness of his crimes of moral turpitude. Accordingly, the review department recommended respondent's disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Richard Harker, Julie W. Stainfield

For Respondent: Gary L. Fontana, John S. Banas, III

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] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
159 Evidence—Miscellaneous

Where respondent's brief on review referred to facts and newspaper articles regarding victim of respondent's misconduct which were not part of the record, review department declined to strike brief or admonish respondent or his counsel, but emphasized that its review is limited to the evidence properly made a part of the record. (Prov. Rules of Practice, rules 1303-1304.)

[2] **130 Procedure—Procedure on Review**
141 Evidence—Relevance
146 Evidence—Judicial Notice
171 Discipline—Restitution
191 Effect/Relationship of Other Proceedings
745.31 Mitigation—Remorse/Restitution—Found but Discounted

Where bankruptcy court order which was not already part of record showed that restitution payments had been made to victim of respondent's misconduct, review department granted request to take judicial notice of such order. Undisputed evidence bearing on issue of restitution is important, if for no other purpose than to create an accurate record on the status of restitution.

[3] **169 Standard of Proof or Review—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1519 Conviction Matters—Nature of Conviction—Other
1691 Conviction Cases—Record in Criminal Proceeding

Respondent's conviction of grand theft and forgery was conclusive evidence of his guilt of all elements of those crimes. The grand theft conviction necessarily carried with it the specific intent to deprive the victim permanently of his funds. The forgery conviction necessarily showed that respondent acted without authority and with an intent to defraud.

[4 a, b] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1519 Conviction Matters—Nature of Conviction—Other
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment

Convictions of grand theft and forgery would have resulted in recommendation of summary disbarment if crimes had occurred in practice of law or a client was a victim. Where respondent's crimes did not occur in practice of law or victimize a client, case was not eligible for summary disbarment, and respondent was entitled to hearing on appropriate degree of discipline. Nevertheless, opportunity for hearing was not designed to lower professional standards. Respondent's crimes constituted heinous misconduct for an attorney. Where such crimes were of great magnitude, and were related to the very types of matters in which attorneys frequently act, such as ensuring validity of documents requiring notarial services, respondent's crimes were of such a serious nature that by themselves, they would warrant disbarment.

[5] **725.39 Mitigation—Disability/Illness—Found but Discounted**
760.39 Mitigation—Personal/Financial Problems—Found but Discounted
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1519 Conviction Matters—Nature of Conviction—Other
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment

Disbarment was warranted for convictions of grand theft and forgery unless most compelling mitigating circumstances clearly predominated. Despite hearing judge's conclusion that respondent's crimes were aberrant and brought on by incredible psychological stress due to marital and business problems, review department did not agree that mitigation was compelling.

[6] **710.35 Mitigation—No Prior Record—Found but Discounted**
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1519 Conviction Matters—Nature of Conviction—Other
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment

Respondent's lack of a prior record of discipline in 14 years of practice was entitled to mitigating weight but did not of itself prove that disbarment was excessive for convictions of grand theft and forgery.

[7 a, b] **162.20 Proof—Respondent's Burden**
740.32 Mitigation—Good Character—Found but Discounted
740.39 Mitigation—Good Character—Found but Discounted
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1519 Conviction Matters—Nature of Conviction—Other
1691 Conviction Cases—Record in Criminal Proceeding

Respondent's favorable character showing, while attested to by many references, did not amount to a showing of extraordinary demonstration of good character, where not all witnesses were familiar with the magnitude and nature of respondent's crimes, and where respondent's repeated contention that he did not act to defraud his victim served to undercut his favorable character showing in light of the conclusive effect of his convictions for grand theft and forgery.

[8 a, b] **725.32 Mitigation—Disability/Illness—Found but Discounted**
725.33 Mitigation—Disability/Illness—Found but Discounted

Problems such as disabling psychological disorders or substance abuse proven to have led to misconduct may mitigate discipline when accompanied by adequate rehabilitative evidence. However, evidence of psychological difficulty will not always warrant reduced discipline. Where respondent suffered from an adjustment disorder and not any chronic psychological condition, and where prior to his crimes respondent had done excellent work despite being under great stress, review department concluded that respondent's proof fell short of entitling him to significant mitigation.

[9 a, b] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
159 Evidence—Miscellaneous
162.90 Quantum of Proof—Miscellaneous
191 Effect/Relationship of Other Proceedings
1699 Conviction Cases—Miscellaneous Issues

The question of the proper degree of discipline in a conviction referral matter may rest on a wide scope of evidence not directly connected with the crimes themselves. Evidence that respondent's real estate license had been revoked over a year before his crimes was improperly excluded from

rebuttal evidence. Such evidence was not an essential element of the State Bar's case in chief, and could properly be reserved to rebut respondent's contention that his crimes were aberrational.

[10 a, b] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous
165 Adequacy of Hearing Decision
191 Effect/Relationship of Other Proceedings
199 General Issues—Miscellaneous

Where administrative proceeding in which respondent had not appeared had resulted in revocation of respondent's real estate license, and record of such administrative proceeding was relevant in State Bar disciplinary proceeding, hearing judge and parties should have addressed issues regarding whether administrative decision had preclusive weight; if not, whether it was admissible under any hearsay exception, and whether respondent should be permitted to introduce evidence concerning culpability or mitigation with respect to the license revocation.

[11 a-c] **725.39 Mitigation—Disability/Illness—Found but Discounted**
801.45 Standards—Deviation From—Not Justified
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1519 Conviction Matters—Nature of Conviction—Other
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment

Not all instances of serious professional misconduct warrant disbarment, depending on mitigating circumstances. Theft crimes unrelated to the practice of law have resulted in less than disbarment. However, where respondent's offenses of grand theft and forgery were extremely grave and multiple examples of felonious and fraudulent misconduct, likely to impugn public confidence in the legal profession, and respondent's experience in sophisticated law practice, public office and private business should have dissuaded him from committing felonies, review department recommended disbarment notwithstanding respondent's evidence of stress caused by personal and financial problems.

ADDITIONAL ANALYSIS

Aggravation

Found

584.10 Harm to Public

Discipline

1610 Disbarment

Other

175 Discipline—Rule 955
178.90 Costs—Miscellaneous
1521 Conviction Matters—Moral Turpitude—Per Se
1541.10 Conviction Matters—Interim Suspension—Ordered
1541.20 Conviction Matters—Interim Suspension—Ordered
2502 Reinstatement—Waiting Period

OPINION

STOVITZ, Acting P.J.*:

Respondent, Ernest L. Brazil, was admitted to practice law in California in 1974 and has no prior record of discipline. In 1990, he pled no contest to forgery and grand theft charges. Without dispute, the record shows that in September 1988, while serving as the principal officer of a mortgage banking company, he misapplied over $1 million which had been given to his company by an investor for loans for specific transactions. Instead, he used the money to reduce the debt of his business. He also forged the signature and notary seal of a notary public on six documents and gave the investor five documents purporting to show that he or his company had an interest in property when no such interest then existed.

After a lengthy trial, the hearing judge concluded that respondent's offenses were indeed very serious but due to a confluence of personal and financial pressures, his misconduct was aberrant. She recommended that respondent be suspended for five years, stayed, and that he be placed on probation for that period on conditions including actual suspension for three and one-half years from the start of his April 1990 interim suspension and until he demonstrates his 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 Office of the Chief Trial Counsel (OCTC) seeks review, urging that the hearing judge erred by excluding proper rebuttal evidence and that disbarment should be the appropriate discipline. Respondent supports the hearing judge's suspension recommendation and urges us to consider additional evidence and to grant relief from any costs which might be imposed.

Upon our independent review of the record, we have given great weight to the hearing judge's recommendation on essentially undisputed findings. However, because we have concluded that the seriousness of respondent's crimes of moral turpitude is not outweighed by any mitigation we can consider compelling, we shall recommend disbarment rather than the lengthy suspension chosen by the hearing judge.

I. ESSENTIAL FACTS AND CIRCUMSTANCES IN THE RECORD.

A. Respondent's background.

As we noted, *ante*, the detailed findings of fact made by the hearing judge are not disputed by either party in any material aspect. Following is a summary of those findings, augmented by evidence in the record.

After completing undergraduate studies at Ohio State University in 1965, respondent became a Navy pilot and served two duty tours in Vietnam. After release from the Navy in 1971, respondent graduated from Harvard Law School. He became a member of the State Bar in 1974. For about three years, he was an associate attorney for a large San Francisco law firm. He then joined a large leasing company, becoming its divisional general counsel. After serving as general counsel for another leasing company, he was hired as vice president and general counsel of the financial subsidiary of a large real estate company. In 1981, Governor Edmund G. Brown, Jr., appointed respondent Real Estate Commissioner of California. He served in that office until early 1983, when Governor Deukmejian appointed a successor.

After leaving state office, respondent became president and chief executive officer of a mortgage banking company. After it was sold to a bank, he became president of another such company, Interbank Mortgage Corporation ("Interbank").[1]

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* Pursuant to rule 453(c), Trans. Rules of Proc. of State Bar.

1. Respondent was approached by three investors to start Interbank and he invested $50,000 as his capital contribution, receiving 10 percent of the company's stock.

B. Facts and circumstances leading to respondent's criminal conviction.

In 1987, while Interbank president, respondent became a director of a savings and loan association. In 1988 Interbank spent almost $400,000 in its attempt to buy this savings and loan institution and then another such institution respondent wished Interbank to acquire. Both purchase attempts were unsuccessful. Also in 1988, led by respondent, Interbank engaged in several municipal bond "defeasance" transactions, which had never been undertaken before. In these bond defeasance transactions, low-interest home mortgages, funded by a city through municipal bonds that it had sold earlier to investors, would then be sold to a buyer. The proceeds from the sale of the mortgages would be used to pay off the municipal bond holders and enable the city to retire the bonds. This process was expected to yield a profit for the city, free up the city's bond capacity, and enable it to issue other bonds for other purposes. The buyer could re-sell the mortgages to other entities for a profit.

Respondent committed his crimes during the period of about mid-September to early October 1988. Respondent first met the victim, Benjamin Hom, in mid-1988.[2] Hom had been chair and president of a bank and was active in investments through his Acorn Corporation.[3] **[1 - see fn. 3]**

Hom approached respondent in July or August to see if respondent would be interested in Hom investing in one of the two savings and loan institutions that respondent was trying to have Interbank purchase. Respondent told Hom that no funds were then needed. By September, Interbank had spent between $700,000 and $750,000 both for unsuccessful bond defeasance projects and failed attempts to buy savings and loan institutions. Interbank had two lines of credit, one with Meridian Bank in Concord for $2 million and one with Commercial Bank of San Jose for $1 1/2 million. In early September 1988, the credit line at Commercial Bank had been used up, and the line with Meridian Bank was being renegotiated and not available. Completion of a City of San Pablo mortgage bond defeasance was expected to place Interbank on a sound financial footing.

In September, respondent approached Hom to see if Hom would make a short-term loan to Interbank to fund a mortgage loan transaction involving homes in Merced, California. On September 9, Hom agreed orally to make a $516,000, 2-week loan at 12 percent interest plus a 2 1/4 percent loan fee. This resulted in an annual percentage rate charge of nearly 60 percent, usurious under California law.

Respondent gave Hom Interbank's promissory note as well as a personal note. Hom wanted as much collateral and security as he could get to support the loan. On about September 15, respondent gave Hom six deeds which purported to grant Hom respondent's or Interbank's interests in the subject properties. Neither respondent nor Interbank had any such interest in five of the six subject properties and respondent knew that neither he nor Interbank had any such interest in the five properties. Also, on about September 15, respondent forged the name of a notary employed by Interbank and affixed her seal without her consent to each of the deeds he gave Hom. As to the parcel in which Interbank or respondent had an interest, on September 24 respondent re-conveyed his interest in that property to another without telling Hom. Upon delivering these documents to Hom, respondent received from him on September 15,

2. Unless noted otherwise, all references hereafter to dates are to the year 1988.

3. **[1]** In his review brief, respondent referred to events surrounding Hom's service as a city commissioner. Respondent also proffered certain related newspaper articles about Hom. About two weeks after respondent filed his brief, OCTC filed a motion to strike respondent's brief in whole or part and admonish respondent and respondent's counsel not to refer to matters outside the record. We deferred ruling on the matter prior to oral argument. We take judicial notice that Hom is the same person who served as a city commissioner but we attach no importance whatever to Hom's status or conduct as a city commissioner. We deny OCTC's motion to strike and decline to admonish respondent or his counsel but we emphasize that our review is limited to the evidence properly made a part of the record. (See Provisional Rules of Practice, rules 1303-1304; *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, 418, fn. 6.)

1988, a check for $516,000 for the purpose of completing the Merced transaction. At the same time, respondent delivered a commission check from Interbank to Hom for the loan.

Interbank's pay-down on its credit line was due at Meridian Bank on September 15. Respondent deposited Hom's $516,000 check into Interbank's Meridian Bank account on September 15. That same day, respondent wrote a check on the same account at Meridian Bank, payable to that bank, to pay-down Interbank's credit line. Hom's $516,000 in funds were not used to fund the Merced mortgages. Respondent did not tell Hom how he used the $516,000 and did not tell Hom that the Merced transactions never came through. Respondent did not discuss the $516,000 loan with anyone else at Interbank. He did not present his negotiations with Hom about the $516,000 loan or its terms to the Interbank board of directors despite the usurious rate being charged.

On about September 22, respondent asked Hom to loan Interbank more money to fund a municipal bond transaction. Hom agreed to loan $1.2 million, for which Hom was to get fees of $500,000, representing an annual percentage rate of 323 percent. Respondent signed a second loan and security agreement and received from Hom, in return, a check for $500,000. Respondent deposited Hom's $500,000 check into Interbank's account at California Commerce Bank. A few days later, respondent transferred these funds as an additional pay-down on Interbank's credit line at Meridian Bank, and not for the proposed bond defeasance transaction. On September 22, Hom gave respondent $500,000 of the $1.2 million loan and respondent used it to reduce Interbank's debt and not for the bond transaction.

Respondent did not present the second loan agreement with Hom to Interbank's board of directors despite respondent's belief that the fees charged by Hom were usurious.

On October 3, respondent gave Hom an Interbank check for $500,694 but it bounced.[4] Hom ultimately pressed for the bringing of criminal charges against respondent.

C. Respondent's nolo contendere plea to crimes involving moral turpitude.

In an amended criminal complaint filed in July 1989 respondent was charged with two counts of grand theft and one count of forgery. In February 1990 he pled nolo contendere to those charges. In his testimony below, respondent stated that the forgery charges presented almost an "open-and-shut case" although, contrary to the legal elements of his admitted crime, he denied his intent to defraud anyone. The sentencing judge suspended execution of a four-year, four-month state prison sentence and granted probation, ordering respondent to perform 2,000 hours of community service. Respondent complied with this condition by performing extensive work for a veteran's center in San Mateo County, even participating in some center activities without claiming credit for them.

The record of respondent's criminal conviction was transmitted to the Supreme Court and effective April 13, 1990, it placed him on interim suspension. (See Bus. & Prof. Code, § 6102 (a).)

D. Evidence in aggravation and mitigation.

In aggravation, the hearing judge considered that Hom was harmed by respondent's crimes. Hom suffered more than a $1 million loss. Respondent attempted to put together other bond defeasance transactions to get funds to repay Hom, but he was unsuccessful. As of the time of the hearing below, respondent had repaid Hom only $50,000. Respondent had entered into an agreement with Hom that his debt to Hom would not be discharged by Interbank's bankruptcy. Only recently, due to bankruptcy court distribution of Interbank assets, did Hom recover

4. The findings draw no conclusion as to whether respondent's uttering of the October 3 Interbank check was a dishonest act and the record affords no basis for so concluding.

most of his loss, nearly $900,000. Respondent still owes Hom slightly over $50,000.[5] **[2 - see fn. 5]**

The hearing judge also considered that respondent's crimes were very serious offenses for an attorney. By themselves, the hearing judge opined, they would warrant disbarment.

In mitigation, the hearing judge considered several factors: respondent's lack of prior discipline in 14 years of practice; the extensive, favorable character evidence he submitted; and evidence offered by him to show that his crime was aberrational and arguably the result, at least in part, of severe stress brought on by his wife's psychological crisis and the stress of Interbank's severe financial problems. We summarize respondent's expert and character evidence, as it comprised the bulk of his mitigative showing.

Respondent's psychiatric evidence was presented through Dr. Robert Kaye, who had treated respondent regularly for marital and family problems from 1984 until August 1988, one month prior to his crimes. It is undisputed that respondent's former wife had suffered serious emotional problems during late 1987 and early 1988 and was hospitalized in early 1988. The emotional illness of respondent's wife caused considerable stress to respondent at this time. Kaye testified that respondent stopped treating with him in August 1988 because he was then in a more positive interpersonal relationship. Kaye saw respondent only twice thereafter, once in February 1990 and once in 1991. Kaye opined that respondent was under severe stress during the summer of 1988 and that it could have affected respondent's judgment causing his crimes. Kaye's diagnosis was that respondent had a "severe adjustment reaction" which fell short of any chronic psychiatric disorder or even of a personality disorder. Kaye testified that respondent told him that because of his upbringing, it was "extremely difficult" for respondent to accept failure of any kind, whether in marriage or business. Later in his testimony Kaye opined that, from all that he knew of respondent, Kaye would not predict that the severe stress he was under would lead to acts of theft. Respondent's counsel, Gary Fontana, testified that he observed respondent's work in the spring of 1988 on bond defeasance matters and it was excellent. This period of time would correlate to a period of high stress for respondent.

Five witnesses testified favorably about respondent's character. Two were attorneys, one of whom was his counsel in this proceeding, another was his former wife, another a business owner and the last was the director of the veteran's center at which respondent performed his community service. Several witnesses did not appear aware of the specific crimes of which respondent was convicted or their magnitude and little evidence was presented as to the time surrounding and immediately preceding his crimes. The hearing judge also received in evidence nearly 20 character reference letters which were also presented to the sentencing judge in his criminal proceeding. The hearing judge found that these references attested to respondent's good character, honesty and concern for others.

OCTC offered four witnesses and several exhibits in rebuttal of respondent's good character and of his position that his 1988 crimes were aberrational. Collectively these witnesses had unfavorable opinions of respondent's performance during periods of time from 1981 to 1988. The testimony of these witnesses was either stricken by the hearing judge as beyond the scope of appropriate rebuttal or was deemed not to weigh against respondent's favorable showing of good character.

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5. **[2]** Respondent asks us to take judicial notice of orders of the bankruptcy court showing payments made as restitution to Hom's corporation and to augment the record with that evidence. OCTC does not oppose respondent's request as to one of the bankruptcy court orders but correctly points out that the other is already part of the record. We grant respondent's request to take judicial notice of the later order of the bankruptcy court, noting the importance of undisputed evidence bearing on the issue of restitution, if for no other purpose than to create an accurate record on the status of restitution. (See *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 496.)

The most significant exhibit offered by OCTC in rebuttal was exhibit 57, a 1989 default decision of an administrative law judge, adopted by the California Real Estate Commissioner, revoking the real estate licenses of respondent and Interbank for dishonest acts in 1987 involving deceit and conversion of funds in a real estate transaction unrelated to the matters which led to respondent's criminal conviction. After hearing argument on the admissibility of this exhibit, the hearing judge excluded it on the ground that it did not specifically rebut evidence offered by respondent and due to procedural concerns expressed by the judge such as regarding the default nature of the real estate licensing proceeding. We shall deal *post* with OCTC's claims that the hearing judge erred in excluding evidence such as exhibit 57 or in not according weight to OCTC's rebuttal testimony.

II. DISCUSSION OF THE APPROPRIATE DEGREE OF DISCIPLINE.

[3] Respondent's conviction of two counts of grand theft and one count of forgery is conclusive evidence of his guilt of all of the elements of those crimes. (Bus. & Prof. Code, § 6101 (a); *In re Basinger* (1988) 45 Cal.3d 1348, 1358 [grand theft]; *In re Bogart* (1973) 9 Cal.3d 743, 748 [grand theft and forgery].) Respondent's grand theft conviction necessarily carries with it his specific intent to permanently deprive Hom of his funds. (E.g., *People* v. *Jaso* (1970) 4 Cal.App.3d 767, 771.) His conviction of forgery necessarily shows that respondent signed the notary's name and affixed her seal without authority and with an intent to defraud. (Pen. Code, § 470; 2 Witkin & Epstein, Cal. Crim. Law (2d ed. 1988) § 714, p. 807.) By respondent's own testimony, his plea to the forgery charges resulted from his awareness or his counsel's advice that the prosecutor had essentially an "open-and-shut" case against him.

[4a] If respondent's crimes had occurred in the practice of law or in any way such that a client was the victim, upon motion to us by OCTC upon the finality of respondent's convictions, we surely would have recommended to the Supreme Court his *summary* disbarment. (Bus. & Prof. Code, § 6102 (c); see *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473; *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71.) Since this case is not eligible for summary disbarment, solely because respondent's crimes did not occur in the practice of law or victimize a client, respondent was entitled to a hearing on the appropriate degree of discipline. Nevertheless, the opportunity for hearing is not designed to lower professional standards. (Cf. *In re Smith* (1967) 67 Cal.2d 460, 462.) In *In re Bogart*, *supra*, the Supreme Court described Bogart's crimes of grand theft and forgery as "'heinous misconduct for an attorney.'" (9 Cal.3d at p. 748, quoting *In re Smith*, *supra*, 67 Cal.2d at p. 462.) Bogart's conviction also arose outside the practice of law and involved a fraction of the loss suffered by the victim of respondent's crimes.

[4b] Although respondent's crimes occurred over about one month in 1988, their magnitude was enormous. He committed two thefts, totaling over $1 million, and six forgeries of the signature and seal of a notary public. Knowing that Hom wanted as much security and formality as possible for the two loans, respondent defrauded Hom by giving him five security interests purporting to be those of Interbank or respondent when respondent knew that neither had any security interest in the subject properties. Only by the relatively recent distribution of the bankruptcy court was Hom made nearly whole, yet respondent still owes Hom over $50,000 in restitution. By themselves, respondent's crimes were of such a serious nature that they would warrant disbarment. Although respondent acted outside the practice of law, the crimes he committed were related to the very types of matters in which attorneys frequently act, such as overseeing the proper handling of documents requiring notarial services to ensure their validity. (Cf. *In re Morales* (1983) 35 Cal.3d 1, 4-6.)

[5] Looking to the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("stds.") as guidelines (e.g., *Kennedy* v. *State Bar* (1989) 48 Cal.3d 610, 617, fn. 3), disbarment is warranted for respondent's crimes unless "the most compelling mitigating circumstances clearly predominate." (Std. 3.2.) The hearing judge concluded that compelling mitigation existed on two grounds: (1) that respondent's crimes were an instance of aberrant behavior and (2) his acts were

desperate, brought on by incredible psychological stress due to his marital problems and the feared imminent collapse of Interbank. Discharging our required function of independent review of this record (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 30), we cannot agree with the hearing judge's conclusion that the mitigation here is compelling.

[6] Respondent's lack of a prior record in 14 years of practice is entitled to mitigating weight (e.g., *Waysman* v. *State Bar* (1986) 41 Cal.3d 452, 457), but does not, of itself, prove that disbarment is excessive. (See *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594, and cases cited.) **[7a]** Respondent's favorable character showing, while attested to by many references, was also not determinative. (*In the Matter of Rodriguez*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 500.) In our independent review of the record, we conclude that respondent did not make a showing of extraordinary demonstration of good character.[6]

[7b] In the first place, not all witnesses appeared familiar with the magnitude of his crimes, nor with all of the specific crimes themselves. (See *In re Ford* (1988) 44 Cal.3d 810, 818.) Second, respondent's repeated position that he did not act to defraud Hom served to undercut his favorable character showing, in view of the conclusivity accorded by law to his criminal convictions.

We have concluded that the most important subissue bearing on respondent's mitigative showing concerns the effect to be given the stress he suffered in 1988. **[8a]** While problems such as disabling psychological disorders or substance abuse proven to have led to misconduct may mitigate discipline when accompanied by adequate rehabilitative evidence (see *In re Billings* (1990) 50 Cal.3d 358, 367; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667), here the proof falls far short of entitling respondent to significant mitigation.

[8b] Dr. Kaye's opportunity to observe respondent closely ended a month before his misconduct and respondent told Kaye he had stopped counselling sessions at that time because he was in a more productive personal relationship. Kaye's diagnosis was that respondent suffered from an adjustment disorder and not any chronic psychological condition. Although Kaye opined that respondent had suffered from severe stress earlier in 1988, questions put to him were phrased in the form of whether such stress "could" affect respondent's judgment adversely. Kaye opined that it could but elsewhere testified that from what he knew of respondent, Kaye would not predict that the severe stress he was under would lead to acts of theft. Respondent's counsel and also one of his witnesses, Fontana, testified to the excellence of respondent's bond defeasance work in spring of 1988. From the record, it appears that respondent would have been under great stress in spring 1988 because of his former wife's hospitalization. We do not conclude that stress was completely absent from respondent's September 1988 crimes. Since the hearing judge observed the demeanor of the witnesses, we have given great weight to her findings. We accept all of her credibility determinations on this issue. However, we conclude that this is a case more akin to *In re Ford*, *supra*, 44 Cal.3d at p. 817, where the Supreme Court concluded that, notwithstanding evidence of serious domestic difficulties caused by the uncommonly difficult behavior of a spouse, that did not justify reduced discipline. That evidence of psychological difficulty will not always warrant reduced discipline, is evidenced by many Supreme Court decisions. (See *Cooper* v. *State Bar* (1987) 43 Cal.3d 1016, 1029; *In re Vaughn* (1985) 38 Cal.3d 614, 619.)

[9a] We conclude that the hearing judge improperly excluded from evidence exhibit 57 (the decision of the Department of Real Estate revoking the real estate licenses of respondent and Interbank for conduct over a year before his crimes), by applying too strict a test of the proper scope of rebuttal evidence. First, the question of the proper degree of discipline in a conviction referral matter has rested in

6. However, we agree with the hearing judge's assessment that OCTC's rebuttal witnesses did not sufficiently call into question respondent's morality. The detailed discussion of the hearing judge in her decision as to the testimony of OCTC rebuttal witness William Stark is somewhat confusing in view of the judge's striking of Stark's testimony at trial. However, whether the judge struck Stark's testimony or instead considered it but gave it no weight has no effect on our ultimate recommendation.

the past on a wide scope of evidence not directly connected with the crimes themselves. (See *In re Possino* (1984) 37 Cal.3d 163, 170 [Supreme Court considered attorney's conduct in approaching and conversing with a juror in his criminal trial two years after committing the drug offense for which he was ultimately convicted]; *In re Arnoff* (1978) 22 Cal.3d 740, 745 [attorney's use of fraudulent medical reports was properly considered on referral of conviction of conspiracy to commit capping]; *In re Langford* (1966) 64 Cal.2d 489, 496 [attorney's involvement in gold importation properly considered on referral of conviction for selling fraudulent securities].) Moreover, even if we look to the civil or criminal case authorities on rebuttal, we do not read them as creating a strict standard for excluding as rebuttal any evidence which conceivably could have been presented in the party's case in chief.[7] **[9b - see fn. 7]** An important theory of respondent's mitigation case at trial was that his crimes were aberrational. Whether or not OCTC was clearly put on notice of this theory from the pretrial statements, evidence of other uncharged misconduct by respondent was not an essential element of the State Bar's case in chief and could properly be reserved for rebuttal.

After respondent presented his evidence that his conduct was aberrational, it became entirely appropriate to attempt to impeach such evidence to demonstrate that respondent had, prior to the commission of the crimes which gave rise to these proceedings, committed analogous dishonest conduct. Acknowledging the wide latitude of evidence we have cited which can be considered in conviction referral matters, competent evidence rebutting that should have been admitted.

[10a] There are other important legal issues surrounding the admissibility of exhibit 57 not addressed by the parties: (1) Does the "default" decision of the Department of Real Estate, which recites that it rests on the clear and convincing evidentiary standard—the same standard as in State Bar Court original disciplinary proceedings—have preclusive weight in the State Bar Court proceeding to establish the basis of the revocation of respondent's real estate license? (2) Should respondent be entitled to an opportunity in this State Bar Court proceeding to offer evidence concerning the real estate accusation as he did request below in the event that the hearing judge admitted the exhibit? (3) Even if the Department of Real Estate adjudication was not preclusive, are the facts set forth in the decision admissible evidence under any exception to the hearsay rule? and (4) Should respondent have been allowed to present other mitigating evidence surrounding the revocation of his real estate license? Some of these issues appeared to support the hearing judge's decision to exclude exhibit 57 and two related documents of the Department of Real Estate, exhibits 55 and 56.

[10b] We hold that, upon a hearing judge finding that records of such an administrative proceeding are relevant to a State Bar proceeding, the above issues should be addressed by the parties and the hearing judge. This is important because, although the hearing judge could take judicial notice of license revocation and of the laws or rules under which the license was revoked, such notice does not carry with it facts found by the administrative agency absent judicial or statutory authority for collateral estoppel or a hearsay exception, issues which were not addressed below or on review.

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7. The statutory authority for rebuttal evidence seems essentially identical whether the case is a civil or criminal one. (See Code Civ. Proc., § 607, subd. 6; Pen. Code, § 1093, subd. (d).) **[9b]** In *People* v. *Daniels* (1991) 52 Cal.3d 815, 859, the Court quoted from the leading case of *People* v. *Carter* (1957) 48 Cal.2d 737, 753-754, to observe that the purpose of the restriction on rebuttal evidence is to achieve an orderly presentation of evidence to avoid confusing the trier of fact; "'to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise'" resulting when a party who assumedly met the opponent's case is "'suddenly confronted at end of trial with an additional piece of crucial evidence. . . . [P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.'" Rebuttal of respondent's contention that his conduct was aberrational would seem to meet these criteria fully. Moreover, the restriction on rebuttal evidence may not even apply in the aggravation/mitigation phase of the trial. (See *People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1251, fn. 46 [*Carter* restriction on rebuttal evidence has only been applied to guilt issues, not to the penalty phase of a capital trial].)

Although we could remand this matter for further proceedings concerning exhibits 55-57, for reasons of judicial economy, because we have concluded that disbarment is warranted in the absence of exhibits 55-57, we do not. Because neither the hearing judge nor the parties addressed these issues, we have not relied upon or considered the substance of exhibits 55-57 in determining that disbarment is warranted.[8]

[11a] The Supreme Court has recognized that not all instances of serious professional misconduct warrant disbarment, depending on mitigating circumstances (e.g., *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 244-245) and we have followed that principle in our own decisions as well. (*In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 192-193.) In support of her recommendation, the hearing judge cited *In re Duchow* (1988) 44 Cal.3d 268, for the point that theft crimes unrelated to the practice of law have resulted in less than disbarment. We do not disagree but the *Duchow* case is of little precedential value since the facts and circumstances are not set forth or discussed in the opinion.[9]

Ultimately, however, the recommendation of the appropriate degree of discipline rests on a balanced consideration of all relevant factors with due regard to the purposes of imposing discipline: protection of the public, preserving integrity of and public confidence in the legal profession and the maintenance of high professional standards. (*In re Scott* (1991) 52 Cal.3d 968, 980; *In re Billings*, *supra*, 50 Cal.3d at p. 365; *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 107.) **[11b]** Respondent's offenses were extremely grave and multiple examples of felonious and fraudulent misconduct, likely to impugn notoriously the confidence of the public in the legal profession. Moreover, respondent's experience in sophisticated law practice, public office and private business should have served him better to dissuade him from committing the felonies to which he pled no contest.

[11c] Although the attorney's misconduct in *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, lasted for a longer time, there are guiding similarities expressed in the Supreme Court's opinion. Kaplan had 12 years of experience with a large law firm prior to being confronted by the firm's managing partner and admitting what turned out to be the misappropriation of $29,000 of law firm revenues, a fraction of the loss suffered by Hom. Kaplan presented psychiatric testimony to establish pressures acting on him at the time of the misappropriation and offered many character references to establish that his misconduct was aberrational. In ordering disbarment, the Supreme Court stated "While marital stresses and the imminent demise of loved ones are always personal tragedies, we fully expect that members of the bar will be able to cope with them without engaging in dishonest or fraudulent activities, especially on the scale that Kaplan engaged in such activities. In light of both the amount of money and the sustained period over which Kaplan misappropriated [his law firm's] funds, we are unpersuaded that the State Bar's recommendation was in error." (*Id.* at p. 1073.) For similar reasons, we recommend that respondent be disbarred. Since he has been under interim suspension continuously since April 1990, if the Supreme Court follows our recommendation, he will be able to petition for reinstatement as of right in April 1995. (Trans. Rules Proc. of State Bar, rule 662.)

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8. Since exhibits 55, 56 and 57 were excluded by the hearing judge, they were not part of the record initially forwarded to this court during the review process. In view of the move of our court clerk's offices in late December 1993, in which the exhibits were maintained, coupled with the need to undertake unanticipated further research, we have extended the submission period of this review an additional 10 days. We have also extended that time period a further 10 days due to delays caused by the recent Los Angeles area earthquake in circulation of this court's draft opinion among the panel which consists of two Los Angeles judges and one San Francisco judge. We therefore vacate our submission of this matter on October 20, 1993, and order it resubmitted nunc pro tunc as of November 9, 1993.

9. In cases such as *In re Chira* (1986) 42 Cal.3d 904 and *In re Chernik* (1989) 49 Cal.3d 467, the Supreme Court has imposed suspension. But those cases involved an attorney committing or counselling a single fraudulent income tax deduction and did not involve any theft.

III. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Ernest Lee Brazil, be disbarred from the practice of law in the State of California. Since he has been suspended continuously since April 1990, we do not recommend that he again be required to comply with the provisions of rule 955, California Rules of Court. We follow the recommendation of the hearing judge to recommend that costs incurred by the State Bar in the investigation and hearing of this matter be awarded the State Bar pursuant to Business and Professions Code section 6086.10. We deny as premature respondent's request in this review proceeding to be relieved from the requirement to pay costs, noting that if the Supreme Court orders the payment of costs, the applicable rules afford him a formal opportunity to seek relief. (Trans. Rules Proc. of State Bar, rule 462.)

We concur:

NORIAN, J.
PECK, J.*

* By appointment of the Acting Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KEVIN P. KIRWAN

Petitioner for Reinstatement

No. 91-R-02993

Filed February 10, 1994

SUMMARY

Petitioner sought reinstatement after resigning from the State Bar with charges pending following his conviction for aiding and abetting mail fraud. His misconduct had ceased over 10 years prior to his reinstatement hearing, and he produced evidence of his good conduct since that date. The hearing judge concluded that petitioner had failed to show rehabilitation based on three factors: his having ceased to perform community service after a certain date; his participation in a hot tub business with a paroled ex-convict, and his failure to establish his recovery from alcoholism by showing sustained participation in a treatment program or offering expert testimony to confirm his abstinence. After receiving the hearing judge's decision, petitioner moved to reopen the record to allow him to present previously unavailable evidence regarding the hot tub business, as well as new evidence regarding his recovery from alcoholism in the form of a report from a psychiatrist whom respondent had consulted after the reinstatement hearing. The hearing judge denied the motion to reopen. (Hon. Carlos E. Velarde, Hearing Judge.)

On review, the review department concluded that the hearing judge had erred in finding lack of moral rehabilitation based on petitioner's failure to continue his community service and his participation in the hot tub business. Accordingly, it found no need to address petitioner's offer of additional evidence on these issues. However, as to petitioner's recovery from alcoholism, the review department concluded that the psychiatrist's report which petitioner had sought to introduce by his motion to reopen raised questions about the adequacy of his recovery program. Accordingly, the review department remanded for a hearing focusing on the issues raised by the psychiatrist's report. (Pearlman, P.J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Teresa M. Garcia, Allen L. Blumenthal

For Petitioner: R. Zaiden Corrado

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] **595.90 Aggravation—Indifference—Declined to Find**
695 Aggravation—Other—Declined to Find
2504 Reinstatement—Burden of Proof
Community service activities may bear on the showing of rehabilitation in a reinstatement proceeding, but discontinuance of such activity, without more, is not necessarily an adverse factor.

[2] **2504 Reinstatement—Burden of Proof**
Where petitioner for reinstatement had operated a hot tub salon with a paroled ex-convict, with the approval of both his own probation officer and the ex-convict's parole officer, and where petitioner took careful steps to avoid any problems and there was no evidence of law violations or immoral activity, potential risk of such problems did not undercut petitioner's showing of rehabilitation in view of other favorable evidence.

[3] **2504 Reinstatement—Burden of Proof**
Where petitioner for reinstatement had a record of eight years of difficult and responsible employment with no impropriety and no unfavorable evidence, accompanied by favorable character evidence and evidence of remorse and acceptance of responsibility for misconduct leading to resignation, such record was adequate to show sustained exemplary conduct and demonstrate moral reform.

[4] **725.36 Mitigation—Disability/Illness—Found but Discounted**
2504 Reinstatement—Burden of Proof
2551 Reinstatement Not Granted—Rehabilitation
Where petitioner for reinstatement admitted his alcoholism, but his showing of recovery rested entirely on his own efforts at abstinence as supplemented by favorable character testimony, and he failed to present any medical or other expert opinion attesting to his recovery and prognosis, or any evidence that he had undergone recent treatment or participated in any recovery program, hearing judge's conclusion that such showing was insufficient to establish rehabilitation was entitled to considerable weight.

[5 a-c] **125 Procedure—Post-Trial Motions**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous
2509 Reinstatement—Procedural Issues
2551 Reinstatement Not Granted—Rehabilitation
In reinstatement proceeding, where petitioner moved to augment record on review with medical evidence regarding recovery from alcoholism which hearing judge had declined to consider on motion for reconsideration, and review department concluded that petitioner made favorable showing on all other aspects of rehabilitation, review department considered petitioner's evidence in accordance with case law holding that extrinsic evidence will not be ignored where it is the only means of proving rehabilitation from serious physical or emotional problems. Where such evidence added support to conclusion that petitioner had not demonstrated that recovery program was adequate, and State Bar expressed concern that evidence had been offered without opportunity for cross-examination, review department remanded for further hearing and expert testimony regarding petitioner's recovery.

[6] **2551 Reinstatement Not Granted—Rehabilitation**
2590 Reinstatement—Miscellaneous

Where reinstatement petitioner showed moral rehabilitation but did not make adequate showing of recovery from alcoholism, review department declined to recommend reinstatement conditional on continued adherence to a treatment program. Possibility of conditional reinstatement has not been foreclosed, but it would not be appropriate when it involves as central an issue of concern as recovery from alcoholism and depression.

ADDITIONAL ANALYSIS

[None.]

OPINION

STOVITZ, J.:

Petitioner Kevin P. Kirwan seeks our review of a decision of a State Bar Court hearing judge denying his petition for reinstatement after he resigned from membership in the State Bar following his conviction for aiding and abetting mail fraud. His conviction was later set aside pursuant to a writ of error *coram nobis*. Petitioner's misconduct ceased in 1982 and all witnesses attested to his good conduct since that time. The hearing judge acknowledged petitioner's remorse over his misconduct but nonetheless concluded that petitioner had failed to show that he was morally rehabilitated. The judge emphasized several factors leading to his conclusion, including that petitioner's showing of recovery from alcoholism involved no sustained participation in any external treatment program and that petitioner presented no expert evidence to support his testimony of abstinence since 1985 from alcohol consumption. Petitioner urges us to reverse the hearing judge's adverse findings since he claims that the record shows that he has been rehabilitated and is once again fit to practice law. The State Bar, represented by the Office of Chief Trial Counsel (OCTC), supports the hearing judge's findings and conclusions adverse to petitioner.

We have reviewed this record independently and have concluded that petitioner made a satisfactory showing of his moral regeneration. Both parties stipulated below that petitioner had the requisite learning and ability in the general law and that is not an issue on review. However, we have considered a psychiatrist's report which petitioner presented to us in the first instance and have concluded that it tends to support the hearing judge's conclusion that petitioner has not clearly and convincingly shown that the steps he took on his own have been satisfactory "to overcome a history of alcohol abuse that has persisted since adolescence." We recognize the important steps petitioner has taken to achieve moral reform. We also recognize that a hearing specifically focusing on the issues raised by petitioner's evaluating psychiatrist, regarding his continued recovery from both alcoholism and depression, would permit a better record to be made. Accordingly, we shall remand this matter to the hearing judge for further proceedings on the issue of petitioner's recovery from alcoholism and depression as set forth, *post*, in this opinion.

I. STATEMENT OF THE CASE.

A. Petitioner's criminal behavior leading to his resignation.

The following facts are not disputed and the facts immediately surrounding petitioner's misconduct, recited *post*, were stipulated to below by petitioner and OCTC. Petitioner was admitted to practice law in California in 1964. In 1968 petitioner formed a law partnership with Charles Kamanski, a former law clerk to Chief Justice Roger Traynor and former managing partner of a Los Angeles tax law firm. Kamanski and petitioner decided to set up a tax shelter program for their clients by buying and developing Arizona fruit orchards. This project required both partners to spend a great deal of time in Arizona tending to the project. In 1976 a freak hail and sleet storm ruined both the $5 million crop and petitioner and his partner. As a result, in the words of the hearing judge, petitioner felt "beaten, emotionally suicidal, out of control and unable to think through matters."

Peter Werrlein, a member of the city council of the City of Bell, California, was one of petitioner's clients who lost about $600,000 in the Arizona orchard project. Because of his loss, Werrlein acted as if petitioner and Kamanski were indebted to him. Some other business people wanted to own a card casino in Bell, where such businesses were legal, and bribed Werrlein and Bell City Manager John Pitts. Werrlein and Pitts set out to get city council approval of the casino. Petitioner and others were to obtain the real estate and license for the casino.

Knowing that Werrlein and Pitts could not legally hold an interest in the casino, petitioner agreed to hold or "front" a 51 percent interest for them. In return, petitioner would have been relieved of the $600,000 debt he owed Werrlein and petitioner would have become casino manager at a salary of $150,000 a year, after taxes. Acting on his plan to "front" the others' interest in the Bell casino, petitioner commit-

ted perjury when applying to the City of Bell for the license to operate by failing to disclose that he held the interests of persons (Werrlein and Pitts) who were forbidden by law from holding an interest in the casino. Petitioner also committed perjury in 1982 by declaring falsely in a superior court lawsuit that Pitts did not own and never had owned an interest in the casino.

In 1982, petitioner again committed perjury on his federal income tax return by reporting a sale of his own interest in the casino. However the actual transaction with one Dadanian was not a sale at all. Dadanian paid petitioner $20,000 for the sale of petitioner's interest but petitioner gave the money back to Dadanian so no sale really occurred. When the FBI started looking into matters at the Bell casino, petitioner first lied to FBI agents that he was not "fronting" others' interests. Anticipating prosecution, petitioner and others devised two "cover" stories and agreed to testify falsely if tried. However, as will be noted, *post*, petitioner stopped all dishonest conduct at that point and cooperated completely with the government.

In mid-1984, petitioner and others were indicted on various federal criminal charges. The essence of the multi-faceted indictment was that the defendants, including petitioner, conspired to defeat the right of the citizens of Bell to have city officials perform their duties honestly in matters affecting the Bell casino. In September 1984 petitioner was convicted by negotiated plea of a crime of moral turpitude, aiding and abetting mail fraud. (18 U.S.C. §§ 2, 1341.) Without any promise as to sentencing, petitioner made himself available for extensive interviews with the FBI, which determined that he was then telling the truth. As a result, the government altered a great deal of its prosecution strategy against the other defendants. Petitioner also testified against several of the other defendants and all were convicted. Petitioner was sentenced to three years probation on condition that he spend six months in a half-way house at night. The parties to this proceeding stipulated to petitioner's successful completion of probation and his early discharge from it in January 1988.

Effective in May 1985, petitioner was suspended interimly and in April 1988, the Supreme Court accepted his resignation with charges pending. In 1990 the convicting court granted petitioner *coram nobis* relief on the authority of *McNally* v. *United States* (1987) 483 U.S. 350, holding that a conviction under the mail fraud statute as it read at the time of petitioner's crime cannot apply to conduct intended to deprive persons of intangible rights such as the right to have public officials act honestly. Despite having his conviction set aside, petitioner has conceded the misconduct he committed which we have summarized *ante*.

B. Evidence regarding rehabilitation and fitness to practice.

1. Employment and character evidence.

Petitioner's dealings with the Bell casino lasted about four years (1980-1984). He was at the casino on an almost daily basis and was involved in the details of its operation. Millions of dollars flowed through the casino annually. Petitioner prided himself not only on avoiding any personal misuse of casino funds but on setting up controls to resist repeated demands from casino principals who wanted to "skim" the casino revenues.

The hearing judge made findings as to some but not all aspects of petitioner's employment. After his conviction, in July 1985, petitioner became a salesperson for a Santa Monica Audi dealership. He did not consider himself a good salesperson but he considered his business skills to be very good and in January 1986 was named dealership general manager. This job ended in 1987 when a critical national report on the car plummeted sales and the dealership owner was forced to eliminate petitioner's job.

Petitioner's next job was with Sierra Energy Company, between September 1987 and August 1988. This firm was a fledgling business which had developed an efficient refrigeration process and had entered into a contract with Ralph's Grocery Company in Los Angeles to develop the system for the grocery chain. However, a dispute arose between Sierra and Ralph's and Ralph's declined to pay Sierra. Petitioner was unable to resolve the dispute and Sierra filed for bankruptcy.

Beginning in September 1988 petitioner worked with A & Y Contractors, a minority contracting firm which had a multi-million-dollar contract for a major postal construction project in Los Angeles. The firm was undercapitalized and had become so obligated to others in order to get enough bonding required for the post office job that its future as a viable minority-owned business was in doubt. Petitioner threw himself into the daily operations of this business, which had a payroll of $160,000 per month, to achieve a successful result.

Petitioner's most recent job has been for his counsel in this proceeding, R. Zaiden Corrado, starting in 1989. He has assisted Corrado in many ways including acting as a law clerk or paralegal, drafting documents and briefs on complex issues for Corrado and devising training procedures for staff and new attorneys.

As to all of petitioner's jobs since his conviction, there has been no evidence presented of any impropriety on petitioner's part and witnesses or references have been offered to verify petitioner's good conduct. The only aspect of petitioner's employment history which caused concern for the hearing judge was petitioner's dealings with an ex-convict, Perez, between about 1986 and 1989 in overseeing him in the running of a hot tub salon, called Hot Tub Fever.

Petitioner met Perez in the federal half-way house and was most impressed with his valor in Vietnam and how his inability to get a job on returning to the United States had led Perez to become involved in drug trafficking out of desperation. Petitioner thought that if he could set up Perez in a legal business, it would give Perez civilian work experience to rehabilitate himself. With the permission of petitioner's probation officer and Perez's parole officer, petitioner operated the salon, supervising Perez. This was a business of 14 hot tubs, each in a private booth with a shower, television and video cassette player where people or couples could enjoy a hot tub in a private setting. OCTC took the position below that the salon was a place for frequent, immoral sexual activity. However, no evidence was introduced to support that claim or to show that any illegal conduct took place at the salon while petitioner worked there. The evidence does show that the salon was adjacent to a private school and it was under constant surveillance by local police. Petitioner refused to allow the salon to be used for prostitution or other improper activity. Some of the salon's patrons were senior citizens using the salon alone for hydrotherapy. In 1989, in order to expand, the adjacent school made an offer to buy the salon property. That ended petitioner's venture with the salon.

Although petitioner did not present many character witnesses, he did present three attorney witnesses: his former partner, Kamanski; attorney Weisman, who represented him in the 1980's in some of the casino matters; and an attorney-investor in the Arizona orchards, Daniels. Petitioner's wife also testified and her testimony showed that because of her own professional background as an investment counselor for a nationwide brokerage firm, she had the ability to compare petitioner's character to that of the many other professionals with whom she dealt. Some of the attorney witnesses did not know all details of the facts behind petitioner's mail fraud conviction. On the other hand, their testimony was valuable because it covered a knowledge of petitioner which was both close and spanned a considerable period of time which extended right up to the time of the hearing below.

2. Community service.

The hearing judge found that starting in 1968, petitioner had been a director of Big Brothers of Greater Los Angeles and continued until his status as a convicted felon impaired his ability to raise funds for the organization. He therefore left the Big Brothers board in 1989.

3. Remorse and recognition of wrongdoing.

The hearing judge's findings point to petitioner's shame, embarrassment and remorse over his misconduct. The judge concluded that petitioner understood the immorality of his criminal acts, accepted responsibility for them and that petitioner and his family had suffered a great deal on account of petitioner's criminal conviction and resignation.

4. Recovery from alcoholism.

By his own admission, petitioner has suffered from alcoholism for many years.[1] Some other members of his family have suffered from the disease as well. Since college, petitioner had always been a heavy drinker and it increased while dealing with the Arizona orchard problems and the Bell casino. Also, in the casino, alcohol was everywhere. When petitioner entered the half-way house in July 1985, disgusted that his defenses against unethical conduct had been impaired in part by alcohol, he decided to effect a complete turnaround of his life. There is no evidence in this record that petitioner has consumed any alcoholic beverage since July 1985, and the evidence showed that petitioner resisted successfully temptations to resume drinking. All of petitioner's efforts at abstention were based on his own efforts and he felt that he did not need any therapy or outside program to refrain from drinking. Petitioner had participated only briefly in Alcoholics Anonymous in 1985 and attended a few meetings since that time. He testified that, as a recovering alcoholic, he had the urge to drink every day but expressed confidence in his ability to control that urge.

II. DISCUSSION.

A. Introduction.

As we observed in *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429, the petitioner seeking reinstatement must establish present ability and learning in the general law, rehabilitation and present moral fitness. (See also Trans. Rules Proc. of State Bar, rule 667.) In addition, petitioner must pass the professional responsibility examination before we can recommend his reinstatement to the Supreme Court. (*Id.*; rule 951(f), Cal. Rules of Court; *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 673-674.) There is no evidence that petitioner has passed the professional responsibility examination. On the other hand, OCTC has stipulated that petitioner made an adequate showing of his learning and ability in the general law and we adopt the favorable conclusion of the judge on that issue.[2]

The Supreme Court has held and the hearing judge correctly observed that one seeking reinstatement "bears a heavy burden of proving rehabilitation" and "must show by the most clear and convincing evidence" that rehabilitative efforts "have been successful." (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1091-1092.) Put another way, the petitioner for reinstatement must show "'sustained exemplary conduct over an extended period of time.'" (*In the Matter of Miller*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 429, quoting *In re Giddens* (1981) 30 Cal.3d 110, 116.) With these principles in mind, we evaluate petitioner's rehabilitative showing with our familiar proviso that we independently review the record. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.)

B. Rehabilitation and Moral Fitness.

We start by examining petitioner's rehabilitative showing in light of the criminal acts which led to his resignation. (See *In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 558, citing *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403; see also *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 314, fn. 2.) We agree with the hearing judge's conclusions that petitioner's misconduct was reprehensible. It not only furthered governmental corruption but manifested his own perjury and dishonesty as well. However, since the law favors "'the regeneration of erring attorneys'" (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404, quoting *Resner* v. *State Bar* (1967) 67 Cal.2d 799,

1. Petitioner testified in great detail about how he or any other alcoholic would have to drink a certain amount to reach the level acceptable to the body where there would no longer be an impulse or craving to drink more and how that level was extended over time. He seemed very aware in his testimony below as to the etiology of alcoholism and the chemical process of the body in reacting to alcohol consumption.

2. Even in the absence of such a stipulation, the record would support such a conclusion, given the diversity and complexity of the legal drafting petitioner has done over several years for his employer.

811), we must determine whether his evidence of rehabilitation met his high burden.

In concluding that petitioner did not show the requisite sustained exemplary conduct, the hearing judge emphasized three areas. First, he found petitioner's conduct in operating the hot tub salon with Perez to show poor judgment, at the very least, since it could adversely affect petitioner's reinstatement if illegal activity had occurred "in a business venture in which the appearance of impropriety was likely." (Decision, p. 19.) The hearing judge was even more concerned that petitioner had not shown sufficient proof that his alcoholism was controlled, since petitioner's showing rested solely on his own efforts to overcome that ailment. Finally, the hearing judge concluded that the lack of any community service activities since 1989 reflected on petitioner's rehabilitation.

We disagree with the hearing judge that either petitioner's conduct of the hot tub salon or his lack of recent community service activities militates against his rehabilitation. **[1]** Community service activities may bear on one's showing of rehabilitation (see *In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 317; *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 675), but we see nothing in this record which demonstrates that petitioner's discontinuance of such activity in 1989 is an adverse factor, especially since he continued to perform such service for four years after his crimes.

[2] We also disagree with the conclusions drawn by the hearing judge as to petitioner's operation of the hot tub salon. As the hearing judge recognized, petitioner's conduct of this business with Perez had the approval of both petitioner's probation officer and Perez's parole officer. There was nothing illegal or immoral about the manner in which petitioner acted and it appears he took careful steps to avoid any problems. We cannot speculate as to the effect on petitioner's burden if evidence of law violations or immoral activity had been produced. However, the potential of such risk did not undercut his showing in view of all of the favorable evidence.

[3] This record shows that for over eight years, petitioner has undertaken a wide variety of difficult and responsible employment challenges with no evidence of any impropriety and with only favorable evidence presented below about him. Under comparable showings, we have found such a record to be sustained exemplary conduct warranting our recommendation of reinstatement. (See *In the Matter of Rudman*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 556.) This is hardly the case of a petitioner who has remained a recluse and has merely rested on a record of lack of significant law violations since disbarment or resignation. As the hearing judge noted, petitioner's showing was also accompanied by favorable character evidence and evidence of remorse about and acceptance of responsibility for his immoral acts concerning the Bell casino. Thus, on this record, we find that petitioner has demonstrated his moral reform from the acts which led him to resign from Bar membership.[3]

We turn to the one remaining issue in assessing this petitioner's rehabilitation, the evidence of his recovery from alcoholism. Unlike the petitioner in *In the Matter of Rudman*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 558, who was free of a chemical dependency problem, and whose involvement in an isolated drunk driving incident was found not to militate against reinstatement, petitioner's alcoholism was long standing and it accompanied his criminal conduct. Thus, the case before us is somewhat more comparable to the factual situation in the disbarment case of *In re Billings* (1990) 50 Cal.3d 358, 363-364, 367-368, where the Court held that the showing of recovery from alcoholism, even though supported by alcohol treatment program participation, was not meaningful enough to warrant reduction of discipline.

[4] While we commend petitioner's candor in accepting his disease openly, at the hearing below,

3. Because of our conclusion, we have not deemed it necessary to consider the evidence petitioner proffered to us in augmentation of the record concerning his operation of the hot tub salon or his community service, or to determine the validity of the hearing judge's denial of petitioner's post-trial application to present previously unavailable corroborating evidence.

petitioner's showing of recovery rested entirely on his own efforts at abstinence as supplemented by the favorable testimony of a few character witnesses. What was missing, however, was any medical or other expert opinion attesting to his recovery and prognosis, or any evidence that petitioner had undergone any recent professional treatment or participated in any external or supporting recovery program. (See *In re Billings*, *supra*, 50 Cal.3d at pp. 367-368; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1119.) In these circumstances, the hearing judge's conclusion that petitioner's showing of recovery was insufficient for rehabilitation was entitled to considerable weight.

[5a] On review, petitioner requests that we augment the record to include a report, the curriculum vitae and a declaration under penalty of perjury of a psychiatrist, Dr. William Vicary, who had examined petitioner in March 1993, two months after the hearing judge filed his decision. Petitioner had offered these same documents to the hearing judge in asking for reconsideration of the judge's decision but the hearing judge declined petitioner's requests. OCTC objects to our consideration of Dr. Vicary's opinion on several grounds including that it is hearsay and unaccompanied by the opportunity to cross-examine the doctor. Because we have concluded that petitioner made a favorable showing as to all other aspects of his rehabilitation, we felt it necessary to examine the doctor's report in evaluating the parties' opposing positions as to whether we should consider it. In that regard, we follow the Supreme Court's guidance in disciplinary cases that, while it is very reluctant to rely on extrinsic evidence, it will not ignore it where it is the only means of proving rehabilitation from serious physical or emotional problems. (See *In re Billings*, *supra*, 50 Cal.3d at pp. 366-367; *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 905; but see, e.g., *Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 682-683.)

[5b] After examining Dr. Vicary's report, we believe that it lends added support to the hearing judge's conclusion that petitioner has not yet demonstrated by clear and convincing evidence that his self-administered program is a sufficient recovery from his disease. The doctor examined petitioner twice in March 1993 for a total of six hours. He read a number of pertinent documents including the hearing judge's decision and the results of medical and psychological tests. Dr. Vicary's report noted no evidence of psychosis but petitioner did present evidence of a chronic depression from which he continued to suffer. The doctor also concluded that petitioner's tests were consistent with one who has been sober for a long time and that his traits and intelligence were all favorable prognostic signs. The doctor prescribed a small dose of psychiatric medicine to eliminate petitioner's depressive symptoms and noted that he will also take a drug, Antabuse, to prevent him from drinking alcohol. In his overall opinion, Dr. Vicary stated that with the "treatment interventions" of outpatient psychiatric care, antidepressant and Antabuse medication and attendance at Alcoholics Anonymous, petitioner's mental condition should be "unremarkable and he should have continued sobriety."

[5c] We read Dr. Vicary's opinion as calling for more structure and treatment than petitioner's self-administered abstinence and also that petitioner needs to recover from depression as well as alcoholism. This does not mean that we devalue petitioner's own efforts for they have resulted in considerable progress toward his eligibility for reinstatement. On the other hand, we also note the concern expressed by OCTC that it had no opportunity to cross-examine the doctor. Petitioner has offered to produce Dr. Vicary's testimony and we believe that this matter should be remanded to the hearing judge to permit expert testimony to be received on the issue of petitioner's recovery from alcoholism and depression or other relevant medical or psychiatric condition. Expert testimony or documentary evidence on this issue may be presented by either party and the hearing judge shall then make findings and conclusions that petitioner has or has not recovered suffi-

ciently from alcoholism and depression so that he may be reinstated.[4] **[6 - see fn. 4]**

III. DISPOSITION.

For the foregoing reasons, we remand this matter to the hearing judge for further proceedings not inconsistent with this opinion. If the hearing judge makes findings favorable on the issue of petitioner's recovery, and petitioner has not yet presented proof of passage of the professional responsibility examination, the judge may make a recommendation pursuant to rule 667, Transitional Rules of Procedure of the State Bar.

I concur:

GEE, J.*

PEARLMAN, P.J., concurring:

Because of the deference due to the hearing judge's resolution of issues of credibility, such as the state of mind of a petitioner seeking reinstatement, I disagree with the majority's finding that the current record is sufficient for us to reach a different conclusion than the hearing judge as to whether petitioner has proved his rehabilitation. However, I agree with the majority that the motion to augment raises additional issues concerning the sufficiency of the steps taken by petitioner with respect to his recovery from alcoholism. I also would have granted the motion to augment with respect to other evidence offered therein by petitioner.

As this review department noted in *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, "Rehabilitation is a state of mind which may be difficult to establish." (*Id.* at p. 436, citing, inter alia, *Resner* v. *State Bar* (1967) 67 Cal.2d 799, 811; *In re Andreani* (1939) 14 Cal.2d 736, 749.) We are required to give great weight to the hearing judge's resolution of issues of fact pertaining to testimony. (Trans. Rules Proc. of State Bar, rule 453.)

In this case, as noted by the majority, petitioner not only sought review of the decision below denying his petition for reinstatement, but also sought to augment the record to present additional evidence which had been rejected in post-trial proceedings below. I believe it is incumbent upon us to examine issues of excluded evidence with care in light of the deference we must give to credibility determinations of the hearing judge with respect to evidence in the record.

One of the central concerns of the hearing judge in denying the petition for reinstatement was the judgment shown by petitioner in becoming involved in a financially unsuccessful hot tub business with two federal parolees. Petitioner explained that he had done so to assist them in reestablishing themselves in society because there were few employment opportunities for ex-felons or business persons willing to take the risk of being associated with ex-felons. Petitioner also asserts that he was surprised by the negative impact his actions had on the hearing judge since there was no evidence of any impropriety in the conduct of that business, but that he was impaired in seeking to corroborate his testimony because his federal probation officer who had approved the arrangement was unavailable to testify without prior approval of the federal court.

In a post-trial application to present additional evidence, petitioner provided to the court a copy of a recently obtained letter from the federal judge approving the probation officer's participation in petitioner's efforts to obtain reinstatement. Petitioner also provided the judge below with a letter from the federal probation officer stating that there

4. We have considered, but rejected, recommending a reinstatement conditional on petitioner's continued adherence to a prescribed treatment program. **[6]** Although the Supreme Court has not foreclosed the possibility of a conditional reinstatement (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at pp. 1097-1098), we do not deem a conditional reinstatement appropriate when it involves as central an issue of concern as petitioner's recovery from alcoholism and depression. (Cf. *In the Matter of Distefano*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 674, fn. 3 [passage of the professional responsibility examination not deemed appropriate for a conditional reinstatement].)

* By designation of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

was no indication of any illegitimate or illegal activity at the hot tub salon; that petitioner had expressly been given permission to employ two federal probationers there; that the probation officer had carefully monitored petitioner's association with the individuals; that petitioner impressed the probation officer as an individual who genuinely wanted to help; and that petitioner was always cooperative and compliant, and on all occasions was found to be sober and hardworking when the probation officer made regular unannounced visits to the hot tub salon. The probation officer's letter also stated that petitioner was granted early termination of his federal probation because of his good conduct. This offer of evidence, if accepted as true, might well have assuaged the hearing judge's concerns about petitioner's involvement in the hot tub business and helped to corroborate petitioner's continued sobriety. In light of petitioner's other evidence, favorable testimony of the probation officer might well have tipped the balance in favor of finding petitioner to be fully rehabilitated.

Petitioner acknowledges that we cannot credit the unsworn statements in the probation officer's letter offered to augment the record before us in view of the Office of the Chief Trial Counsel's right to cross-examination on behalf of the State Bar. However, it would appear that under the circumstances, petitioner's application to present additional evidence to the hearing judge on this issue should have been granted.

For the reasons stated above, I concur with the majority opinion in remanding the case for further proceedings.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROGER S. HANSON

A Member of the State Bar

Nos. 90-O-12046, 90-O-17011

Filed February 23, 1994

SUMMARY

In a single matter, respondent failed to return an unearned legal fee promptly to his clients and, upon discharge by the clients, failed to take steps to avoid foreseeable prejudice to them. Based on this misconduct and on respondent's record of prior misconduct, the hearing judge recommended that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that respondent be placed on probation for a period of two years on conditions. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent requested review, arguing, among other things, that the discipline should be a public reproval along with the requirement that he take and pass the California Professional Responsibility Examination. The review department concluded that respondent was culpable of the misconduct found by the hearing judge. However, because the review department gave less weight to respondent's prior discipline than the hearing judge did, and in view of comparable case law, it concluded that the discipline should be a public reproval with the added requirement that respondent complete the State Bar Ethics School.

COUNSEL FOR PARTIES

For Office of Trials: Rachelle M. Bin, Lawrence J. Dal Cerro

For Respondent: Keith C. Monroe

HEADNOTES

[1] **130 Procedure—Procedure on Review**
166 Independent Review of Record

Even though primary focus of respondent's arguments on review was degree of discipline, review department's review of the record was independent and therefore, review department was required to determine whether hearing judge's findings of fact and conclusions of law were supported by record.

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] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Respondent's failure to return the unearned portion of an advanced legal fee for over a year violated the rule of professional conduct requiring that unearned fees be promptly returned to the client.

[3] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Respondent's failure to notify counsel for the opposing side that respondent was no longer representing a client violated the rule of professional conduct requiring attorneys to take steps to avoid foreseeable prejudice to their clients prior to withdrawal from employment.

[4] **270.30 Rule 3-700(B) [former 2-111(B)]**
Given relatively short duration of respondent's representation of two clients and work respondent performed for them, there was insufficient evidence to support charge that respondent intentionally, or with reckless disregard, or repeatedly failed to perform legal services competently.

[5] **214.30 State Bar Act—Section 6068(m)**
275.00 Rule 3-500 (no former rule)
Where respondent spoke with clients approximately eight or nine times during short period of representation, there was insufficient evidence to support charge that respondent failed to communicate with clients.

[6] **162.11 Proof—State Bar's Burden—Clear and Convincing**
165 Adequacy of Hearing Decision
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
Where there was clear conflict in testimony with regard to whether respondent provided clients with an accounting, and hearing judge was unable to resolve such conflict, there was insufficient evidence to support charge that respondent did not provide accounting.

[7 a, b] **277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]**
An attorney's failure to turn over client's file to successor counsel is not excused by fact that client has copies of documents in file. However, where respondent's employment was of limited duration, work respondent performed was of minimal nature, and there was no evidence that file contained any documents that had not been previously released to client, there was insufficient evidence to support charge that respondent failed to return file.

[8] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where respondent filed a late response to a motion to dismiss, the response was considered by the court, and the late filing was an isolated and at most negligent act, it did not amount to a violation of the rule of professional conduct prohibiting intentional, reckless or repeated failures to perform legal services competently.

[9 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
Where there was no clear and convincing evidence establishing services that were to be performed for fee paid, or establishing respondent's agreement to perform those services, evidence did not support charge of failing to perform services competently. Where, in addition, review department could not determine whether respondent's employment was ever terminated, as opposed to simply being completed, or whether respondent did not earn entire fee paid, review department did not find that respondent violated rule requiring attorneys to take reasonable steps to avoid foreseeable

prejudice to clients prior to withdrawal from representation, or rule requiring prompt refund of any unearned fee.

[10] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
178.10 Costs—Imposed
178.90 Costs—Miscellaneous

Where review department imposed public reproval, it was statutorily required to order that respondent pay costs of disciplinary proceeding. Respondent's request to be relieved of such order to pay costs, on ground that State Bar abused its discretion in filing one of the charges, was rejected as premature in light of statute and rules permitting respondent to seek relief from order assessing costs after its effective date. (Trans. Rules Proc. of State Bar, rules 460-464.)

[11] **130 Procedure—Procedure on Review**
141 Evidence—Relevance
159 Evidence—Miscellaneous
765.51 Mitigation—Pro Bono Work—Declined to Find
795 Mitigation—Other—Declined to Find

List of representative cases respondent had handled, including pro bono matters, which was attached to respondent's brief on review, and expanded from similar list introduced at trial, was of minimal value in terms of mitigation, especially without explanation. Review department therefore declined to augment record to include list and did not consider it.

[12 a, b] **513.20 Aggravation—Prior Record—Found but Discounted**
513.90 Aggravation—Prior Record—Found but Discounted
805.51 Standards—Effect of Prior Discipline

Where last acts of misconduct in prior discipline matter occurred approximately 17 years before first acts of misconduct in second matter, and prior misconduct itself was minimal in nature and involved misconduct for which respondent was found not culpable in second matter, prior misconduct did not merit significant weight in aggravation, and it would be manifestly unjust to impose greater discipline in second matter than in prior proceeding solely because of prior discipline.

[13 a, b] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness

In light of comparable case law and absence of mitigating circumstances, public reproval was appropriate discipline for respondent who failed to refund promptly an unearned legal fee and failed to take reasonable steps to avoid prejudice to clients prior to withdrawal from representation. Hearing judge's recommended discipline of stayed suspension was therefore modified.

[14 a-c] **173 Discipline—Ethics Exam/Ethics School**
242.00 State Bar Act—Section 6148
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
1099 Substantive Issues re Discipline—Miscellaneous

Where respondent's failure to adhere to statutory requirement of written attorney-client fee agreements was at heart of both matters in which he had been charged with misconduct, and

respondent's attention needed to be directed to written fee agreements and also to his obligations upon withdrawal from employment, public reproval was properly conditioned on completion of State Bar Ethics School. Its format of classroom instruction, followed by a test, would better remedy these problems than the more passive experience of the California Professional Responsibility Examination.

[15] **242.00 State Bar Act—Section 6148**

Keeping proper records prepares attorneys to prove honesty and fair dealing when their actions are called into question, and is part of their duty in the attorney-client relationship. Written fee agreements not only protect clients and help to ensure that a fair and understandable fee agreement is reached for specified services, but can also aid the attorney as well in proving the terms of engagement.

[16] **173 Discipline—Ethics Exam/Ethics School**
1099 Substantive Issues re Discipline—Miscellaneous

Where State Bar Court did not recommend respondent's suspension from law practice, it was not required to include, as condition of public reproval, requirement that respondent pass a professional responsibility examination.

ADDITIONAL ANALYSIS

Culpability

Found

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

214.35 Section 6068(m)
242.05 Section 6148
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.05 Rule 3-500 (no former rule)
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]

Aggravation

Declined to Find

582.50 Harm to Client
615 Lack of Candor—Bar

Mitigation

Declined to Find

720.50 Lack of Harm
735.50 Candor—Bar

Discipline

1041 Public Reproval—With Conditions

Probation Conditions

1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of the hearing judge that respondent, Roger S. Hanson, be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for a period of two years on conditions. The recommendation is based on respondent's misconduct in a single client matter that involved failing to return promptly to the clients an unearned legal fee and, upon discharge by the clients, failing to take steps to avoid foreseeable prejudice to the clients. Respondent was admitted to practice in this state in 1966 and was privately reproved in 1975.

Respondent requested review, arguing, among other things, that the discipline should be a public reproval along with the requirement that he take and pass the California Professional Responsibility Examination (CPRE). The Office of the Chief Trial Counsel argues in reply that we should reject respondent's contentions and adopt the hearing judge's decision, including the discipline recommendation.

Based on our independent review of the record, we conclude that respondent is culpable of the misconduct found by the hearing judge. However, because we give less weight to respondent's prior discipline than the hearing judge did, and in view of comparable case law, we conclude that the discipline should be a public reproval with the added requirement that respondent complete the State Bar Ethics School.

FACTS AND FINDINGS

We adopt the following findings of fact from the hearing judge's findings and the record:

Shea Matter (Case No. 90-O-12046)

In the early 1980's, James Shea was fired from a job as a deputy sheriff in a county in Idaho. He sued the county. Shea's claims against the county were settled and a condition of that settlement was that the county would not disclose adverse information about Shea to any law enforcement agency that contacted the county seeking pre-employment information. In 1988, Shea applied to the police department of the City of Seal Beach for a position as a police officer, but was not offered the job.

In June 1989, Shea and his wife, Leslie, hired respondent to assist them in determining whether the Idaho county had improperly disclosed negative information to Seal Beach's police department during its pre-employment background check of Mr. Shea. The Sheas paid respondent $3,000 as advanced attorney's fees.

Respondent met with Ms. Shea and reviewed the documents she gave him. Respondent then telephoned the police chief of Seal Beach in an attempt to obtain the information the Sheas wanted. The police chief would not disclose anything to respondent and referred respondent to the city attorney of Seal Beach. After discussions with the city attorney, respondent prepared a hold harmless agreement for the Sheas to execute and give to Seal Beach so that it would release the requested information. Respondent met with the Sheas in August 1989 to discuss this hold harmless agreement, which they signed. Ultimately, Seal Beach declined to accept the hold harmless agreement and refused to release the requested information.

Respondent believed that the most effective way to obtain the desired information from Seal Beach was to file a lawsuit and obtain it through discovery. Ms. Shea did not want to file a lawsuit, but was to discuss the matter with her husband. Ms. Shea delayed responding to respondent regarding his recommendation of filing suit until November 1989 because Mr. Shea was out of town. Mr. Shea worked as a bodyguard and was regularly out of town on business. When she did respond, Ms. Shea suggested, as an alternative to filing suit, a meeting between the Sheas, respondent, and the city attorney. However, Mr. Shea was again out of town.

In late November 1989, Ms. Shea advised respondent of Mr. Shea's return date. In December 1989, respondent tried to set up a meeting with the city attorney, but the city attorney was unavailable

because he was out of the country. In late January 1990, Ms. Shea terminated respondent's employment and demanded that respondent provide an accounting of the advanced attorney's fees, refund any unused portion of the fees, return their file, and send a letter to the city attorney of Seal Beach informing him that respondent was no longer representing the Sheas.

Respondent testified that he sent the Sheas a letter in late February 1990, which the hearing judge characterized as a billing/accounting. In the letter, respondent indicated that he had earned fees of approximately $2,231 and he offered to refund $1,000. Ms. Shea testified that she did not receive this letter.[1] In April 1991, after the intervention of the State Bar, respondent paid the Sheas $1,100, which represented the original $1,000 he had previously offered plus $100 interest.

In June 1990, the city attorney sent respondent a letter telling respondent that Ms. Shea was attempting to contact him and that he would not talk with her unless and until he received written verification from respondent that respondent no longer represented the Sheas. Respondent never sent such a letter to the city attorney.

The notice to show cause in this matter charged that respondent failed to perform the services for which he was hired; failed to communicate; failed to refund unearned fees promptly; failed to provide an accounting promptly; failed to return the Sheas' papers to them; and failed to notify the city attorney that he was no longer representing the Sheas. These acts were alleged to be in wilful violation of sections 6068 (m) and 6148 (b) of the Business and Professions Code,[2] and rules 3-110(A), 3-500, 3-700(D)(1), 3-700(D)(2), 4-100(B)(3), and 3-700(A)(2) of the former Rules of Professional Conduct of the State Bar of California.[3]

The hearing judge found respondent culpable of failing to refund promptly unearned fees (rule 3-700(D)(2)), and of failing to take steps to avoid foreseeable prejudice to the client in that respondent failed to notify the city attorney that he was no longer representing the Sheas (rule 3-700(A)(2)). The hearing judge did not find clear and convincing evidence to support the remaining charges.

Flesher Matter (Case No. 90-O-17011)

In 1989, Alan Flesher was in state prison serving a sentence for grand theft. Flesher contacted respondent in mid-1989 regarding hiring respondent to represent him in connection with a petition for writ of habeas corpus which Flesher, acting as his own attorney, had previously filed in the United States District Court. Flesher hired respondent in November 1989 to perform legal services in connection with the writ. Flesher sent respondent a letter dated November 6, 1989, in which he indicated their agreement was that for an attorney fee of $2,500, respondent was to handle "all the necessary legal filings, motions, answers, rebuttals, court appearances, etc. To appeal this matter through the highest court available in this state." (*Sic.*) In this letter, Flesher also authorized respondent to communicate with Nancy Khalial and Flesher's mother regarding the matter. Flesher paid respondent $2,500.

In December 1989, the attorney general's office filed a motion to dismiss the writ because Flesher had not exhausted his state court remedies. Respondent did not prepare a response and instead advised Flesher to request an extension of time. Flesher did so and the court granted an extension until March 5, 1990.

In early January 1990, Flesher sent respondent another letter in which he stated that respondent had told Flesher in a telephone conversation that respondent believed that the federal writ would be dismissed,

1. The hearing judge determined that he could not resolve this conflicting testimony, and as a result, there was insufficient evidence to support the charge that respondent failed to provide an accounting to the Sheas.

2. All further references to sections are to the Business and Professions Code, unless otherwise noted.

3. 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 May 27, 1989, to September 13, 1992.

that the writ would have to be refiled in state court, that the $2,500 fee Flesher had paid respondent had been "used up," and that respondent would require an additional $2,500 to proceed at the state level.

Respondent prepared a reply to the motion to dismiss and mailed it to the court on March 2, 1990. Respondent sent Flesher a letter dated March 2, 1990, enclosing a copy of the reply and a substitution of attorney. In this letter respondent stated that if the federal court dismissed the writ, "I will *appeal* that to the 9th Circuit." (Emphasis in original.) However, respondent had orally discussed his request for more money with Flesher. Flesher testified that he signed and returned the substitution of attorney to respondent. The federal court docket does not indicate that the substitution was filed.

The reply to the motion to dismiss was not filed until March 7, 1990. The caption of the reply read "Alan G. Flesher, aided by" with respondent's name and address followed by "Attorney for Alan Flesher." Even though filed late, the federal magistrate judge considered the reply, but recommended in May 1990 that the writ be dismissed because Flesher had not exhausted his state court remedies. Written objections to the magistrate judge's findings and recommendation were to be filed within 30 days. Flesher sent respondent another letter dated May 22, 1990, which indicated that Flesher had received the magistrate judge's recommendation and which inquired about respondent's plan in response. Flesher testified that respondent did not reply to the letter. No objections were filed and the district court dismissed the writ in June 1990. The order of dismissal was served on Flesher and respondent. Flesher sent a final letter to respondent dated July 10, 1990, in which he stated that he had received the dismissal and that he felt he had been abandoned by respondent "because you can not receive any more money from us." Flesher testified that respondent did not reply to this letter.

Flesher and Khalial testified that between them they had made from 60 to 70 telephone calls to respondent that were not answered. According to respondent, Flesher and Khalial called him less than 10 times and he returned every call. The hearing judge found that respondent kept Flesher and Khalial adequately informed of the status of his work on the writ by telephone. The only letter respondent sent to Flesher or Khalial was the March 2, 1990, letter.

The notice to show cause in this matter charged that respondent failed to perform the services for which he was hired, failed to communicate, and failed to return unearned fees. These acts were alleged to be in wilful violation of section 6068 (m) and rules 3-110(A), 3-500, 3-700(A)(2), and 3-700(D)(2). In its pretrial statement, the Office of the Chief Trial Counsel alleged that respondent violated rule 3-700(A)(2) because he withdrew from employment without taking steps to avoid foreseeable prejudice to Flesher. The hearing judge concluded that there was insufficient evidence to support any of the charges.

Mitigation/Aggravation

The hearing judge found no mitigating circumstances. In aggravation, the hearing judge found that respondent had a record of prior discipline. Respondent was privately reproved in February 1975. The misconduct involved a single client and occurred between 1968 and 1973. Respondent was hired to represent the client in connection with a writ of habeas corpus. He thereafter failed to perform the legal services for which he was hired, failed to communicate with his client, and failed to release all the client's papers to the client promptly.

DISCUSSION

Except for the assertion that the hearing judge's misinterpretation of a letter adversely affected the discipline recommendation, which conceivably implicates the factual findings, respondent does not contest the hearing judge's findings of fact or conclusions of law. The deputy trial counsel also does not contest the findings or conclusions. **[1]** As the primary focus of respondent's arguments on review is the degree of discipline, we address his contentions below in our consideration of that issue. However, our review of the record is independent. (Rule 453(a), Trans. Rules Proc. of State Bar; *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 541-542.) Therefore, we must first determine whether the hearing judge's findings of fact and conclusions of law are supported by the record.

Culpability

1. Shea Matter

[2] Respondent's failure to return the unearned portion of the legal fee the Sheas paid him, which by his calculation amounted to approximately $769, for over a year supports the hearing judge's conclusion that respondent failed to return an unearned fee promptly in wilful violation of rule 3-700(D)(2). **[3]** We also agree with the hearing judge that respondent failed to take steps to avoid foreseeable prejudice to his client in wilful violation of rule 3-700(A)(2) by not notifying the city attorney that he was no longer representing the Sheas. In light of the city attorney's letter to respondent, the simple step of notification would have avoided prejudice to the Sheas. Respondent concedes in his reply brief that he is culpable of these violations.

[4] Given the relatively short duration of respondent's representation of the Sheas and the work he performed for them, we also agree with the hearing judge that there is insufficient evidence to support the charges that respondent "intentionally, or with reckless disregard, or repeatedly fail[ed] to perform legal services competently." (Rule 3-110(A).)[4] **[5]** We also agree that there is insufficient evidence to support the charge that respondent failed to communicate with the Sheas (section 6068 (m); rule 3-500) in light of the hearing judge's finding that respondent spoke with Ms. Shea approximately eight or nine times during the period of time he represented the Sheas.

[6] There was a clear conflict in the testimony with regard to the accounting contained in respondent's February 1990 letter. The hearing judge's inability to resolve this conflicting evidence indicates that he did not find either Ms. Shea's or respondent's testimony on this issue to be more credible than the other's. Given the great weight to be accorded to the hearing judge's credibility determinations (rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 203-204), we agree with the hearing judge that there is a lack of clear and convincing evidence to support the charge that respondent failed to provide an accounting to the Sheas in violation of rule 4-100(B)(3).[5]

[7a] We also agree that there is insufficient evidence to support the charge that respondent failed to release the clients' file in violation of rule 3-700(D)(1) in light of the short duration of respondent's employment, the minimal nature of the work he performed, and the lack of evidence relating to the contents of the file. The only documents that the Sheas gave respondent were copies of newspaper articles relating to the allegations that led to Mr. Shea's discharge by the Idaho county, and respondent gave the Sheas a copy of the hold harmless agreement. Other than these items, there is no direct evidence of the contents of the file.[6] **[7b - see fn. 6]**

2. Flesher Matter

The State Bar presented testimony from two witnesses in this case, Flesher and Khalial. The hearing judge expressly found that Khalial's testimony as to all disputed facts, and Flesher's testimony as to respondent's alleged failure to communicate and as to the nature of the legal services respondent

4. The hearing judge also concluded that the notice to show cause did not properly allege the failure-to-act-competently charge and that the deputy trial counsel did not properly brief that charge in the pre-trial statement. We do not reach the merits of these conclusions because we agree that there is insufficient evidence to support the violation.

5. The Office of the Chief Trial Counsel alleged that the failure to provide an accounting was also a violation of section 6148 (b). The hearing judge determined that a violation of that section is not a disciplinable offense. We do not reach the merits of this holding either because we agree that there is insufficient evidence to support the charge.

6. **[7b]** The hearing judge concluded that respondent was not required to give the Sheas copies of documents they already had. We do not reach this issue. However, we note that the Supreme Court has held, in the context of a charge that the attorney withdrew from employment without taking reasonable steps to avoid prejudice to the client, that an attorney's failure to turn a client's file over to successor counsel was not excused by the fact that the client had a copy of each of the documents in the file. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 244.)

was to provide, lacked credibility. We find no reason on this record to disturb the hearing judge's credibility determinations.

Respondent testified in his defense. However, his testimony was limited to the issue of the alleged failure to communicate and mostly focused on the number of calls he received and the number of calls he returned, not the substance of the conversations. Consequently, the record contains very little credible evidence regarding the charges.

[8] The Office of the Chief Trial Counsel alleged that respondent failed to perform the legal services for which he was hired (rule 3-110(A)) by failing to timely file a response to the motion to dismiss and by not appealing the dismissal of the writ. The hearing judge concluded respondent's late response to the motion to dismiss was isolated and at most negligent and did not amount to an intentional, reckless or repeated failure to perform. We agree, especially since the reply was considered by the magistrate judge.

[9a] We also agree with the hearing judge's conclusion that the evidence failed to establish that respondent had a duty either to object to the magistrate judge's ruling or appeal the dismissal of the writ. Even though Flesher's letters to respondent indicated the services Flesher wanted performed, respondent testified and Flesher acknowledged that the fee for the services was not agreed upon. In addition, the only evidence presented regarding the services to be performed came from Flesher, Khalial, and the various letters they sent respondent. The hearing judge expressly found this evidence not credible.[7] Thus, there is no clear and convincing evidence establishing the services that were to be performed for the fee paid or establishing respondent's agreement to perform those services. (See *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 275 [attorney not culpable of failing to perform services competently where there was no clear and convincing evidence attorney had agreed to perform those services].)[8]

With respect to the failure to communicate charge (section 6068 (m); rule 3-500), the hearing judge found that respondent kept Flesher adequately informed about the status of respondent's work relating to the writ. Although respondent testified that he returned all of the telephone calls, the substance of those conversations was not explored at trial. Respondent did inform Flesher regarding the writ in a telephone conversation with Flesher and in the March 1990 letter. As the only contrary evidence on this issue came from Flesher and Khalial, whom the hearing judge specifically found not credible, we agree with the conclusion that there is no clear and convincing evidence to support this charge.

[9b] Lastly, the hearing judge concluded that the evidence did not establish that respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice to his client (rule 3-700(A)(2)), and did not establish that he did not earn the entire $2,500 Flesher paid him. (Rule 3-700(D)(2).) We agree. As indicated above, no clear and convincing evidence was presented regarding the exact services respondent was to perform for Flesher or the exact fee that was agreed upon. Thus, like the hearing judge, we are not able to determine whether respondent's employment by Flesher was ever terminated, as opposed to simply being completed. Furthermore, no clear and convincing evidence was presented establishing that respondent did not earn the entire fee paid him as a result of the services he did perform for Flesher.[9]

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7. It is clear that the hearing judge did not find the hearsay statements contained in the letters written by the same witnesses any more credible than he found their live testimony.

8. The hearing judge also found that respondent testified that Flesher's November 6, 1989, letter did not reflect the agreement of the parties; that respondent explained to Flesher that he would become the attorney of record in the district court for a fee of $10,000; and that Flesher knew when he wrote the November 6 letter that respondent would not perform the described legal services for only $2,500. We do not find clear and convincing evidence to support these findings.

9. The hearing judge also concluded that the rule 3-110(A), rule 3-700(A)(2), and rule 3-700(D)(2) violations were not properly charged in the notice to show cause. As in the Shea matter, we do not reach the merits of these conclusions because we agree that there is insufficient evidence to support the allegations even if they were properly charged.

Discipline

1. Respondent's Contentions

Respondent argues that the hearing judge's misinterpretation of his February 1990 letter to the Sheas adversely influenced the discipline recommendation; that the hearing judge's recommendation that respondent both complete ethics school and pass the CPRE is duplicative; that the State Bar abused its discretion in filing the charge that he failed to timely file the response to the motion to dismiss in the Flesher matter and that as a remedy, we should award him costs for the Flesher matter; and that the recommended discipline is excessive and should be a public reproval along with the requirement that respondent take and pass the CPRE.

We reject respondent's assertions with regard to the February 1990 letter. First, we note that the statement in the hearing judge's decision that respondent finds objectionable was that the more plausible inference to be drawn from the letter was that respondent returned the $1,100 to the Sheas in order to avoid having the amount he claimed to have earned scrutinized in a fee arbitration proceeding *and/or* that respondent finally realized that returning the money was the proper thing to do. Next, the record simply does not support the conclusion that the above statement adversely influenced the discipline recommendation. In fact, the statement is contained in the part of the decision dealing with and properly rejecting respondent's estoppel defense, and the hearing judge viewed favorably respondent's return of the money in the part of the decision discussing the appropriate degree of discipline. Finally, our de novo review renders the issue moot as the hearing judge's statement, which we have not adopted, has not adversely influenced our conclusion as to the appropriate degree of discipline.

[10] We also reject as premature respondent's request with regard to costs. The argument is in essence a request to be relieved of an order to pay costs. Because we impose a public reproval in this matter, we must order that respondent pay the costs of the disciplinary proceeding. (See Bus. & Prof. Code, § 6086.10.) Respondent may seek relief from the order assessing costs on the grounds of hardship, special circumstances, or other good cause, by filing a verified petition, accompanied by appropriate declarations or affidavits, no later than 30 days from the date of the order assessing costs. (*Id.*; Trans. Rules Proc. of State Bar, rules 460-464.) The petition is assigned for decision to a hearing judge and an evidentiary hearing may be held to resolve questions of fact. (Rule 462(c), Trans. Rules Proc. of State Bar.) The parties may seek review of the hearing judge's decision by petition to the Presiding Judge. (*Id.*; see, e.g., *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273.) Thus, under this statutory and procedural framework, respondent will have a formal opportunity to seek relief from the costs ordered before the hearing judge where an appropriate factual record can be made.[10]

Respondent asserts that the discipline is excessive because there are mitigating circumstances despite the hearing judge's contrary finding, the misconduct found by the hearing judge is minimal, and his prior private reproval is so remote that it merits little weight. While we do not find the mitigating circumstances suggested by respondent, we agree that the prior discipline is remote and the prior misconduct was minimal.

The only evidence respondent presented on the issue of mitigation was a list of representative cases he has handled over the years. The list was submitted as an exhibit and no evidence was adduced regarding the nature of the cases or respondent's representation. **[11]** Respondent has attached to his brief on review what appears to be an expanded version of the list of cases he submitted at trial. He has highlighted cases on that list and indicates he handled those cases pro bono. The deputy trial counsel objects to our consideration of the list because it was not introduced at trial. We agree with the deputy trial counsel

10. We express no opinion at this juncture regarding what may or may not constitute good cause for relief from an award of costs in this matter.

and see no reason to augment the record, especially since the list, without explanation, is of minimal value in terms of mitigation.

Without citing to any evidence in the record, respondent claims he was candid and cooperated with the State Bar. We do not find clear and convincing evidence establishing that he either was, or was not, candid and cooperative.

Respondent also claims that there was no harm to the Sheas because he paid them more than he owed them for the unearned fee. We reject this argument. The Sheas were harmed in that there was a delay in refunding the money and in that they were not able to discuss their matter with the city attorney because of respondent's misconduct. However, we also do not find that significant harm to the Sheas was established by clear and convincing evidence. (See standard 1.2(b)(iv), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (standard[s]).) The money was ultimately returned to them and the record is not clear as to whether they were able to speak with the city attorney and if not, the consequences that resulted. Thus, while we do not find lack of harm as a mitigating factor, we also do not find harm as an aggravating factor.

[12a] The last acts of misconduct in respondent's prior discipline occurred in 1973, approximately 17 years before the first acts of misconduct in the present case. He was disciplined for that misconduct in 1975, approximately 19 years ago. In addition, the prior misconduct itself was minimal in nature as indicated by the fact that respondent was privately reproved, the minimum discipline available for professional misconduct. Furthermore, the prior misconduct (failure to perform services competently, failure to communicate and failure to release a client's file) involved acts for which respondent was found not culpable in the present matter. In light of the above, we do not believe the prior misconduct merits significant weight in aggravation. (See std. 1.7(a); *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 105.)

[12b] In determining the appropriate discipline, the hearing judge considered respondent's present misconduct, the prior misconduct, standard 1.7(a), and the underlying purposes of disciplinary proceedings. Standard 1.7(a) provides 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." Our view of the prior discipline, as indicated above, persuades us that imposing greater discipline in the current matter based solely on standard 1.7(a) would be manifestly unjust.

2. Comparable Case Law

[13a] In the present proceeding, respondent failed to refund promptly an unearned fee of approximately $769 and failed to take reasonable steps to avoid prejudice to his clients by failing to notify the city attorney that he was no longer representing the Sheas. The parties do not cite, and our research has not revealed, other cases involving the same circumstances as the present case. Nevertheless, viewing this case against cases that have resulted in a range of discipline from reproval to one year of stayed suspension with two years probation indicates to us that the recommended discipline should be modified.

In *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, the attorney was privately reproved for failing to perform services competently in a probate case. The misconduct resulted in the client suffering interest and penalties on unpaid taxes. No aggravating circumstances were found, but several mitigating circumstances existed. As a condition of the reproval, the attorney was required to make restitution to the client. However, we declined to order the attorney to take and pass the CPRE because he had voluntarily taken steps to insure that his misdeeds would not recur. (See *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 181 [denying reconsideration of decision not to require CPRE].)

In *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, the attorney was privately reproved for commingling and failing to

retain disputed funds in trust in a single client matter. The misconduct was caused by an isolated mistake in an otherwise careful bookkeeping system. Extensive mitigating factors were present and no aggravating circumstances were found. As a condition of the reproval, we ordered the attorney to take and pass the CPRE.

In *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, the Supreme Court adopted our recommendation and the attorney was given six months stayed suspension and one year probation for failing to render a proper accounting and failing to communicate in a single matter. Although significant mitigating circumstances existed, the attorney had a record of prior discipline, which consisted of a public reproval. We noted that a reproval would ordinarily have been in order but that the prior discipline indicated greater discipline was appropriate under standard 1.7(a). (*Id.* at p. 150.)

In *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, the Supreme Court adopted our recommendation and the attorney was given one year stayed suspension and two years probation for failing to perform competently and abandonment of the clients' case without notifying them, returning their file, or shielding their rights from foreseeable prejudice in a single matter. The attorney denied to his clients that he had withdrawn as their counsel and refused to give the clients their file until they paid him additional fees. Both mitigating and aggravating circumstances were found, but the attorney had no prior discipline.

The misconduct in the present case is similar, in terms of its severity, to the misconduct in *Respondent G*, *Respondent E*, and *Cacioppo*. However, both *Respondent G* and *Respondent E* had mitigating circumstances not found here and the discipline in *Cacioppo* was greater because of the prior discipline. On the other hand, the misconduct in *Aguiluz* was more serious than present here. **[13b]** In light of these cases and the absence of mitigating evidence in the present record, we conclude that a public reproval is appropriate.

3. Ethics School

Respondent argues without citing to any authority that the CPRE is comparable to a final examination given after a prescribed course of study and ethics school is that course of study. Respondent asserts that he is amply prepared to pass the CPRE and therefore should not be required to attend ethics school. The Office of the Chief Trial Counsel asserts in its brief on review that the ethics school "is a one day, eight hour remedial course offered by the State Bar in a classroom setting which focusses on specific disciplinary problems. Through the use of hypotheticals and specific examples, the instructor reviews with attorneys practical methods of handling a law practice and attempts to provide them with the tools for recognizing and dealing with potential ethical problems in the future. Ethics School also provides attorneys with a forum to not only discuss the Rules of Professional Conduct but also to discuss the application of the Rules to their practice."

[14a] Respondent's failure to adhere to the provisions of the State Bar Act regarding written fee agreements (Bus. & Prof. Code, § 6148) appears at the heart of both the Shea and Flesher matters. We believe that that failure would be better remedied by requiring respondent's satisfactory completion of the State Bar's Ethics School instead of passage of the CPRE.

The Sheas hired respondent in June 1989 and paid him $3,000 as advanced attorney fees. Business and Professions Code section 6148, in effect for over two years at the time, required this engagement to be the subject of a written retainer agreement which sets forth the basis of the fee and charges in the case, the general nature of the legal services respondent was to provide the Sheas and the "respective responsibilities" of respondent and the Sheas in performing the contract. The record shows no evidence that respondent entered into the required written agreement. Had respondent complied with these provisions, some or all of the triable issues below would likely have been obviated.

Although respondent committed no charged professional misconduct in the Flesher matter, as in the Shea matter, he apparently entered into no bilateral written agreement in exchange for $2,500 in advance attorney fees in an engagement which also required such an agreement. The parties and the hearing judge expended considerable effort below in attempting to ascertain what services respondent was obligated to perform for Flesher. One of the very purposes of an attorney-client written retainer agreement is to eliminate such a basic issue from this proceeding.

[15] Decades before the State Bar Act required written attorney-client fee agreements, the Supreme Court observed that "'The purpose of keeping proper books of account, vouchers, receipts and checks is to be prepared to make proof of the honesty and fair dealing of attorneys when their actions are called into question, whether in litigation with their clients or in disciplinary proceedings and *it is a part of their duty which accompanies the relation of attorney and client.*'" (*Lewis* v. *State Bar* (1973) 9 Cal.3d 704, 713, emphasis in original, quoting *Clark* v. *State Bar* (1951) 39 Cal.2d 161, 174.) The written fee agreement not only protects clients and helps to ensure that a fair and understandable fee agreement is reached for specified services (see *Severson & Werson* v. *Bolinger* (1991) 235 Cal.App.3d 1569, 1572-1573), it can also aid the attorney as well in proving the terms of engagement. Unfortunately, the foregoing principles appear to have been missed on respondent.

Our conclusion that respondent is not culpable of charged misconduct in the Flesher matter should not be read as a conclusion that he complied with his duties under section 6148, violation of which was not charged. **[14b]** Because of our concern that respondent's attention needs to be directed to his duties as to attorney-client fee agreements, as well as his duties upon withdrawal from employment, we conclude that his public reproval should be accompanied by a duty to address these concerns. **[16]** Because we do not recommend suspension, we are not required to include the duty that respondent pass a professional responsibility examination. (See *In the Matter of Respondent G*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 180.) **[14c]** We believe that the State Bar Ethics School with its format of classroom instruction, followed by a test, is a better learning alternative to meet respondent's needs than the more passive experience of CPRE passage. For these reasons, we will require respondent's completion of the State Bar Ethics School rather than passage of the CPRE.

DISPOSITION

For the foregoing reasons, it is hereby ORDERED that respondent be publicly reproved. As a condition of the reproval, respondent is ORDERED to attend the State Bar Ethics School, and to pass the test given at the end of such session, within one year of the effective date of this reproval. Costs incurred by the State Bar in this matter are awarded to the State Bar pursuant to section 6086.10.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WALTER HARRY KOPINSKI

A Member of the State Bar

No. 88-O-10704

Filed March 2, 1994

SUMMARY

Respondent represented a mother and daughter, as well as other members of their family, in various legal matters. He was found culpable of failing to communicate adequately with both clients, of failing to return the mother's file promptly on demand when she terminated his employment, and of failing to take steps to avoid prejudice to the daughter when he withdrew from representing her. The hearing judge recommended that respondent be suspended for six months, stayed, with two years probation on conditions, and no actual suspension. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Respondent requested review, contending that he did not commit any of the charged misconduct, and alternatively that he should receive at most a private reproval. The review department held that respondent was properly found culpable of failure to communicate with his clients because the misconduct lasted until after the effective date of the statute requiring such communication; that respondent's failure to give the daughter important information upon his withdrawal violated his duty to avoid foreseeable prejudice to her; and that the mother's failure to sign a substitution of attorney did not excuse respondent from failing to release her file. Noting that the clients' frequent changes of address did not entirely mitigate respondent's failure to keep in contact with them, the review department upheld the hearing judge's findings, conclusions, and discipline recommendation. (Pearlman, P.J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Geri Von Freymann, Andrea T. Wachter

For Respondent: David A. Clare

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] **130 Procedure—Procedure on Review**
165 Adequacy of Hearing Decision
565 Aggravation—Uncharged Violations—Declined to Find

Evidence of uncharged misconduct can be considered in aggravation or for purposes such as impeaching witness credibility. However, where hearing judge's findings on uncharged misconduct were too tentative to warrant consideration for enhanced discipline, review department did not adopt them as findings or conclusions, although it declined to strike them from the decision.

[2 a, b] **214.30 State Bar Act—Section 6068(m)**
410.00 Failure to Communicate

Conduct which falls below the standard of the statute requiring attorneys to communicate with their clients, but which occurred prior to the effective date of the statute, does not violate its ban. However, where the attorney's failure to communicate began prior to that effective date, but extended beyond it, discipline has been imposed under the statute. Accordingly, where respondent's principal failures to communicate with client occurred prior to effective date of statute, when he withdrew from representing her, but respondent thereafter continued to encourage client to contact him as a conduit for her new counsel after his withdrawal, and did not respond to her efforts to contact him after effective date of statute, respondent was properly found culpable of violating his statutory duty to communicate with the client.

[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)]

Where, at time client requested file, respondent had already transferred client's file to successor attorney, respondent was not culpable of failure to release file to client on demand. However, where, upon transferring file to successor counsel and withdrawing from representation, respondent had failed to give client due notice, and had allowed client to believe that respondent remained conduit for contact with successor counsel, respondent violated rule prohibiting withdrawal without taking steps to avoid foreseeable prejudice to client.

[4] **277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]**

Portion of client's file which is client's property must be surrendered promptly upon request to client or client's new counsel once representation has terminated. Client's failure to sign substitution of counsel did not excuse failure to release file, where respondent did not take position that file was needed to protect client's legal interests until client signed substitution.

[5 a-c] **214.30 State Bar Act—Section 6068(m)**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
582.10 Aggravation—Harm to Client—Found
1091 Substantive Issues re Discipline—Proportionality

Where respondent with no prior record of discipline failed to communicate reasonably with two clients and failed to relinquish their files promptly, causing harm to clients, six-month stayed suspension, with no actual suspension, was well within appropriate range of discipline as indicated by comparable cases.

[6] **173 Discipline—Ethics Exam/Ethics School**
174 Discipline—Office Management/Trust Account Auditing
Where probation conditions requiring office organization plan and completion of Ethics School would amply address respondent's misconduct, review department deleted recommended probation condition requiring respondent to join and maintain membership in State Bar's Law Practice Management Section.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m)
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]

Not Found

213.45 Section 6068(d)
220.35 Section 6104
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]
320.05 Rule 5-200 [former 7-105(1)]

Aggravation

Found

521 Multiple Acts

Mitigation

Found

715.10 Good Faith
735.10 Candor—Bar

Found but Discounted

710.33 No Prior Record
793 Other

Discipline

1013.04 Stayed Suspension—6 Months
1017.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management

Other

162.11 Proof—State Bar's Burden—Clear and Convincing
166 Independent Review of Record

OPINION

STOVITZ, J.:

At the request of respondent, Walter H. Kopinski, we review a decision of the hearing judge finding him culpable of failing to communicate reasonably with two clients who were members of the same family and failing to take required ethical steps when withdrawing from employment. The hearing judge recommended that respondent be suspended from practice for six months, that the suspension be stayed and that respondent be placed on probation for two years on conditions with no actual suspension.

Our independent review of this record supports the basic findings of the hearing judge as well as her overall recommendation of discipline.

I. FACTS

A. Introduction.

Respondent was admitted to practice law in California in 1980. He has no record of prior discipline.

Respondent was originally charged with six counts of misconduct involving six clients. On motion of the examiner, counts 1, 2, 4 and 6 were dismissed prior to trial, along with alleged violations of Business and Professions Code sections 6068 (a) and 6103 in the remaining charges.[1] The remaining charges of violation of former rule 2-111(A)(2)[2] in counts 3 and 5 and violation of former rule 6-101(A)(2) in count 5 were amended to include an alleged violation of section 6068 (m) in count 3 and violations of sections 6068 (m) and 6068 (d) and former rule 7-105 in count 5. At the close of the culpability phase of the hearing, the examiner moved to dismiss the charge in count 3 that respondent's representation of both mother and daughter (passenger and driver) at the outset of his employment was a violation of former rule 5-102 and the motion was granted.

The hearing judge's findings of misconduct arose from respondent's relationship with the Lee family. Respondent was initially retained by Richard Lee in 1983 to handle his personal bankruptcy. Richard had separated from his wife Joan Lee (now Birch) in 1979 and he instructed respondent not to disclose the bankruptcy filing to Joan. Joan was living with the couple's college-aged daughter, Shelly[3] and with her mother (Shelly's maternal grandmother), Edna Birch, in Oregon. Joan had no income and Richard sent money for Shelly's support and for her college education. The couple's joint residence in California had been sold shortly after the separation, while Richard was working overseas, with Joan using his power of attorney. Joan's residence in Oregon had been built with funds from Edna, but was in Joan's name. After its completion, Joan gave her mother $45,000 from the proceeds of the sale of the California house.

On September 16, 1984, while traveling from California to Oregon, Joan, Shelly and Edna were injured when their car, owned and insured by Joan and driven by Shelly, was struck by an on-coming automobile near Marysville, California.[4]

In December 1984 Richard suggested to respondent that he contact the women about the accident and in January 1985, respondent did so by telephone. All three women signed and returned respondent's retainer agreements. At respondent's request, they sent him narratives of their recollections of the accident.

The women continued to live together at addresses in Oregon and San Diego and Montclair,

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

2. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct in effect after May 26, 1989, and references to former rules are to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

3. Shelly Lee has since married and is known as Candace Michelle Lilabeth Cook.

4. The hearing judge found that the accident occurred in Lancaster but the record shows it happened several hundred miles north of that city, near Marysville, in Sutter County.

California, until Shelly's marriage in July 1990. Shelly also maintained a post office box in San Diego from October 1986 until December 1990, at which all three of them received mail.

B. Count 3 - Respondent's representation of Shelly Lee.

Between January and May 1985 respondent spoke by telephone to Shelly and her mother, Joan, about the personal injury case. In May 1985 respondent advised Shelly that there was a problem with his continuing to represent both her and her mother in the automobile accident case, but did not explain the reason. The hearing judge accepted Shelly's testimony that respondent told her then and in subsequent conversations that he was going to refer the case to another attorney, Richard Singer, but that respondent would continue to do the "legwork." Shelly testified that she asked respondent for Singer's telephone number and address on at least two occasions and rather than giving her the information, respondent told her that if she had any questions, she should contact him.

Between May 1985 and 1987, Shelly spoke to respondent 12 times, in which she asked him about the status of her case and was told that she had nothing to worry about. She also met respondent briefly in August 1986 when Shelly, Joan and Edna traveled to respondent's office for Edna's deposition. Shelly then had a brief, five-minute discussion with respondent concerning general pleasantries and his head cold, which prevented him from conducting the deposition himself. On October 7, 1986, Ann Tehan from respondent's office also wrote to Shelly and Joan enclosing a copy of the accident reconstruction and asking them to review it and contact respondent to discuss it in further detail. Shelly testified, and the hearing judge found, that she had no contact with Singer, had not seen the September 6, 1985, civil complaint filed on her behalf by Singer, and had no idea as to the status of her claim for her injuries from the accident.

Shelly admitted that she had seen a letter respondent addressed solely to her mother, Joan, dated May 13, 1985, in which respondent stated that further pursuit of the matter would be unwarranted and outlined several possible courses of action. According to this letter, his office could continue to represent Joan and Edna, a lawsuit would be filed against the other driver *and* Shelly, the negligence of both drivers would preclude any finding of criminal liability against Shelly, and respondent "would refer Shelly to another attorney that could handle her case—thereby eliminating any possible conflicts of interest." Respondent's letter invited Joan to call his office collect if she wished respondent to represent Joan further. Respondent did not send any correspondence to Shelly describing the conflict and his possible withdrawal. Respondent has relied on the letter to Joan as notice of his withdrawal from representing Shelly and communication to her of the reasons. Unknown to Shelly, in about July 1985, respondent transferred Shelly's file to Singer.

When Shelly was sued by the other driver, Joan's insurance company provided an attorney, Peter Viri, to defend Shelly against the lawsuit. Shelly had a few telephone conversations with Viri. She testified that she knew that Viri had been hired by the insurance company and was only defending her, not pursuing her personal injury claims.

After early 1987, Shelly's only effort to contact respondent was her attempt, in conjunction with her mother and grandmother, to recover her file from respondent. To do this, they hired Harold Fair, a private investigator. On his instructions, on November 6, 1988, Shelly signed a joint letter with Joan and Edna, asking respondent for all their files. As will be discussed, *post*, although respondent communicated with Fair, he did not turn over Shelly's file as he had given it to Singer in 1985.

The hearing judge concluded that respondent failed to withdraw properly from his representation of Shelly, contrary to former rule 2-111(A)(2), by failing to take reasonable steps to avoid foreseeable prejudice, noting that respondent did not advise Shelly what work had been done on her behalf, what work remained outstanding or needed to be started, or how to reach her new counsel. She also found that respondent did not communicate properly with Shelly in violation of section 6068 (m) when he did not fully explain to her the reasons that he was not continuing to represent her or the problems with the lawsuit; did

not provide complete and accurate information about her new counsel, and did not explain the impropriety of continuing to discuss the lawsuit with her thereafter. The hearing judge dismissed charges that respondent did not provide competent legal services for Shelly.

C. Count 5 - Respondent's representation of Joan Lee in three matters.

1. Bankruptcy matter.

As part of the bankruptcy proceeding of Richard, Joan Lee's estranged husband, Joan and Richard were sued by the trustee in bankruptcy regarding the Oregon house where Joan, Edna, and Shelly lived. In 1982, in applying for a loan from a credit union, Richard had listed this Oregon property as an asset.[5] When he filed his bankruptcy petition, he did not include the Oregon property. It was the trustee's position that the proceeds of the sale of the marital home were used to purchase the Oregon house and therefore Richard had an interest in the Oregon house as a community asset. If the house was Richard's asset, the bankruptcy court would have jurisdiction over it and the trustee would have the authority to sell it to satisfy Richard's debts.

In November 1985, the attorney for the trustee filed and mailed to Joan, Richard, and respondent a summons and complaint to define the interests in the Oregon property. The attorney for the trustee admitted at the State Bar Court hearing that because Joan was not the debtor in the case, mailing the summons and complaint to her was not sufficient service and personal service would be required to bring her within the court's jurisdiction. Joan denied that she received the complaint or spoke to respondent to represent her prior to her receipt of a proposed stipulated judgment in July 1986. In a note Joan sent to respondent dated December 31, 1985, she indicated to him that she had gotten his message concerning her house papers, did not understand why she was involved in her estranged husband's problems, and enclosed a copy of her warranty deed for respondent. The hearing judge found that respondent spoke to Joan during this time and told her that the trustee wanted to take the Oregon house and sell it, and that if she did not file an answer, her default would be taken. The hearing judge accepted respondent's testimony that Joan agreed to have respondent file an answer to the complaint on her behalf. Respondent filed an answer for Joan in bankruptcy court on December 23, 1985.

After legal research, respondent concluded that Joan did not have a viable defense to the bankruptcy trustee's action to include the Oregon house as one of Richard's assets and to sell it to pay his creditors. In negotiations with the trustee's attorney, and to save additional costs to the estate, respondent agreed to a proposed stipulated judgment drafted by the trustee's attorney and respondent sent it to both Richard and Joan. Accompanying the proposed judgment was a letter from respondent in which he stated that unless he heard from either Richard or Joan within seven days, he was going to assume that they each consented to entering the stipulated judgment. The hearing judge found that Joan did not understand the proposed stipulated settlement. Respondent acknowledged at the disciplinary hearing that he did not get Joan's specific authority to enter the stipulated settlement, but rather he claimed that he had her authority to do so because he represented her and was acting in her best interests. When Joan received the signed, stipulated judgment dated August 22, 1986, she called respondent for an explanation and was told that the bankruptcy court was going to take her house and sell it.

In order to attempt to set aside the stipulation, Joan hired first an Oregon law firm and later a Los Angeles firm. On January 2, 1987, the Los Angeles firm moved to set aside the stipulation based on respondent's lack of authority from Joan to act. The motion was denied in March 1987 after respondent

5. The hearing judge incorrectly stated that the Montclair, California house was listed on the loan application. The Montclair house had been sold in 1979. According to his deposition in the bankruptcy matter, Richard had listed the Oregon house on the loan application in 1982 because he thought he was automatically an owner due to his marriage to Joan.

testified as to his discussions with Joan concerning the proposed stipulated judgment. Joan paid $400 for her representation and at the time of the State Bar Court hearing still owed the law firm $380. The property was eventually sold and shortly before the State Bar Court hearing began, Joan received $12,000 representing her homestead interest.

2. Family law matter.

In 1986 Joan decided that she should be legally separated from Richard and asked respondent to handle the matter. She completed and returned respondent's questionnaire and paid him $125 to cover court filing costs. On respondent's advice, Joan and Richard signed a paper reflecting an allocation of their assets dated July 29, 1986. On January 13, 1987, after rejection by the clerk's office several times, respondent filed Joan's petition for legal separation. When Joan called respondent on January 9, 1987, to ask about the status of the case, thinking that it would be final soon, respondent told her he had just filed the papers the week before. Joan decided instead to dissolve the marriage and retained new counsel, Carol McFarland. In April 1987 McFarland filed an action to dissolve Joan's marriage. On May 26, 1987, McFarland moved to dismiss the legal separation matter filed by respondent. The dismissal was entered on May 29, 1987. Joan paid McFarland $2,800 for her services. Her divorce became final in 1988.

In the same January 9, 1987, conversation Joan had with respondent about the status of her family law matter, and later by letter dated January 16, 1987, Joan asked respondent to send all her files to the Los Angeles law firm which was then representing her in her attempt to set aside the stipulated judgment re the Oregon house. Thereafter, Allison Kotlarz, an attorney with the Los Angeles firm, spoke to respondent twice concerning release of Joan's files. Kotlarz arranged to pick up the files from respondent's office on the morning of March 17, 1987, but no one was in the office when she arrived. By letter dated March 17, 1987, Kotlarz demanded delivery of the files by March 20, and respondent sent unrelated bankruptcy files to her on March 28. Kotlarz made another demand for the files by letter dated March 31, 1987. By letter dated April 2, 1987, respondent refused to surrender the files until he received an executed substitution of attorney form from Joan.

3. Automobile accident matter.

After she retained respondent, Joan Lee called him regularly for status reports and with questions on her auto accident case, as well as her mother's and daughter's causes of action. In May 1985, after respondent wrote to Joan to advise her of further options if he was to continue to represent her, she found it increasingly difficult to communicate with respondent. On September 3, 1985, respondent filed a lawsuit on Joan and Edna's behalf against Shelly and the driver and owner of the other vehicle. This is the same lawsuit in which Shelly was defended by attorney Peter Viri.

After March 1987, the only outstanding matter in which respondent served as counsel for Joan was her personal injury lawsuit. Joan remained the only plaintiff in that suit after respondent had settled Edna Birch's claims against the defendants for $30,000 and she had been dismissed out of the lawsuit in December 1986. Joan did not hear from respondent after her attempt to secure her file in January 1987 until she, along with her mother and daughter, retained the services of private investigator Harold Fair in September 1988 to recover their files from respondent. On October 3, 1988, Joan sent a mailgram to respondent asking that he turn over her files, as well as Edna's, to Fair. Fair called respondent's office five days later and respondent agreed to turn over the files once he got a signed substitution of attorney form. Fair asked respondent to send the needed forms to Joan at their address at 4580 Ohio Street in San Diego. Respondent sent the forms to *4080* Ohio Street and continued to use this incorrect address in later attempts to contact Joan. In late October 1988, after his clients had not received anything from respondent, Fair called respondent's office and left a message, but did not receive a reply. On November 6, 1988, as discussed *ante* under count 3, Joan, Edna, and Shelly sent a joint letter to respondent asking that their files be sent to Fair. Fair followed this letter with a strongly-worded letter of his own to respondent dated November 8, 1988, asking for the files. Respondent did not answer this letter, but did send Fair a letter dated January 6, 1989, asking

for Joan's correct address. Fair answered three days later, reiterating his request to release Joan's files. Fair had no further contact with respondent.

On January 24, 1989, respondent filed an at-issue memorandum with the superior court in Joan's accident case. Trial was set for June 1989, then later reset for September 19, 1989. Respondent sent interrogatories to Joan in February 1989, again to the incorrect address on Ohio Street. By March 1989 Joan and Shelly had filed a complaint against respondent with the State Bar. State Bar investigator Duane D. Dade wrote to respondent on March 20, 1989, advising him of the complaint and seeking a written response. The next day, respondent replied that his correspondence with Edna and Joan had been returned, that he had been dealing with Harold Fair "to no avail" and enclosed a "notice," presumably the interrogatories from February, for Dade to forward to Joan.

Respondent's office again wrote to Joan on April 3, 1989, this time at the correct address, enclosed a second set of interrogatories, advised her that her trial was in June and asked that she contact the office for a telephone conference. Two weeks later, Joan sent a letter to the State Bar enclosing the interrogatories, stating that she had been trying to fire respondent and recover her file, and asking for the Bar's assistance as she had to respond to the interrogatories at once.

Respondent's office sent notices to Joan by certified mail at her correct Ohio Street address and by regular mail to her post office box, advising her of the September 19, 1989, trial date. The certified mailing was returned unclaimed, and the regular mailing returned marked "moved, left no address." By this point, respondent had been sanctioned by the trial court for failure to comply with defendant's discovery request. Respondent filed a motion to be relieved as counsel on July 19, 1989. Respondent sent a copy of the motion and supporting papers to Pat Kissane of the State Bar ("[f]or your reading in your spare time . . .") with the request that he would appreciate Kissane "finding the time and informing Ms. Lee to obtain new counsel to represent her." On July 15, 1989, respondent forwarded Joan's file and a substitution of attorney form to Kissane for her to forward to Joan. Kissane returned both the substitution form and Joan's file to respondent by certified mail dated July 31, 1989, and advised respondent that the State Bar could not be used as a conduit to deliver client files or secure a client's signature on a substitution of counsel form. Joan acknowledged at the disciplinary hearing that she had received respondent's motion to withdraw as counsel but thought that it meant that he would only continue to be her attorney through the trial of *this* case.

In the minute order granting respondent's motion to withdraw, the civil court noted that it had asked respondent if he had had any mail to Joan returned to him as undelivered, and he responded that as of July 28, 1989, none had been returned as non-deliverable. Respondent advised the trial court that Joan had filed papers with the State Bar but that he had had no correspondence from Joan.

The case was called for trial on September 19, 1989. Joan was not present, nor was she represented by counsel. Defendants moved for dismissal based on her nonappearance, the motion was granted and the case was dismissed with prejudice.

4. Decision of the hearing judge as to count 5.

The hearing judge concluded that in representing Joan in her personal injury case, the bankruptcy matter and her family law matter, respondent did not adequately communicate with her, as required by section 6068 (m). She found Joan's frequent moves and failure to always provide respondent with written notice of her address changes did not excuse respondent's loss of contact with her, finding that more frequent and more careful contact would have avoided the gaps and problems in communicating with Joan. The judge rejected the charge that respondent had misrepresented information to Joan or the bankruptcy court, contrary to section 6106 and 6068 (d), or former rule 7-105(1).

The hearing judge also rejected the allegation that respondent violated section 6104, stating that there was insufficient evidence to prove respondent knew he did not have authority to act on Joan Lee's behalf. Similarly, she found the record did not show clear and convincing evidence that respondent did

not represent Joan competently during his employment (former rule 6-101(A)(2)).

As to the charge of improper withdrawal from representation, the hearing judge concluded that Joan had made it clear without using the "technically correct words" that she wished to sever her relationship with respondent, when she hired other counsel to undo the stipulated judgment in bankruptcy court and to withdraw her legal separation complaint and requested that respondent forward her files to other law firms. Joan's failure to complete the interrogatories almost five years into her personal injury lawsuit and otherwise to cooperate with respondent at that point contributed to the compromise of Joan's rights, but in the hearing judge's view, respondent's inaction in response to Joan's efforts to recover her files and discharge respondent led to the breakdown of the relationship and the resulting harm to her cause of action.

D. Factors considered in aggravation and mitigation.

In aggravation, the hearing judge found that respondent's misconduct was repeated, lasted over a three-year period, and resulted in significant harm to the causes of action of both Joan and Shelly. Respondent had no prior record of discipline but the misconduct began only five years after his admission to practice, and therefore the hearing judge allotted little weight in mitigation to his lack of a prior record. Considered by the hearing judge to be mitigating was respondent's showing of some good faith in taking some limited steps to locate Shelly and Joan to return their files and his demonstration of candor and cooperation with the State Bar.

II. DISCUSSION

A. Procedural point.

Respondent urges that the portion of the hearing department decision immediately under the heading "Conclusions of Law" entitled "Uncharged Violations" (decision, p. 14) was improper and should be stricken. This very brief discussion concerns charges which were not made, or if made, were dismissed by OCTC.

[1] Evidence of uncharged misconduct can be considered in aggravation (see *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35-36) or for purposes such as impeaching witness credibility. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 401.) Had the hearing judge made clear findings of culpability on the added violations, they could have figured into her discipline recommendation. Her findings on the uncharged misconduct, however, are too tentative to merit consideration for enhanced discipline and she disclaimed any consideration of those issues. We do not adopt them as findings or conclusions but we see no good reason to strike them from her decision.

B. Culpability.

Respondent contends that he did not commit any charged misconduct in counts 3 and 5 and we should dismiss the proceeding. He argues that the bulk of his acts allegedly violating section 6068 (m) occurred prior to January 1, 1987, the effective date of the statute, and thus we should reverse that finding of culpability. He also contends that he had no duty to return Shelly's or Joan's files since either he was not their attorney at the time of their demand for the return of files, or, in the case of Joan's files, she had not provided a substitution of attorney. A considerable force of respondent's attack on the findings rests on disagreement with the hearing judge's assessment of witness credibility. Respondent urges that we accept his view of the facts as the more plausible. If we do not dismiss the proceeding, he urges that we impose no more than a private reproval.

The Office of the Chief Trial Counsel (OCTC) supports all of the findings and conclusions of the hearing judge and her recommendation of stayed suspension.

Disciplinary charges against an attorney must be proven by OCTC by clear and convincing evidence and if equally reasonable inferences may be drawn from proven facts, the inference leading to innocence must be chosen. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239-240, and cases cited.) Our review is independent based on the record below but our procedural rules require us to give great weight to the credibility

determinations of the hearing judge who saw and heard the conflicting testimony and reviewed it together with the documentary evidence. (Trans. Rules Proc. of State Bar, rule 453(a); see *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 42.)

[2a] It is clear that conduct which falls below the standard of section 6068 (m)[6] but which occurred prior to January 1, 1987, does not violate its ban. (*Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 902-903; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815; *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 297-298.) However, we cannot agree with respondent that he is therefore innocent of the charges.

[2b] We have imposed discipline under section 6068 (m) where the attorney's failure to communicate began prior to, but extended beyond December 1986. (See *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 204; see also *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 486-487 [pre-1987 failure to communicate disciplinable under section 6068 (a) if properly charged].) That was the situation both in counts 3 and 5. Respondent's principal failures to communicate with Shelly occurred in 1985 and 1986 in not making clear that he was no longer representing her and that attorney Singer was taking over that representation, and in not providing her with Singer's address and phone number. Respondent not only failed to convey this information clearly, and failed to send Shelly any document addressed to her in that regard, but also continued to encourage Shelly to contact him as a conduit for Singer. Moreover, the record reveals no documents sent by Singer to Shelly. In count 3 the hearing judge concluded that respondent's obligation under section 6068 (m) lasted until into 1988 and Shelly contacted respondent about her auto accident case at least into the beginning of 1987. Well into 1988, Shelly sought her file from respondent. Although he had long since transferred it to Singer, he failed to inform her of that fact. Thus, we find support for the hearing judge's conclusions that respondent's failure to clearly apprise Shelly of his withdrawal from employment and purported transfer of responsibility to Singer violated section 6068 (m).

Applying the foregoing principles, respondent also violated section 6086 (m) in count 5 by failing to communicate with Joan for over two years starting in January 1987 in response to her requests in the auto accident case.

[3] Respondent points to his 1985 transfer of Shelly's file and urges us to reverse the hearing judge's conclusions of a violation of former rule 2-111(A)(2) on the ground that he no longer had the file to give her. Although we agree on the fact of file transfer, an attorney's delivery to the client of her file is not the only duty required by former rule 2-111(A)(2) when an attorney withdraws from employment. That rule, as well as successor rule 3-700(A), requires a withdrawing attorney to give due notice to the client, to avoid foreseeable prejudice and to allow time for employment of successor counsel. Respondent did not give Shelly the notice due her when he transferred her case and file to Singer. As we have seen, he let Shelly believe that he was the conduit for contact with Singer. We therefore uphold the hearing judge's conclusion of respondent's culpability of wilful violation of former rule 2-111(A)(2) as to Shelly.

[4] We also uphold the hearing judge's conclusions that respondent violated former rule 2-111(A)(2) by failing to honor Joan's request in 1987 to promptly turn over to successor counsel all her files and by failing in the auto accident case in which he still represented her as of 1988 to turn over her file in that matter. Respondent's defense that he had no signed substitution of attorney from Joan does not avail him. The rule has never been construed to require a substitution of attorney as a condition precedent to an attorney's duty to deliver the client's file, but we do not reach that issue for in this case respondent never

6. Section 6068 (m) makes it a duty of an attorney to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

took the position that he needed Joan's files in order to protect her legal interests until she signed a substitution. As the Supreme Court observed in *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 655, the portion of a client's file which is the client's property "must be surrendered promptly upon request to the client or the client's new counsel once the representation has terminated." (See also *Kallen* v. *Delug* (1984) 157 Cal.App.3d 940, 950 [refusal to forward a client's file until a successor attorney has signed a division of fees agreement breaches rule 2-111(A)(2)].)

C. Degree of discipline.

The hearing judge considered the applicable Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) but did not identify any comparable case law in her discipline discussion. On review, neither party analyzes any comparable decisional law in support of their respective positions on the appropriate discipline.[7]

[5a] Our decision in *In the Matter of Aguiluz, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 45-46, discusses a number of comparable cases in which an attorney with no prior record of discipline improperly withdrew from employment in a small number of matters, coupled in some instances with a failure to communicate, or with circumstances more serious than present here, such as misrepresentation to a client, a lack of remorse or appreciation of the disciplinary process, or failure to cooperate with the State Bar. From those cases, we see that the entirely stayed suspension recommended by the hearing judge is well within the range of discipline in comparable or slightly more serious cases. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921 [failure to communicate, to properly withdraw, or to take action in one client matter; default matter; six-month stayed suspension, one-year probation]; *Harris* v. *State Bar* (1990) 51 Cal.3d 1082 [neglect of case for one client resulting in large loss to estate; little recognition of wrongdoing; three-year stayed suspension; ninety days actual suspension]; *Layton* v. *State Bar* (1990) 50 Cal.3d 889 [neglect of estate over five years, failure to communicate; indifference to harm caused; three-year stayed suspension, thirty-day actual suspension].) In *Aguiluz*, we found the attorney had withdrawn as counsel in one matter but refused to turn over the clients' file until he was paid additional fees and a substitution of attorney form was signed. The clients were misled to some extent and unearned advanced fees were owed to them. We recommended and the Supreme Court ordered a one-year stayed suspension, two years on probation and restitution, but no actual suspension, in light of the impact of Aguiluz's son's death on his misconduct.

One Supreme Court case not summarized in our *Aguiluz* opinion which is also instructive in this matter is *Lister* v. *State Bar* (1990) 51 Cal.3d 1117. The Court dismissed charges that Lister had misappropriated client funds, but found that he had failed to perform legal services and communicate with two clients, with the loss of one client's cause of action, had not surrendered their files upon repeated requests, and kept a case which he was not competent to handle, resulting in delays and large interest and tax penalties owed by the clients. The misconduct was mitigated to some degree by an office move and staff problems suffered by Lister. Lister did have a prior private reproval but the Court agreed with the referee's decision below that it was minor and remote in time. The Court reduced the discipline to nine months actual suspension and three years probation.

[5b] Respondent's misconduct, as charged and found in this proceeding, focuses on failure to communicate reasonably with two of his clients and failure to relinquish their files promptly. This resulted in harm to the clients by added delay, expense and creating limited options for them. We recognize the mitigating circumstances found by the hearing judge including the clients' periodic moves which undoubtedly made respondent's attempts to provide services to them more difficult. However, we note that significant failures of respondent to communi-

7. Although respondent cites several private reproval cases in his brief, he does not demonstrate how the cited cases compare to his.

cate with his clients adequately occurred at times when they could not be attributed to confusion over the clients' whereabouts.

[5c] Accordingly, we shall adopt the hearing judge's recommendation of respondent's suspension for six months, stayed, on conditions of a two-year probation, with no actual suspension and with all of the other duties and conditions incident to the judge's recommendation, **[6]** except that we shall delete proposed condition 8 that respondent join and maintain his membership in the State Bar's Law Practice Management Section. We believe that the other remedial conditions of probation, notably conditions 6 (submission of an office organization plan approved by a probation monitor) and 9 (completion of the State Bar's "Ethics School"), will amply address respondent's misconduct. Other special conditions of respondent's probation involve assignment of a probation monitor referee and completion of six hours of law office management or organization courses.

III. RECOMMENDATION

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for six months, and that execution of that suspension be stayed on conditions of a two-year probation, with all of the other duties and conditions incident to the judge's recommendation, except for condition 8. We further recommend that within one year of the effective date respondent be required to provide the State Bar proof that he has passed the California Professional Responsibility Examination. We also follow the recommendation of the hearing judge to recommend that costs incurred by the State Bar in the investigation and hearing of this matter be awarded the State Bar pursuant to Business and Professions Code section 6086.10.

I concur:

NORIAN, J.

PEARLMAN, P.J., concurring:

I concur in the opinion of the court, but consider it important to emphasize why I have concluded that this case does not present reviewable conflict of interest issues despite facts which appear to abound in such conflicts. Only one conflict of interest was charged by the State Bar as a violation of former rule 5-102 and, for reasons not apparent from the record, was dismissed at trial by the hearing judge on the State Bar's own motion. As a consequence, the hearing judge noted some indication of conflicts of interest problems but declined to make any findings thereon because she did not consider them to be properly before her.[1] The State Bar did not seek review and, upon respondent's request for review, has simply sought affirmance of the hearing judge's decision.[2]

Under the circumstances, it would clearly be inappropriate for the review department to make adverse culpability findings against respondent based on facts which appear to demonstrate uncharged conflicts of interest. If the State Bar fails to move to amend the notice to conform to proof, an attorney may only be disciplined for conduct alleged in the notice to show cause. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35; *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 420.) In *Edwards*, *supra*, the Supreme Court nonetheless upheld the use by the prior volunteer review department of evidence of uncharged misconduct to establish a circumstance in aggravation not found by the hearing panel. In that case, Edwards's own testimony, elicited for the purpose of inquiring into the cause of the charged misappropriation from his trust account, established that Edwards had a practice of commingling his own funds in his clients' trust account and failing to keep proper records.

Indeed, when a check issued against a trust account bounces, an inference of misappropriation may be drawn and the burden of proof shifts to the respondent to show that the office procedures he or

1. The hearing judge also noted that the facts provided some indication of uncharged violations of former rule 2-101(B) and former rule 7-103, but also did not consider such uncharged conduct in her decision.

2. The State Bar was represented by different attorneys before the review department than the attorney who prosecuted the case at trial.

she had in place were adequate. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.) No such integral relationship exists here between the evidence related to the charged and uncharged conduct. Here, respondent was affirmatively led to believe that no conflicts issue remained when the State Bar dropped the rule 5-102 charge of its own volition in the culpability phase of the trial. His counsel points out in his brief on review that he therefore did not focus his presentation of evidence or his questioning of witnesses to defend respondent with respect to possible conflicts of interest or other uncharged allegations of misconduct. Under these circumstances, due process would not be afforded respondent if we were to make findings in aggravation based on uncharged conflicts appearing in the record.

Nonetheless, the recitation of facts in the majority opinion makes one wonder why conflict of interest issues did not become the gravamen of the charges. The facts appear to raise insurmountable questions of the ability of one attorney to represent zealously and competently all of the clients' interests—husband, estranged wife, her mother, and the couple's daughter. The husband's bankruptcy appeared to present potential conflicts of interest with his wife regarding ownership of the Oregon property, raising questions as to their joint representation in defense of the trustee's suit; it also posed issues with respect to respondent's representation of the wife in seeking formal separation from her husband. The fact that he did not charge fees for representing her in either situation does not alter the potential for harm to her interests.

Most notably, of course, the representation of both the driver and passenger in an automobile accident case poses inherent potential conflicts of interest problems. (See, e.g., *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 614-617.) The facts also appear to indicate respondent's disqualification from continuing to represent the passengers in the personal injury suit due to improper receipt of pertinent confidential information from an adverse party (i.e., the driver). (Cf. *Western Continental Operating Co.* v. *Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 759.)

One of the salutary purposes of the requirement in former rule 5-102 that "A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned" is to serve as a prophylactic against predictable problems of this type. Good intentions may be mitigating, but they are not a defense. "'The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]'" (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 351, quoting *Anderson* v. *Eaton* (1930) 211 Cal. 113, 116.)

Representation of conflicting interests without informed written consent is not only a rule violation, it is very risky practice. Attorneys must be attuned to these risks because the clients who come jointly to them for advice seldom realize what concerns they might have until it is too late. Even when the attorney may in fact be able to serve clients with conflicting duties to the full extent of their rights, the attorney risks the perception by one or more of the clients that the attorney's loyalty is impaired. The loss of faith in the attorney then engenders additional problems such as further lawsuits and State Bar complaints as well as adding to general distrust of the legal profession.

In the proceedings below, the hearing judge was careful not to take into account evidence of possible uncharged misconduct in her decision and so has this court been on review. But no one reading this opinion should conclude that an attorney's representation of various family members in multiple suits, however well-meaning, may not be rife with serious conflict problems. Fortunately for public protection, as part of the discipline recommended by the hearing judge for the charged conduct on which respondent was found culpable, it was recommended that respondent be ordered both to take and pass the California Professional Responsibility Examination and to complete a one-day session in the State Bar's Attorney Remedial Training System ("Ethics School"). In this case, unlike *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, both appear to be well-warranted conditions of probation.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROLAND RAMEZ SALAMEH

A Member of the State Bar

No. 91-C-04384

Filed March 7, 1994

SUMMARY

The Office of the Chief Trial Counsel requested that respondent be summarily disbarred based on his felony conviction for forgery of a court document.

The review department found that the statutory requirements for summary disbarment were satisfied in that an element of the crime was a specific intent to defraud and the offense was committed in the practice of law. It concluded that based on the seriousness of the conviction, disbarment was consistent with Supreme Court precedent. Respondent's contention that he should be granted a hearing on the question of discipline, because he did not actually intend to commit a crime, was rejected as inconsistent with the conclusive presumption of guilt which arose from his conviction. The review department therefore recommended that respondent be summarily disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro, Geri Von Freymann

For Respondent: Jeffrey S. Benice, Cheryl A. Canty

HEADNOTES

[1] **191 Effect/Relationship of Other Proceedings**
192 Due Process/Procedural Rights
1691 Conviction Cases—Record in Criminal Proceeding
An attorney is charged with knowledge that the legal consequences of the attorney's conviction include summary disbarment when statutory authority provides therefor.

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] **162.90 Quantum of Proof—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1519 Conviction Matters—Nature of Conviction—Other
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding

Summary disbarment is statutorily authorized where an attorney is convicted of a felony and (1) an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, and (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. The crime of forgery includes as one of its elements the specific intent to defraud. A forgery conviction for altering a court document was unquestionably committed in the course of the practice of law in that it involved fraud on the court perpetrated on behalf of the attorney's client. Accordingly, summary disbarment was appropriate in the absence of conflicting Supreme Court precedent or a violation of due process in disbarring respondent without a hearing.

[3] **191 Effect/Relationship of Other Proceedings**
192 Due Process/Procedural Rights
1691 Conviction Cases—Record in Criminal Proceeding
1699 Conviction Cases—Miscellaneous Issues

An attorney convicted of a felony is chargeable with notice that the crime remains a felony for State Bar discipline purposes irrespective of whether in a particular case the crime may be considered a misdemeanor as a result of post-conviction proceedings. Under some circumstances, prosecutorial discretion in originally charging a particular crime as a felony rather than a misdemeanor may raise questions as to the propriety of summary disbarment, but no such issue was presented where there was no evidence of abuse of discretion or other unfairness in charging forgery of a court document as a felony.

[4] **101 Procedure—Jurisdiction**
1091 Substantive Issues re Discipline—Proportionality
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1699 Conviction Cases—Miscellaneous Issues

The Legislature itself has recognized that the inherent authority of the Supreme Court controls the outcome in disciplinary proceedings. It is therefore incumbent upon the review department not only to review the statutory criteria for summary disbarment, but also to review Supreme Court precedent to assure that application of statutory summary disbarment does not conflict with Supreme Court standards for disbarment.

[5 a-c] **147 Evidence—Presumptions**
191 Effect/Relationship of Other Proceedings
192 Due Process/Procedural Rights
1691 Conviction Cases—Record in Criminal Proceeding

Where respondent contended that he had only pleaded guilty in order to avoid two separate trials, and that he had not intended to commit a crime, due process did not entitle him to a hearing before the State Bar Court to prove these contentions, because he would be precluded from presenting evidence thereof by the statute providing that proof of an attorney's conviction of a felony or misdemeanor involving moral turpitude is conclusive evidence of the attorney's guilt of the elements of the crime in any proceeding to suspend or disbar the attorney. This conclusive presumption precludes collateral attack on the conviction by attorneys who seek to reassert their

innocence in subsequent State Bar proceedings. In this regard, a conviction following a guilty plea is just as conclusive as a conviction following a full criminal trial.

[6] **1518 Conviction Matters—Nature of Conviction—Justice Offenses**
1519 Conviction Matters—Nature of Conviction—Other
1521 Conviction Matters—Moral Turpitude—Per Se
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment

Forgery is by definition a crime of moral turpitude. Under Supreme Court case law, disbarment is the rule rather than the exception for this serious crime. Forgery of a court document involves fraud on the court, which is particularly egregious. Accordingly, where respondent was convicted of such crime, respondent would have faced disbarment even if granted a hearing on the issue of appropriate discipline.

ADDITIONAL ANALYSIS

Discipline

1610 Disbarment

Other

175 Discipline—Rule 955
1541.10 Conviction Matters—Interim Suspension—Ordered
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P.J.:

Respondent Roland Ramez Salameh was convicted on September 15, 1992, of one felony count of violating Penal Code section 470, subdivision (a) (forgery) following entry of his guilty plea. This conviction resulted from a plea bargain following charges of violating Penal Code section 182 (conspiracy to commit the crime of falsifying documents); Penal Code section 134 (falsifying documents to be used in evidence); and Penal Code section 132 (offering forged or altered documents as genuine). The record of conviction was transmitted by the State Bar to the State Bar Court on or about January 5, 1993. On January 8, 1993, under the authority of rule 951(a) of the California Rules of Court, the Presiding Judge ordered Salameh suspended effective February 9, 1993. He has remained on interim suspension ever since.

In July of 1993, the Office of the Chief Trial Counsel ("OCTC"), on behalf of the State Bar, submitted evidence of the finality of respondent's conviction to the State Bar Court Review Department and requested respondent's summary disbarment pursuant to Business and Professions Code section 6102 (c). Respondent's counsel objected thereto and the matter was set for briefing and oral argument.[1] Upon due consideration of the arguments raised by both parties, we conclude that the criteria for summary disbarment have been met and recommend to the Supreme Court that respondent be summarily disbarred.

DISCUSSION

Respondent asserted in a declaration in support of his brief that he was led to believe he would receive a trial in the State Bar disciplinary proceedings and that the plea bargain would preserve his right to present a defense in the State Bar Court. At oral argument, his counsel withdrew the suggestion that respondent was misled by the State Bar. He also indicated that there was no basis for respondent to file a writ of error *coram nobis* attacking the validity of his conviction. We therefore proceed to analyze his rights following his felony conviction.

Business and Professions Code section 6102 (c) was enacted several years prior to respondent's commission of his crime and entry of his guilty plea. **[1]** An attorney is charged with knowledge that the legal consequences of his conviction include summary disbarment when statutory authority provides therefor. (*In re Collins* (1922) 188 Cal. 701, 707-708; see also *In re Riccardi* (1920) 182 Cal. 675.)

[2a] Business and Professions Code section 6102 (c) authorizes summary disbarment after a felony conviction becomes final[2] **[3 - see fn. 2]** if two criteria are met: "(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."

In this case, the conviction was based on forgery of a court document—a proof of service and declaration re diligence which was altered after filing with

1. In connection therewith, respondent requested that this court take judicial notice of certain court files maintained by the Orange County District Attorney's office (*O'Rourke* v. *Dominguez et al.*) and Orange County Superior Court case number C-88760 (*People* v. *Roland Ramez and Linda Lucille Brierley*) and the corresponding investigative file maintained by the District Attorney. We agree with the State Bar that respondent has failed to establish the relevance of such documents and we decline respondent's request.

2. Respondent asserts that the plea bargain included conversion of the felony conviction to a misdemeanor after one year.

[3] He is also chargeable with notice that a crime remains a felony under section 6102 of the Business and Professions Code "irrespective of whether in a particular case the crime may be considered a misdemeanor as a result of post conviction proceedings." (Bus. & Prof. Code, § 6102 (b).) While, under some circumstances, prosecutorial discretion in originally charging a particular crime as a felony rather than a misdemeanor might raise questions as to the propriety of summary disbarment (cf. *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 470-471), no evidence of abuse of discretion or other unfairness in the charges was raised here.

the Orange County Superior Court in connection with a motion to enter default in a pending personal injury case in which respondent represented the plaintiff. The alteration was made by a court clerk named Linda Brierley who also performed clerical services for respondent. Respondent offered the following facts to the superior court judge as the basis of his guilty plea: "During November 1990, in Orange County, with the intent to prejudice I aided and abetted in the false alteration of a document executed and filed on my behalf by Linda Brierley and later presented the document as true and accurate."

[2b] The crime of forgery to which respondent pled guilty includes as one of its elements the specific intent to defraud. (*People* v. *Prantil* (1985) 169 Cal.App.3d 592, 596; see generally 2 Witkin & Epstein, Cal. Crim. Law (2d ed. 1988) §§ 714, 715; CALJIC 15.00 ["Every person who, with the specific intent to defraud . . . ."].) Respondent's crime was unquestionably committed in the course of the practice of law. It involved fraud on the court perpetrated on behalf of his client. The only remaining question is whether, as respondent's counsel contends, there is no Supreme Court precedent for his summary disbarment and due process would be violated if respondent were disbarred without a hearing.

OCTC has not sought summary disbarment solely based on the technical applicability of Business and Professions Code section 6102 (c), but also on the basis of Supreme Court precedent. **[4]** As we noted in *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71, 76, the Legislature itself has recognized that the inherent authority of the Supreme Court controls the outcome in disciplinary proceedings. It is therefore incumbent upon the review department not only to review the statutory criteria for summary disbarment, but also to review Supreme Court precedent to assure that application of section 6102 (c) does not conflict with Supreme Court standards for disbarment.

Among the numerous cases cited by OCTC in support of disbarment are *In re Rivas* (1989) 49 Cal.3d 794; *In re Scott* (1991) 52 Cal.3d 968; *In re Ford* (1988) 44 Cal.3d 810 and *In re Collins*, *supra*, 188 Cal. 701. The first three involved disbarment after a hearing but regardless of mitigating circumstances, while the fourth involved summary disbarment. The only recent cases cited by respondent's counsel either involved felonies not committed in the practice of law (e.g., *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 103-104) or misconduct not involving a felony conviction. (E.g., *Friedman* v. *State Bar* (1990) 50 Cal.3d 235.) Respondent's counsel, moreover, in attempting to distinguish the cases cited by OCTC, fails to acknowledge that respondent submitted a factual basis for his guilty plea and fails to recognize the legal effect of respondent's guilty plea. **[5a]** Rather, respondent's counsel contends that respondent's plea did not address whether he actually intended to do the act alleged; that respondent only agreed to the conviction in order to avoid the expense and trouble of two separate trials; and that he did not intend to commit a crime. He argues that respondent should be entitled to a hearing before the State Bar Court to prove these contentions and that, if such hearing is not afforded, he will be deprived of his right to due process under the United States Constitution.

[5b] Business and Professions Code section 6101 (a) expressly makes proof of conviction of a felony or misdemeanor involving moral turpitude conclusive evidence of the attorney's guilt of the elements of the crime in any proceeding to suspend or disbar the attorney. This is consistent with Supreme Court case law. (*In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423.) The conclusive presumption precludes collateral attack on the conviction by respondents who seek to reassert their innocence in subsequent State Bar proceedings. (*In re Prantil* (1989) 48 Cal.3d 227, 232; *In re Kirschke* (1976) 16 Cal.3d 902, 904.) Indeed, in *Prantil*, the Supreme Court specifically rejected due process arguments similar to those raised here, noting that it perceived "no constitutional infirmity in the conclusive presumption provision contained in section 6101." (48 Cal.3d at p. 233.) As we recently noted in *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, a conviction following a guilty plea is just as conclusive evidence of the respondent's guilt of all of the elements of the crime for which he was convicted as a conviction following a full criminal trial. (See *In re Prantil*, *supra*, 48 Cal.3d at p. 233,

quoting *In re Gross* (1983) 33 Cal.3d 561, 567 ["'[N]either constitutional nor policy reasons' preclude the Legislature from giving conclusive effect to convictions based on nolo contendere pleas in bar disciplinary proceedings"].)

[5c] Thus, even assuming arguendo that respondent were not summarily disbarred pursuant to section 6102 (c), application of section 6101 at an ensuing subsequent hearing would preclude him from putting on the evidence that he seeks to offer: that he did not intend to commit a crime and that the crime was not one involving moral turpitude. **[6]** Respondent was convicted of forgery which is by definition a crime of moral turpitude. (*In re Prantil*, *supra*, 48 Cal.3d at p. 234.) Moreover, even if a hearing were held, under Supreme Court case law respondent should have expected to face disbarment. As the Supreme Court noted in *Prantil*, for the serious crime of forgery "disbarment is the rule rather than the exception." (*Ibid.*, citing *In re Silverton* (1975) 14 Cal.3d 517, 523; *In re Bogart* (1973) 9 Cal.3d 743, 748.) The Supreme Court proceeded to reject evidence offered by Prantil in mitigation as insufficient to justify lesser discipline than disbarment for Prantil's conviction of forgery under Penal Code section 470. Prantil had been found to have assisted in the negotiation of a forged check. The forgery was discovered before the funds were withdrawn. Here, respondent's crime involved fraud on the court, which the Supreme Court considers particularly egregious. (Cf. *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 315 ["No act of concealment or dishonesty is more reprehensible than Rodgers's attempts to mislead the probate court"].) The fact that the fraud was discovered in time to prevent substantial harm is no more availing here than it was in *Prantil*.

RECOMMENDATION

We conclude that, based on the seriousness of a felony conviction for the crime of forgery, a recommendation of summary disbarment pursuant to section 6102 (c) is clearly consistent with Supreme Court precedent. We therefore recommend that respondent Roland Ramez Salameh be summarily disbarred.

As respondent was interimly suspended effective February 9, 1993, and ordered at that time to comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court within 30 and 40 days respectively, we do not include a recommendation of compliance with rule 955. An award of costs in favor of the State Bar is recommended pursuant to Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FRANKLIN KNIGHT LANE III

A Member of the State Bar

No. 86-O-14623

Filed March 14, 1994

SUMMARY

Respondent loaned $100,000 to a client without complying with the rule governing business transactions with clients. In later actions, in which he sued the client, represented the client, or was a codefendant with the client, he committed repeated violations of the rules governing conflicts of interest, as well as other rule violations. Taking into account respondent's long unblemished legal career before his misconduct, the many years since his misconduct, the devastating impact of his misjudgment on his life, and the low risk of similar future misconduct, the hearing judge recommended discipline of three years stayed suspension and three years probation, on conditions including sixty days actual suspension. (Hon. Christopher W. Smith, Hearing Judge.)

Respondent sought review, contending that the recommended discipline should not include actual suspension. The review department adopted the hearing judge's findings, conclusions, and disciplinary recommendation. The review department noted that while respondent had had a long legal career with no other misconduct, and his initial motives might have been to aid the client, mitigating factors could not shield him from the consequences of his misconduct. Further, the review department concluded that the gravamen of respondent's misconduct was not the improper loan by itself, but the profound misjudgment which prompted lengthy litigation against a client and harmed the administration of justice. Accordingly, two months of actual suspension was appropriate.

COUNSEL FOR PARTIES

For Office of Trials: Janet S. Hunt

For Respondent: Franklin K. Lane, 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] **162.11 Proof—State Bar's Burden—Clear and Convincing**
191 Effect/Relationship of Other Proceedings
204.90 Culpability—General Substantive Issues
213.30 State Bar Act—Section 6068(c)
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
272.00 Rule 3-210 [former 7-101]

Due to difference in applicable standards of proof, a civil court finding is not binding on the State Bar Court for purposes of discipline. Where, upon evidence presented to civil court plus additional testimony, hearing judge concluded, contrary to civil court's decision, that respondent's loan to a client was not a sham transaction, then, resolving all reasonable doubts in respondent's favor, it was appropriate to dismiss charges that the loan transaction violated statutory duties to counsel only legal or just actions and to employ only truthful means of maintaining clients' causes; constituted act of moral turpitude; and violated rule against advising violations of law.

[2] **162.20 Proof—Respondent's Burden**
273.00 Rule 3-300 [former 5-101]
430.00 Breach of Fiduciary Duty

Business transactions between clients and their attorneys are closely scrutinized. The burden is on the attorney to demonstrate that the dealings are fair and reasonable. Where respondent loaned a large sum to one client so that the client could repay a debt to another client, respondent owed a fiduciary duty to both clients and was obligated to explain his role in the transaction and the impact it could have on his continued representation of their interests. Where one client, notwithstanding his written consent, did not understand the full implications of the transaction, and the other client did not consent in writing, respondent violated the rule governing business transactions with clients.

[3] **273.00 Rule 3-300 [former 5-101]**

A violation of any part of the rule governing business transactions with clients gives rise to culpability. The practice of using confessions of judgment to collect legal fees presents an opportunity for overreaching beyond judicial scrutiny which justifies a per se prohibition. Respondent's use of a confession of judgment to secure repayment of a loan to a client, a portion of which represented attorney's fees already owed by the client, made the transaction inherently unfair.

[4] **273.00 Rule 3-300 [former 5-101]**

Where respondent had obtained a deed of trust on property owned by his client's relatives to secure a loan owed to respondent by the client, and respondent subsequently became the attorney for the relatives in a suit which involved in part the conveyance to respondent of the deed of trust, respondent had an interest adverse to his clients which warranted the disclosures and written consent required by the rule governing business transactions with clients, even though the transfer had actually occurred two years earlier.

[5] **273.00 Rule 3-300 [former 5-101]**
691 Aggravation—Other—Found

Where respondent had made a loan to a client, and later represented that client in a lawsuit in which respondent was a codefendant, and where, in order to secure the client's debt to him, respondent

had obtained an ownership interest in property which was a subject of that lawsuit and respondent later sued to foreclose on that interest, the fact that respondent's original business transaction with the client became the subject matter of litigation aggravated his initial misconduct in failing to comply with the rule governing business transactions with clients, but did not constitute a separate ethical violation.

[6] **221.00 State Bar Act—Section 6106**
273.00 Rule 3-300 [former 5-101]
Where respondent filed a foreclosure suit in good faith against persons whom he was representing in another lawsuit, his violation of his fiduciary duties under the rule governing adverse interests to clients did not constitute a per se violation of the statute regarding acts of moral turpitude or dishonesty by attorneys.

[7] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where a difference of opinion on the merits of a client's defense led respondent to withdraw from representing the client one month prior to trial, with the client's consent, the withdrawal did not violate the rule regarding the duty of competent representation.

[8] **191 Effect/Relationship of Other Proceedings**
194 Statutes Outside State Bar Act
Where respondent was a creditor of a client's bankruptcy estate and also represented the client in the bankruptcy, and where the only evidence about the bankruptcy proceeding showed that the claims of two other creditors were found non-dischargeable, there was no clear and convincing evidence to sustain a charge that respondent's representation of the client was improper under bankruptcy law.

[9] **273.00 Rule 3-300 [former 5-101]**
273.30 Rule 3-310 [former 4-101 & 5-102]
561 Aggravation—Uncharged Violations—Found
Where respondent represented a client in the client's bankruptcy and at the same time represented the client's landlord, a company owned by respondent, in negotiating and drafting a new lease with the client, respondent was culpable, as charged, of representing conflicting interests. In addition, respondent's failure to comply with the requirements for business transactions with clients, including giving the client a reasonable opportunity to seek independent counsel, constituted an aggravating factor as uncharged misconduct.

[10 a, b] **273.30 Rule 3-310 [former 4-101 & 5-102]**
Under the former rule providing that an attorney shall not accept employment adverse to a client or former client relating to a matter in which the attorney has obtained confidential information, except with the written consent of the client, actual possession of confidential information was not required to be demonstrated; showing a substantial relationship between representations was enough to establish a conclusive presumption that the attorney possessed confidential information adverse to the client. Where respondent represented a client in many actions, most of which related to the client's financial status, respondent's representation of his own company against the client in unlawful detainer actions while representing the client in bankruptcy court constituted not only a violation of the former rule regarding adverse representation and confidential information, but also a representation of conflicting interests.

[11 a, b] **135 Procedure—Rules of Procedure**
218.00 State Bar Act—Section 6090.5
274.00 Rule 3-400 [former 6-102]
Respondent's letters to client demanding release from all liability, including for malpractice, in exchange for settling outstanding business disputes between them, violated rule prohibiting attorneys from attempting to exonerate themselves from liability for malpractice except in settlement of a malpractice claim. However, respondent's attempt to persuade client to withdraw State Bar complaint did not violate statute prohibiting attorneys from requiring as a condition of malpractice settlement that plaintiff agree to not file a complaint with the State Bar. The plain language of the statute is limited to settlements involving the agreement not to file a disciplinary complaint. The effect of withdrawal of charges is not the same as not filing them. Once the State Bar becomes aware of possible misconduct by the filing of a complaint, it does not need a complaining witness in order to go forward with its investigation. (Trans. Rules Proc. of State Bar, rule 507.)

[12] **277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]**
791 Mitigation—Other—Found
Even under the threat of a malpractice action by a client, an attorney is not excused from complying with the duty to provide the client with his or her file. The trial court's determination of the requirements of discovery in the malpractice case is irrelevant to this ethical obligation. Where a client sued respondent for malpractice and respondent failed to turn over the client's file on request, respondent violated the rule requiring release of the client's file, but his misconduct was mitigated by his adherence to the discovery conditions allowing access to the client's files ordered by the trial judge in the malpractice case.

[13] **755.52 Mitigation—Prejudicial Delay—Declined to Find**
755.53 Mitigation—Prejudicial Delay—Declined to Find
Where respondent failed to show that delay in his disciplinary proceeding was not attributable to him and that it caused specific, legally cognizable prejudice, the delay was not a mitigating circumstance.

[14] **710.10 Mitigation—No Prior Record—Found**
Where respondent had practiced law for more than 25 years before committing misconduct, such practice was entitled to considerable weight in mitigation.

[15] **795 Mitigation—Other—Declined to Find**
Where respondent's misconduct lasted over a long period of time, it could not be considered aberrational, despite his lengthy record of prior practice without misconduct and his good reputation in the legal community.

[16 a-c] **273.00 Rule 3-300 [former 5-101]**
273.30 Rule 3-310 [former 4-101 & 5-102]
586.19 Aggravation—Harm to Administration of Justice—Found
710.10 Mitigation—No Prior Record—Found
881.10 Standards—Business Transaction with Client—Suspension
881.20 Standards—Business Transaction with Client—Suspension
Where respondent not only made a bad loan to a client without complying with the rule governing business transactions with clients, but also thereafter exhibited profound misjudgment which prompted lengthy litigation against an existing client, and which harmed the administration of

justice, two-month actual suspension was appropriate discipline despite respondent's initial motive to aid the client and despite his long legal career and the high personal and financial cost he had already paid for his poor judgment.

ADDITIONAL ANALYSIS

Culpability

Found

273.01 Rule 3-300 [former 5-101]
273.31 Rule 3-310 [former 4-101 & 5-102]
274.01 Rule 3-400 [former 6-102]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]

Not Found

213.35 Section 6068(c)
213.45 Section 6068(d)
218.05 Section 6090.5
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
271.05 Rule 3-200 [former 2-110]
272.05 Rule 3-210 [former 7-101]
273.05 Rule 3-300 [former 5-101]

Aggravation

Found

521 Multiple Acts
591 Indifference

Declined to Find

545 Bad Faith, Dishonesty
582.50 Harm to Client

Mitigation

Found

740.10 Good Character
750.10 Rehabilitation

Standards

881.30 Business Transaction with Client—Suspension
901.10 Miscellaneous Violations—Suspension
901.30 Miscellaneous Violations—Suspension

Discipline

1013.09 Stayed Suspension—3 Years
1015.02 Actual Suspension—2 Months
1017.09 Probation—3 Years

OPINION

PEARLMAN, P.J.:

We agree wholeheartedly with the sentiments expressed by the Court of Appeal in its summary of many of the events which underlie the ethical misconduct charges against respondent Franklin Knight Lane. "This case is a primer on why lawyers should not do business with their clients." (*Younesi* v. *Lane* (1991) 228 Cal.App.3d 967, 969.) Respondent, who was admitted to practice in 1951 and is now near retirement, admits that he handled himself very poorly in this matter but challenges the recommended discipline. He contends that discipline should not include actual suspension because he has suffered enough for his mistakes in dealing with a difficult client with whom he also had a personal relationship which clouded his judgment.

After reviewing the lengthy record in this matter at the request of respondent, we adopt the hearing judge's findings and conclusions. The State Bar originally sought respondent's disbarment, but was unable to prove respondent's culpability on the most serious charges. Nonetheless, respondent was found culpable of repeated conflicts of interest and other rule violations resulting in significant harm to the administration of justice. The hearing judge took into account the many years that have passed since the misconduct, the devastating impact respondent's misjudgment has already had on his life, the previous 25-year blemish-free legal career of the respondent and the low risk that similar misconduct will occur in the future in recommending only 60 days suspension of respondent's license to practice law in California with other conditions, including a 3-year stayed suspension and 3 years of probation. We adopt the hearing judge's recommendation.

A. FACTS

1. The Loan

The incidents recounted in the 12-count notice to show cause arose from respondent's relationship with Jack Younesi ("Younesi"), an Iranian national and self-employed import/exporter. Respondent is a sole practitioner experienced in litigation in the areas of real estate and business law. Respondent met and was retained by Younesi in 1975 to perform legal work for himself and his company, Bianca Enterprises. Younesi also introduced respondent to many wealthy Iranian nationals, who employed respondent for their legal work. One of these individuals, Feizollah Younesi ("Feizollah"), a cousin of Younesi, retained respondent in early 1976 to assist in purchasing real estate and to represent him in litigation that resulted.

Respondent had a favorable impression of Younesi's apparent wealth and success, and anticipated a large volume of business from his association with Younesi and Younesi's close connection with other wealthy potential clients. In January 1976, respondent had loaned Younesi $5,000, secured by stock assigned to respondent, with the understanding that Younesi could repurchase the stock if the loan was paid within 90 days. Younesi defaulted on the loan and instead approached respondent in April 1976 for a large loan to repay a debt owed to Feizollah.

After initially resisting Younesi's pleas, respondent agreed to loan Younesi approximately $55,000, and made arrangements to borrow the money from several banks. The agreement signed April 23, 1976, represents this loan. The amount was shortly increased to $100,000, by amendment to the agreement dated April 28, 1976, of which approximately $70,000 was paid by respondent directly to Feizollah, approximately $12,800 was given to Younesi, and the remaining $17,200 was for outstanding legal fees Younesi owed to respondent, rounded off from over $18,400 owed, to make an even $100,000. Respondent also asked for and received a financial statement from Younesi, which indicated his net worth at over $850,000. Respondent did not investigate any of the information provided on the statement, or seek an independent valuation of any of the property, including the real property.

As security for the $100,000 loan, Younesi assigned his interest in his home in Pasadena to respondent. The home was held in the name of Younesi's wife's brother and sister-in-law, Mr. and Mrs. Ray Nehdar, subject to a first deed of trust held by California Federal Bank. Younesi promised to use his best efforts to have the record title of the house transferred into his name without delay and thereafter execute a second deed of trust on the house to

respondent. If the record title was not transferred into Younesi's name within 30 days, Younesi agreed to get his brother-in-law and wife, the Nehdars, to execute a second deed of trust on the property to respondent. Younesi also consented to a lien on his interest in the property and to a levy of any writ of attachment or execution on the property.

In addition, Younesi executed a security agreement and UCC 1 form covering all his personal property, including his automobiles, all his household and office goods, and furniture and furnishings, and promised to deliver to respondent 100 semi-precious stones. The amended agreement provided that Younesi would grant a power of attorney to respondent over all Younesi's stock and security accounts with licensed brokerage houses as well. On April 28, 1976, the same date of the amended agreement, Younesi executed a promissory note payable on demand to respondent with interest due from June 1, 1976, and a confession of judgment on the note. The confession of judgment would not be filed if, by June 1, 1976, Younesi had repaid at least $85,000 of the loan and, in respondent's view, there was adequate security for the balance.

Further, a letter on Younesi's stationery for the "IRAN SOCIAL, ECONOMIC AND CULTURAL ORGANIZATION" dated April 23, 1976, signed by Younesi, stated that he and his brother jointly owned property in Tehran and agreed, in the event that Younesi was unable to repay the loan, he would either convey to respondent a one-half interest in the Iranian property or sell it to satisfy his debt. The letter also stated that respondent had advised him to consult with another attorney before entering the loan transaction, and he had informed respondent that he did not wish to do so, and was fully capable of acting without independent advice because he was sophisticated in business matters. Younesi has repudiated this letter in subsequent proceedings, including the discipline hearings, as a fabrication constructed prior to trial of an unlawful conveyance complaint brought by creditors of Younesi against him, the Nehdars and respondent (hereinafter "*Lalingo* case"). Weighing all the evidence including the testimony of Younesi and respondent, the hearing judge concluded that the document was authentic.

2. Creditor Lawsuits

By early summer of 1976, Younesi was threatened with legal action by three brokerage firms, Merrill Lynch (suit filed approximately June 9, 1976), Dean Witter (July 1976) and Drexel Burnham (October 1976), as a result of bad checks Younesi had executed to cover his option accounts after he had suffered considerable losses in the stock market. Some of this stock activity was initially financed by the funds Younesi borrowed from Feizollah. Respondent represented Younesi in all three lawsuits.

Respondent demanded payment of his loans on June 4, 1976. On June 22, 1976, he wrote to Younesi that he was in default on the loan, had 48 hours to arrange for payment, and that the confession of judgment would be filed if payment was not forthcoming. The confession of judgment was filed on July 22, 1976, but later rejected by the court clerk.

Respondent also filed suit against the Nehdars and Younesi in July 1976 for an equitable lien on the Pasadena house because the Nehdars had neither transferred title into Younesi's name nor executed a second trust deed to respondent. In response to the lawsuit, the Nehdars granted a second deed of trust to respondent as beneficiary, and respondent's "shell" corporation, Providencia Limited, as trustee.

Despite these financial problems, in October 1976, respondent arranged to have two other clients each loan Younesi $7,500 ($15,000 total), secured by 15,000 shares of Stanwood Oil stock issued to Younesi's corporation, Bianca Enterprises, Inc., and payable in 90 days. Younesi defaulted on these loans and respondent testified that he (respondent) paid the clients sometime thereafter.[1]

1. There is little evidence in the record concerning these additional transactions with clients, since they were not charged as misconduct.

In early 1977, respondent convinced Younesi to stipulate to judgments in two of the brokerage cases, totaling approximately $50,000. Younesi balked at any settlement with Merrill Lynch, contending that he had a viable defense and countersuit against the action. Respondent considered Younesi's position to be without merit and withdrew from representing him in the case in March 1981, one month before trial, with Younesi signing the substitution of counsel form to appear in propria persona. The lawsuit went by default in favor of Merrill Lynch, with judgment of $70,000 in compensatory damages and $50,000 in punitive damages awarded.

Other creditors of Younesi filed suit or threatened to do so. Respondent remained Younesi's attorney in these actions. In one case filed in March 1978, the *Lalingo* case, Younesi, his wife, the Nehdars, respondent, and Providencia were charged with conspiring to accomplish the fraudulent conveyance of Younesi's assets to shelter them from his creditors.

In July 1978, with the debt and interest owed to respondent by Younesi totalling over $120,000, respondent filed suit against Younesi and the Nehdars to foreclose on the Pasadena house. The Nehdars, concerned about their credit record, conveyed to respondent's corporation, Providencia, a deed in lieu of foreclosure prior to the sale on August 9, 1978, and in exchange, respondent cancelled Younesi's $100,000 note and the Nehdars' second deed of trust. After taking record title to the house, respondent's corporation leased the house to Younesi and his wife, at a rent of $1,000 per month, with Younesi making the mortgage payments to California Federal Bank directly. Monies in excess of the costs of the property (found by the hearing judge to be the mortgage payment, taxes, insurance, etc.) were applied to attorney's fees Younesi owed respondent.

Respondent also prosecuted two of Younesi's lawsuits, one a securities case and the other a personal injury matter arising out of an automobile accident in which Younesi and his wife were involved. Younesi assigned his interest in the securities case to respondent on November 1, 1978, stating that the assignment was made in part "to induce said Franklin K. Lane III to permit the undersigned and his family to remain as tenants in the single family residence presently occupied by the undersigned at 3765 Hampton Road, Pasadena, California." (Exh. H.) Younesi and respondent testified that he assigned his interest in the automobile accident case[2] to respondent in January 1981. This assignment was made to pay for attorney's fees and "other indebtedness" Younesi owed respondent. The case settled sometime after March 1982 for $10,000.

3. Younesi's Bankruptcy and Lease on Pasadena Property

At respondent's repeated urging and, in at least one instance, upon respondent's threat of eviction, Younesi filed in March 1982 a chapter 7 bankruptcy petition (personal liquidation) prepared by respondent.[3] The filing had the effect of staying all creditor litigation then pending. The petition noted an outstanding secured debt of $60,000 owed to respondent for legal fees accrued after 1976 and respondent filed with the court notice that he had charged Younesi $1,000 for preparing the bankruptcy petition. Respondent continued to represent Younesi in bankruptcy proceedings, primarily in an adversary proceeding in which several creditors, including Drexel Burnham and Dean Witter (which also intervened in 1980 as plaintiffs in the *Lalingo* case), succeeded in having their claims declared non-dischargeable in October 1985. As of the date of the last hearing in the hearing department in this disciplinary matter, Younesi had yet to be discharged from bankruptcy due to an appeal brought by respondent in connection with the adversary proceedings.

Within a month of the bankruptcy filing, respondent had Younesi and his wife execute another lease for the Pasadena house in April 1982, increasing the rent to $1,500 per month, with another increase to $2,000 per month after one year. The hearing judge

2. Respondent was already entitled pursuant to their agreement to one-third of any recovery in the automobile accident case.

3. Aside from the bankruptcy petition, the bankruptcy file was not put into evidence.

found part of the payments were applied to the outstanding attorney's fees Younesi owed to respondent. Any arrearages Younesi may have accrued under the 1978 lease were not listed as claims by respondent on Younesi's bankruptcy petition and respondent did not seek bankruptcy court approval of the new lease with Younesi which had been entered into after the filing.

Respondent's company, Providencia Limited, filed an unlawful detainer action against Younesi for non-payment of rent in June 1983, but respondent permitted Younesi to remain in the property after receiving a $3,000 payment. Nevertheless, a default was entered against the Younesis in July 1983. In June 1984, respondent's company obtained a default judgment against the Younesis in the unlawful detainer action. An application for writ of possession was filed on August 29, 1985, and a writ of possession was issued to Providencia on September 19, 1985. Thereafter, respondent promised that he would not evict the Younesi family until the conclusion of the *Lalingo* trial.

4. Lalingo Trial

The *Lalingo* lawsuit was revived in April 1986, after Dean Witter and Drexel Burnham succeeded in having their debts declared non-dischargeable by the bankruptcy court on the grounds that they arose out of false representations and fraud by the debtor, Younesi. (11 U.S.C. § 523(a)(2).) The trial was held in August 1986, with respondent appearing on behalf of himself and his company, Providencia.[4] The trial court issued its statement of decision on October 17, 1986, in which it set aside the transfer of the Pasadena property to respondent. The court concluded that the loans to Younesi from respondent were sham transactions[5] and were without fair consideration, that respondent, as Younesi's counsel, was in a position to know Younesi's true financial situation, and that when the Nehdars conveyed the property by trust deed in lieu of foreclosure, the Younesis were clearly insolvent.

Respondent filed initial papers to appeal the *Lalingo* court decision, but the appeal was dismissed when respondent failed to pay costs on time.

5. Unlawful Detainer Actions

After the *Lalingo* court decision, respondent's company revived its unlawful detainer action against the Younesis. The Younesis retained counsel and filed motions to vacate defaults and to set aside the default judgment in January 1987, which was granted. The matter was tried on February 10, 1987, and judgment was in favor of the Younesis, with a statement of decision issued on March 11, 1987, finding that the *Lalingo* decision had collateral estoppel effect on the issue of ownership of the Pasadena property.[6]

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4. Respondent originally appeared in the lawsuit on behalf of himself, his company, the Nehdars and the Younesis. Plaintiffs moved to have respondent disqualified as counsel for Providencia, the Nehdars and the Younesis because it was likely that respondent would be called as a witness in the proceeding and respondent would then be in the position of violating former rule 2-111(A)(4) of the Rules of Professional Conduct (eff. prior to May 26, 1989), which permitted an attorney to testify as a witness on behalf of a client only if the client was advised of the possible implications of the dual role, was given the opportunity to seek independent counsel and gave written consent to the continued employment, the consent to be filed with the trial court in a civil matter before the commencement of trial. Respondent stipulated to his disqualification and the plaintiffs' motion was granted in November 1978. In February 1980, respondent filed a substitution of attorney form for Providencia Limited, substituting himself for other counsel. The Younesis appeared in propria persona.

5. The court found the transaction suspect because (1) the payments to Feizollah were made in cashier's checks, when Feizollah had a bank account; (2) Feizollah filed suit against Younesi in May 1976, shortly after allegedly receiving $82,000 from respondent to satisfy Younesi's debt, for $18,000 plus interest for sums owed; (3) respondent could not produce a cashier's check for over $10,000 loaned to Younesi as part of the transaction; (4) respondent did not do a title search of the property prior to the loan, although he is an experienced real estate attorney; (5) respondent rounded off his fees by approximately $1,300 to make the loan exactly $100,000, a reduction which the trial court found incredible; and (6) Younesi was permitted to stay in the Pasadena property for 10 years, during which time he often did not pay rent.

6. The judgment was eventually vacated and the action was dismissed on respondent's motion on April 27, 1987.

Providencia posted a three-day notice on the Pasadena property on February 10, 1987 (the day of trial in the first case), and filed a second unlawful detainer action in superior court in Los Angeles on March 13, 1987. This time an associate in respondent's office initially appeared on behalf of Providencia. The Younesis demurred to the complaint and the action was dismissed on June 24, 1987.

On July 15, 1987, a third unlawful detainer action was filed against the Younesis by respondent, on behalf of Providencia. This third action was also dismissed by statement of decision filed May 4, 1988.

6. Malpractice Action and Settlement Offers

Respondent, Younesi, and Younesi's son met in early March 1986 in an attempt to resolve their differences. Respondent wrote a letter to Younesi on March 6, 1986, in which he made two proposals to Younesi, requiring in either instance that Younesi and his wife "give me [respondent] a full and complete release of any claims, demands or causes of action that you may have against me or Providencia Ltd." In a second letter dated September 29, 1986, respondent threatened Younesi with eviction from the Pasadena house unless he met conditions including the following: "I want a written waiver and relinquishment signed by you and Evelyn of any and all claims, demands or causes of action against me from any of our past dealings or transactions, including any claims against me for malpractice, breach of fiduciary duty or any claim for any unethical conduct on my part."

The Younesis and the Nehdars filed a malpractice and other civil torts action against respondent and Providencia on November 6, 1986. By this point, a complaint had also been filed with the State Bar. During the malpractice case, which was tried before a jury between October 17, 1988, and November 17, 1988, a friend of the Younesi family approached respondent to explore a possible settlement. Respondent told that friend of the Younesi family that he would require as a part of any settlement that Younesi go to the State Bar to get it to drop the discipline investigation.[7]

During pretrial proceedings, Younesi requested respondent to deliver his files to his new counsel. Respondent refused, citing the cost of duplicating the voluminous file and the fear that Younesi would destroy documents in the file prior to the malpractice trial. The trial court ordered that Younesi's counsel be given access to the files in respondent's office, but did not require that they be delivered to Younesi as part of a discovery order.

The jury found in respondent's favor. On Younesi's untimely motion, the trial judge entered a judgment notwithstanding the verdict in Younesi's favor. This was reversed on appeal; the Court of Appeal found that Younesi had not met the statutory deadlines for filing a motion for a judgment notwithstanding the verdict, vacated the trial court judgment, and reinstated the jury verdict. (*Younesi* v. *Lane*, *supra*, 228 Cal.App.3d 967.)[8]

Eventually, the Pasadena house was sold, the *Lalingo* judgment creditors were satisfied, and the remaining proceeds went to Younesi.

B. CULPABILITY FINDINGS

Rather than tracking the counts in the notice to show cause, we have analyzed the findings in the context of the particular transactions involved.

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7. On this issue, the hearing judge made an additional finding based on the testimony of the friend of the Younesi family which is in direct contradiction of testimony of respondent found credible by the hearing judge. We reconcile these conflicts in the findings by adopting only that finding which is supported by both respondent's and the friend's testimony, i.e., that respondent demanded that Younesi withdraw his disciplinary complaint as a condition of settlement.

8. At the close of the State Bar's case, respondent moved to dismiss counts 1 through 8 based upon the res judicata effect of the malpractice judgment in respondent's favor. The hearing judge denied the motion. On review, respondent has not raised this issue or, more properly, any collateral estoppel effect of the attorney misconduct issues adjudicated in the malpractice action. Upon de novo review, we see no basis for disagreeing with the hearing judge's ruling.

1. Loan to Younesi

[1] Due to the difference in applicable standards of proof, the civil court finding by the *Lalingo* court was not binding on the State Bar Court for purposes of discipline. (*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 947.) Taking into consideration both the evidence presented at the superior court trial which was offered into evidence by the State Bar below and the testimony of respondent and Younesi before him, the hearing judge found, contrary to the decision of the *Lalingo* court, that the loan by respondent to Younesi was not a sham transaction, but a bona fide loan to Younesi from respondent for consideration. The hearing judge concluded that the indicia of fraud cited by the superior court judge in *Lalingo* were that Feizollah received the proceeds in the form of cashier's checks rather than into his bank account, and that respondent had rounded off his fees, neither of which in the hearing judge's view constituted affirmative evidence of fraud. The hearing judge also accepted respondent's testimony that he did not have knowledge of Younesi's precarious financial situation when he made the loan to Younesi. He further credited the testimony of both Younesi and respondent that the transaction occurred. The State Bar has not sought review of these findings. Resolving all reasonable doubts in respondent's favor, it was appropriate to dismiss the charges that the loan transaction was an attempt to shield assets, in violation of former rule 7-101 and sections 6068 (c), 6068 (d) and 6106.[9]

The hearing judge found that the terms and conditions of the loan were not fair and reasonable because it contained a confession of judgment for fees (which constituted about 18 percent of the proceeds of the loan), and also because the conflicts inherent in the transaction were not adequately explained to both clients. [2] Business transactions between clients and their attorneys are closely scrutinized. (*Ritter* v. *State Bar* (1985) 40 Cal.3d 595, 602.) The burden is on the attorney to demonstrate that the dealings were fair and reasonable. (*Hunniecutt* v. *State Bar* (1988) 44 Cal.3d 362, 372-373.) The hearing judge found that respondent owed a duty to both Younesi and Feizollah to explain his role in the transaction and the impact it could have on his continued representation of their interests. As noted earlier, the hearing judge found, contrary to Younesi's testimony, that Younesi's written statement of April 23, 1976, acknowledging his right to independent counsel was authentic. However, the hearing judge concluded that notwithstanding the written consent, Younesi did not understand the full implications of the transaction. Further, respondent did not have Feizollah's consent in writing. Respondent does not challenge the conclusion that Feizollah was involved in a business transaction such that former rule 5-101 conditions would attach. Since respondent was acting both as an agent of Younesi in delivering the funds to him and as a fiduciary to both parties in the transaction (see *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962), the prophylactic conditions of former rule 5-101 applied to respondent's dealings with Feizollah as well.

[3] Respondent argues in his brief that the terms and conditions of the loan were fair and reasonable to Younesi and contends he should not be bound by the Supreme Court's holding in *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, 450, that prohibits the use of a confession of judgment to collect legal fees since his fees constituted less than 20 percent of the monies loaned. As the State Bar noted, a violation of any part of former rule 5-101 gives rise to culpability. (*Read* v. *State Bar* (1991) 53 Cal.3d 394, 411.) Over $17,000 in fees subject to a confession of judgment cannot be considered an insignificant sum. The practice of using confessions of judgment to collect legal fees presents an opportunity for overreaching beyond judicial scrutiny which justifies a per se prohibition. (*Hulland* v. *State Bar*, *supra*, 8 Cal.3d at p. 450; *Isbell* v. *County of Sonoma* (1978) 21 Cal.3d 61, 70-71; *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 600.) Respondent's use of the confession of judgment to secure over $17,000 in fees made the transaction inherently unfair.

9. Except as otherwise noted, all further references to former rules are to the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989, and all further references to sections are to the Business and Professions Code.

2. July 1978 Foreclosure Action

[4] By July 1978, when respondent filed suit against the Nehdars to foreclose on the Pasadena property, he was also representing them in the *Lalingo* lawsuit. The subject matter of the *Lalingo* lawsuit was in part the conveyance of the deed of trust by the Nehdars to respondent in June 1976. This was clearly an interest adverse to his clients and warranted the disclosures and written consent required by former rule 5-101. Respondent's argument that he did not need to comply since the transfer had actually occurred two years earlier ignores both the legal significance of the transfer of the title to his company and the impact of the foreclosure action on the Nehdars. Fidelity to his clients' interest ahead of his own required him to follow the requirements of former rule 5-101 when the foreclosure action shifted the legal relationships.

[5] As to the Younesis, the issue is whether additional explanations to and consent were required from them or whether respondent was required to withdraw from representation, being a codefendant and simultaneously possessing an ownership interest in the subject of the *Lalingo* litigation. The foreclosure was clearly a foreseeable result of respondent's original business transaction with Younesi. The fact that the transaction became the subject matter of litigation aggravates the initial misconduct, but does not constitute a separate ethical violation.

[6] The State Bar did not challenge the hearing judge's conclusion that respondent's actions in the foreclosure proceeding did not constitute an act of moral turpitude under section 6106. Rather, the judge found that respondent acted in good faith in the proceeding and that respondent's violation of his fiduciary duties under former rule 5-101 did not constitute a per se violation of section 6106. In *Hawk* v. *State Bar*, *supra*, 45 Cal.3d 589, the Supreme Court found a violation of former rule 5-101, coupled with misleading actions against the clients, constituted a violation of section 6106. It dismissed section 6106 charges in *Connor* v. *State Bar* (1990) 50 Cal.3d 1047 when it did not find sufficient evidence that the attorney was intentionally dishonest. The hearing judge's conclusion is consistent with this case law.

3. Withdrawal from Merrill Lynch Case

[7] The State Bar has not challenged the dismissal of charges arising from respondent's withdrawal in March 1981 from representing Younesi in the Merrill Lynch lawsuit one month prior to trial. The client's consent to the withdrawal was evident from his signature on the substitution of counsel form, and resulted from a difference of opinion on the merits of Younesi's defense to the lawsuit.[10] We see no reason to disturb the hearing judge's finding in this regard.

4. Bankruptcy

[8] The hearing judge concluded that there was no clear and convincing evidence that respondent's representation of Younesi while a creditor of the estate was in violation of the Bankruptcy Code. We do not have the record of the adversary proceedings in the bankruptcy court in this record, nor was there much testimony below concerning the bankruptcy adversary proceedings. Since all that was established below is the fact that the claims of Dean Witter and Drexel Burnham were found non-dischargeable under section 523(a)(2) of the Bankruptcy Code, there is no clear and convincing evidence to sustain a charge that respondent's representation of Younesi was improper in this respect.

[9] We agree with the hearing judge that the execution of the new residential lease between Providencia and the Younesis shortly after Younesi had filed for bankruptcy was not a reaffirmation

10. The decision below indicated that the notice to show cause had incorrectly charged respondent with a violation of former rule 6-101(2) and, finding sufficient notice to respondent, proceeded with its analysis under former rule 6-101(A)(2). Former rule 6-101(A)(2) was an amendment to rule 6-101 and became effective on October 23, 1983. Since the misconduct allegedly occurred between June 1976 (when the Merrill Lynch suit was filed) and respondent's withdrawal from representation on March 27, 1981, the prior rule 6-101(2) was in force and the notice properly charged the prior rule.

agreement nor was there sufficient evidence produced to establish that it was otherwise inconsistent with bankruptcy law.[11] However, we concur with the hearing judge that respondent violated former rule 5-102(B) by representing conflicting interests. Respondent represented Younesi in bankruptcy court and at the same time negotiated and drafted the new lease on the Pasadena property for Providencia. Further, because of the bankruptcy filing, this new lease was a new business transaction with his clients and respondent was obligated to meet the dictates of former rule 5-101, including giving his clients a reasonable opportunity to seek independent counsel. He did not and we find this uncharged conduct to be an aggravating factor. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35-36.)

The hearing judge also concluded that the execution of the new lease and respondent's unlawful detainer actions did not violate the automatic stay provisions of the Bankruptcy Code.

The State Bar has not objected to the finding that Younesi's assignment to respondent of his recovery in two lawsuits was not in violation of the automatic stay. These transactions took place more than a year prior to the filing and thus did not come within the ambit of 11 United States Code section 329(a). Nor did the State Bar charge the assignments as potential violations of former rule 5-101.

5. Unlawful Detainer Actions

[10a] Respondent contests the finding that his reactivation of the unlawful detainer action in the fall of 1986 after the court decision in the *Lalingo* case was improper, and contends that there was no confidential information which he received as part of his representation of Younesi in the bankruptcy proceedings and *Lalingo* litigation which related in any way to the unlawful detainer actions. Respondent takes a too narrow view of his representation of Younesi. Former rule 4-101 states that an attorney shall not accept employment adverse to a client or former client relating to a matter in which he has obtained confidential information, except with the written consent of the client. Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (*H.F. Ahmanson & Co.* v. *Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1452.)

[10b] Respondent had a long relationship with Younesi, representing him in many actions, most of which related to Younesi's financial status. Respondent denies that he acted as attorney for Providencia, and thus maintains that he cannot have violated the rule. According to the record of the unlawful detainer actions, respondent is wrong. During various points in the unlawful detainer actions, respondent made court appearances and filings for his company, Providencia Limited, against Younesi while continuing appeals on Younesi's behalf in the bankruptcy court. This was not only a violation of former rule 4-101, but a representation of conflicting interests as well.

The State Bar has not sought review of the hearing judge's conclusion that respondent's repeated filings for unlawful detainer did not constitute harassment or improper use of the legal process, contrary to former rule 2-110(A) and (B). While we do not look with favor on respondent's actions in these matters, we do not discern in this record a basis for reversing the hearing judge on this issue.

6. Malpractice Action

[11a] Respondent concedes that his letters to Younesi in March and September 1986 constituted a violation of former rule 6-102 as an attempt to

11. The hearing judge also concluded that portions of Younesi's payments which were in excess of respondent's actual costs of the property (the mortgage payment, taxes, insurance, etc.) were applied to attorney's fees Younesi owed to respondent. Payments from a debtor for attorney's fees resulting from an adversary proceeding in the bankruptcy court are not in violation of the automatic stay, but have to be approved by the bankruptcy court as postpetition legal fees. (11 U.S.C. § 329.) If they were paid for legal services provided prior to the March 1982 bankruptcy filing, then such payments would be in violation of the automatic stay. Respondent was not charged with this as misconduct in the notice to show cause.

exonerate himself from any liability but he contends that his attempt to have Younesi withdraw his State Bar complaint in the midst of the malpractice trial was not also a violation of section 6090.5. We must agree with respondent because of the clear limitations of the statute. Section 6090.5 establishes grounds for discipline when a bar member requires "as a condition of a settlement of a civil action for professional misconduct brought against the member that the plaintiff agree to not *file* a complaint with the disciplinary agency concerning that misconduct." (Emphasis added.)

[11b] The State Bar argues that there is no difference between requiring a client as a condition of settlement not to file disciplinary charges against the attorney and attempting to force the client to withdraw those charges once filed as a condition of settlement. The State Bar argues that section 6090.5 applies in both instances to prevent attorney interference with the proper investigation of unethical conduct by the attorney. We cannot agree. The plain language of the statute is limited to settlements involving the agreement not to file a disciplinary complaint. (See, e.g., *Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 800, 801 [no extrinsic aids needed to interpret clear, unambiguous language of law].) Nor is the effect of withdrawal of charges the same as not filing them in the first instance. Once the State Bar becomes aware of possible misconduct by the filing of a complaint, it does not need a complaining witness in order to go forward with its investigation. (Rule 507, Trans. Rules Proc. of State Bar.)

[12] Respondent's failure to surrender Younesi's files violated former rule 2-111(A)(2). Even under the threat of a malpractice action by the client, an attorney is not excused from complying with his duty to provide the client with his or her file. The trial court's determination of the requirements of discovery is irrelevant to this ethical obligation. In *King* v. *State Bar* (1990) 52 Cal.3d 307, the attorney did not file an action within the statute of limitations and was discharged by his client. The client retained new counsel, requested that his files be sent to his new attorney and sued King for malpractice. The Supreme Court found King had violated former rule 2-111(A)(2) when he failed to deliver his former client's files. (*Id.* at pp. 310, 313, 315; see also *Finch* v. *State Bar* (1981) 28 Cal.3d 659, 663-665 [attorney refused to forward file to new counsel; after malpractice claim filed, sent file instead to malpractice insurance carrier; culpable of misconduct].) However, we find the misconduct mitigated by the fact that respondent did adhere to the discovery conditions allowing access to Younesi's files ordered by the trial judge in the malpractice case.

C. DISCIPLINE RECOMMENDATION

Aggravating circumstances identified by the hearing judge included respondent's repeated conflicts of interest with his client over a 12-year period, significant harm to the administration of justice due to the multiplicity of suits arising between respondent and Younesi, and respondent's indifference toward rectifying his misconduct. Nonetheless, the hearing judge did not find any resulting harm to Younesi and rejected the State Bar's assertion that respondent's pleadings showed evidence of bad faith.

In mitigation, the hearing judge noted respondent's 25-year legal career without discipline and that the misconduct was aberrational. Respondent presented character evidence from one attorney and three retired judges, all acquainted with respondent for more than 30 years, who were aware of respondent's work in the legal community and conversant with the disciplinary charges against respondent. The hearing judge concluded from their testimony that respondent has a good reputation of long standing in the Los Angeles legal and judicial community.

The hearing judge rejected the State Bar's recommendation of disbarment as totally unwarranted. Indeed, the State Bar apparently concedes this because it did not seek review of the hearing judge's recommendation of two months suspension. It has argued to this court on respondent's request for review that the discipline might be increased, but does not specify any particular degree of discipline to which it might be increased.

The case cited in support of the State Bar's original disbarment recommendation, *Rimel* v. *State Bar* (1983) 34 Cal.3d 128, involved multiple misap-

propriations by an attorney from clients in bankruptcy—very serious misconduct which the Court concluded the attorney was likely to repeat in the future. In fact, the only similarities between that case and the instant case are that there were business transactions between the attorneys and their clients and the clients were in bankruptcy. In a brief recitation of cases involving conflict of interest, the hearing judge noted that the range of discipline for the type of misconduct involved here has been from a private reproval to two years actual suspension. Finding that respondent placed his self-interest before his duty to his client but that his conduct did not cause his client harm and was aberrational, the judge recommended that respondent receive a three-year stayed suspension and three years probation on conditions, including sixty days actual suspension.

Respondent contends that the recommended discipline is excessive because of the lengthy time that has passed since the bulk of the misconduct took place, his long practice without misconduct, the lack of harm to the client, and alleged excessive delay by the State Bar in conducting the discipline proceedings. Respondent indicates that he suffered great economic losses from his representation of Younesi and prolonged anxiety and stress as a result of the extended time it took for this matter to be filed and tried.

In rebuttal, the examiner outlines the number of extensions and continuances granted to respondent during the pendency of the matter in the hearing department and contends that respondent has not shown prejudice resulting from the alleged delay. She argues that the evidence in aggravation outweighs that presented in mitigation and that respondent's inability to recognize his ethical responsibilities toward one client over a 12-year period should not be considered aberrational behavior. She also revives her argument that respondent's pleadings, including his brief before us, were not in good faith and demonstrate his complete lack of understanding of the Rules of Professional Conduct and the State Bar Act.

[13] On the question of delay, in order to establish mitigation, respondent must show that the delay was not attributable to him and that it caused specific, legally cognizable prejudice. (Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct ("stds."), std. 1.2(e)(ix); *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 361.) He has not done so.

[14, 15] Respondent's over 25 years of practice (1951-1976) without misconduct is entitled to considerable weight in mitigation. "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time. [Citations.]" (*In re Young* (1989) 49 Cal.3d 257, 269.) Respondent's good reputation in the legal community is also mitigating. (*Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 331; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 471.) However, we cannot consider respondent's misconduct over such a long period of time aberrational.

Nonetheless, this case does not warrant comparison to the extreme case of self-dealing and disloyalty to client interests as exemplified in *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612.[12] Many prior cases that involve improper business transactions with clients are coupled with other, more serious misconduct. For example, in one of the seminal cases in this area, *Hawk* v. *State Bar*, *supra*, 45 Cal.3d 589, the attorney not only acquired an interest adverse to his client by procuring a note secured by a deed of trust in a client's property, but committed acts of moral turpitude and dishonesty by misleading his clients as to the time period they had to pay off their indebtedness and, in one instance, changing the amount of the indebtedness secured after the note had been executed. Hawk also had a prior record of discipline, but the Court mitigated the amount of discipline it imposed because the former rule 5-101 charge was an issue of first impression. He received a four-year stayed suspension, a four-year period of probation and a six-month actual suspension.

12. In that case, there were multiple transactions rife with conflicts, coupled with large misappropriations of client funds, false testimony, and harassment of the client, resulting in disbarment. (*Rosenthal* v. *State Bar*, *supra*, 43 Cal.3d 612.)

In *Beery* v. *State Bar* (1987) 43 Cal.3d 802, the attorney was involved in a single transaction with a client in which he induced the client to invest $35,000 from a settlement in a business venture without disclosing his own involvement and other material facts and without complying with former rule 5-101. He also personally guaranteed the loan repayment knowing at the time he would be unable to do so in the event of default by the company. The Court found the attorney's acts to be dishonest and an abuse of the attorney-client relationship, considering that the client was particularly vulnerable and unsophisticated in business matters. Although the attorney had a lengthy legal career without prior discipline, the Court found he did not appreciate the seriousness of his misconduct in characterizing the client's testimony and State Bar findings as "trivial." The Court imposed a five-year stayed suspension and two (rather than the recommended three) years of actual suspension, and required $35,000 in restitution.

In *Brockway* v. *State Bar* (1991) 53 Cal.3d 51, an experienced attorney commingled a $500 check to be used as his client's earnest money in a real estate transaction and, in the more serious charge, required a criminal client facing multiple murder counts to execute a quitclaim deed on his home to secure payment for legal fees, a transaction both unfair to the client and entered into without satisfying the safeguards of former rule 5-101. The Court found mitigating the then novel application of the rule to the facts, the roughly equal value of the property obtained and the value of the legal services rendered, and character evidence of the attorney's long record as a conscientious and honest practitioner. He was actually suspended from practice for three months, with a one-year stayed suspension and two years of probation.

Here, we find that much of the misconduct in this case stems from respondent's unique ties with Younesi. Their relationship was beyond that of an attorney and client, and they were bound together by more than is evidenced by their financial dealings. The two of them and their spouses traveled together and over the years exchanged gifts and other tokens of friendship. Their personal relationship soured over time due to bad judgment, greed, and self-interest on both sides. As a result, respondent allowed his professional judgment to be clouded and his legal career sullied.

There are some aspects of this case which resemble *In re Chira* (1986) 42 Cal.3d 904. In that matter, the attorney participated in a tax shelter scheme which led to his conviction on federal criminal conspiracy charges. The Supreme Court, in eliminating a recommended 30-day actual suspension as a condition of Chira's 3-year probation period, found that Chira had an otherwise exemplary 24-year legal career and was personally and professionally devastated by his misconduct. However, Chira did not personally gain from the transaction and was led by and was overly trusting of a co-conspirator in a matter outside the practice of law.

[16a] Here, after a long legal career, respondent has paid a high personal and financial cost for his poor judgment. While respondent's initial motives may have been to aid his client, that does not shield him from the consequences of his misconduct. (See *Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1060; *Ames* v. *State Bar* (1973) 8 Cal.3d 910.) "[M]itigating factors cannot wholly dissolve the violation of the rule [former rule 5-101] that proscribes such conduct even when engaged under such circumstances, because of its potential risk of harm to clients and its erosion of the highest standards of loyalty demanded of members of the bar." (*Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1060.)

[16b] Indeed, if all respondent had done was to make a bad loan to a client without complying with former rule 5-101, in all likelihood he would not be facing suspension. The gravamen of his misconduct is the profound misjudgment which prompted lengthy litigation against an existing client and harmed the administration of justice. The applicable standards call for suspension, unless the extent of the misconduct and harm to the client are minimal, in which case, the appropriate discipline would be reproval. (Stds. 2.8 and 2.10.)

[16c] After considering the case law discussed above, and weighing the need to protect the public, the courts and the profession and to maintain the

public trust and standards of the profession, we agree with the hearing judge's recommendation of two months actual suspension.

We therefore recommend that respondent be placed on a three-year suspension, stayed, with three years probation on the conditions set forth in the hearing judge's decision, including sixty days actual suspension. We further recommend that costs be awarded to the State Bar and be added to and become part of the membership fee for the next calendar year. (Bus. & Prof. Code, § 6140.7.)

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ANTHONY NOVO FONTE

A Member of the State Bar

No. 90-O-18297

Filed March 16, 1994

SUMMARY

Respondent failed to provide a proper accounting regarding the fees paid to him by clients he represented in real property litigation. He also drafted a trust instrument for the same clients, naming himself as successor trustee, without full disclosure, written advice as to independent counsel, and informed, written client consent. In a separate matter, respondent represented both an elderly couple and another couple who wished to give them in-home personal care in exchange for an interest in their property, without written consent of all clients to the adverse representation. Finding respondent culpable of several rule violations, aggravated by serious uncharged misconduct but mitigated by respondent's long record of practice with no prior discipline and extensive public service, the hearing judge recommended a one-year stayed suspension with two years probation and 60 days of actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent sought review, contending that he was not culpable of most of the violations found, that his misconduct was minor and technical, and that the appropriate discipline was a private reproval. The review department rejected respondent's challenges to the hearing judge's findings and conclusions, holding in the first matter that his drafting of the trust agreement naming himself as successor trustee constituted obtaining an adverse interest in a client's property, and in the second matter that respondent had simultaneously represented clients with conflicting interests. Expressing concern about respondent's recognition of his duty to serve his clients' interests faithfully and to avoid overreaching them, the review department adopted the hearing judge's discipline recommendation.

COUNSEL FOR PARTIES

For Office of Trials: Margaret P. Warren, Allen L. Blumenthal

For Respondent: Eugen C. Andres

HEADNOTES

[1] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where respondent's failure to file answers to interrogatories when due flowed from a simple calendaring error, and respondent handled other discovery timely, respondent was properly found not culpable of failure to provide competent legal services.

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] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
A true retainer fee is one which is paid solely to ensure the attorney's availability over a given period of time, and is earned when paid since the attorney is entitled to it regardless of whether any actual services are performed. Where respondent did not devote certain blocks of time to certain clients' claims or turn away other business to proceed with their matters, and it was evident that clients were paying for more than respondent's ability, respondent was not excused from accounting for an advanced fee on the ground that it was a retainer earned on receipt.

[3 a-d] **204.90 Culpability—General Substantive Issues**
242.00 State Bar Act—Section 6148
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.00 Rule 4-100(A) [former 8-101(A)]
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
Attorneys are not permitted to set their fees unilaterally. If a client contests fees charged or paid, the disputed fees must be placed in a trust account until the conflict is resolved. The duty to account for client funds includes a duty to maintain adequate records of fees drawn against an advanced fee and of fee payments made thereafter, and to provide clients with an appropriate accounting. In evaluating the promptness and adequacy of such an accounting, it was appropriate to look to the standards set forth in the statute governing attorneys' bills for fees and costs, even where a violation of that statute was not charged.

[4 a-d] **273.00 Rule 3-300 [former 5-101]**
The rule governing acquisition of adverse interests in clients' property, which requires adequate disclosure, written advice regarding consultation with independent counsel, and written client consent to the transaction, encompasses transactions where it is reasonably foreseeable that the interest acquired may become detrimental to the client. When an attorney acquires the ability to extinguish a client's interest in property, the attorney's interest is adverse, no matter what the motivation. Where respondent drafted a trust agreement for an elderly, infirm couple, naming them as trustees and himself as successor trustee, and included in the trust agreement a clause giving trustees unrestricted power to borrow trust assets without any security or oversight, respondent thereby acquired an adverse interest to his clients in the trust property, and the rule applied.

[5 a, b] **274.00 Rule 3-400 [former 6-102]**
Rule adopted in 1989, unlike former similar rule, precludes only actual contracts prospectively limiting an attorney's malpractice liability, not attempts to contract. The rule only applies to prospective claims, not to exposure for past malpractice.

[6] **199 General Issues—Miscellaneous**
204.90 Culpability—General Substantive Issues
Where words used in a rule are unambiguous, there is no need to go beyond the plain language to extrinsic aids.

[7] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where respondent delayed in transferring client trust funds to a client's new counsel due to the new counsel's failure to provide adequate authority for respondent to relinquish the funds, respondent did not violate the rule requiring prompt payment of client trust funds on demand.

[8 a, b] **273.30 Rule 3-310 [former 4-101 & 5-102]**

Where respondent was initially hired by a married couple to protect their interests arising out of their relationship with an elderly couple to whom they had given in-home care, and respondent subsequently undertook to represent the elderly couple and drafted a proposed agreement between the two couples regarding further in-home care, and the interests of the two couples were in clear conflict, respondent was required to obtain the written consent of all parties at the outset of his representation of the elderly couple. Even if respondent's representation of the two couples was consecutive rather than concurrent, written consent of all affected clients was still required, because the second employment involved the same subject matter as the first.

[9] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
159 Evidence—Miscellaneous

Petitions to augment the record on review are generally granted only if it is demonstrated that the record below is incomplete or incorrect. (Prov. Rules of Practice, rule 1304.) The general rule is not to entertain evidence not heard by the hearing judge unless it is the only means of presenting limited evidence of subsequent rehabilitation. It is also unusual for petitions to augment to be granted if contested. Where respondent requested to augment the record with documents relating to one of his complaining clients, and with two newspaper articles, respondent did not show good cause for the review department to consider such evidence over the State Bar's objection.

[10 a, b] **120 Procedure—Conduct of Trial**
165 Adequacy of Hearing Decision
192 Due Process/Procedural Rights
1099 Substantive Issues re Discipline—Miscellaneous

Where hearing judge's oral comments at close of case regarding appropriate discipline deviated from the recommendation made in judge's written decision, but hearing overall was fair and respondent's counsel had opportunity to present argument regarding degree of discipline, hearing judge's written decision controlled, and respondent was not denied due process. Respondent could not, as a matter of law, rely on hearing judge's oral or written discipline recommendation since it was not binding on review department or Supreme Court.

[11 a-c] **213.40 State Bar Act—Section 6068(d)**
243.00 State Bar Act—Sections 6150-6154
253.00 Rule 1-400(C) [former 2-101(B)]
273.00 Rule 3-300 [former 5-101]
273.30 Rule 3-310 [former 4-101 & 5-102]
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
551 Aggravation—Overreaching—Found
561 Aggravation—Uncharged Violations—Found
591 Aggravation—Indifference—Found
710.10 Mitigation—No Prior Record—Found
765.10 Mitigation—Pro Bono Work—Found
801.41 Standards—Deviation From—Justified
824.54 Standards—Commingling/Trust Account—Declined to Apply

Where respondent violated rules regarding accounting for client funds, obtaining adverse interests in client property, and representing clients with conflicting interests, and respondent's misconduct was aggravated by overreaching, by additional uncharged misconduct including solicitation of a client at the hospital and misleading a court, and by respondent's failure to recognize his ethical

accountability to clients, respondent's misconduct would have warranted substantial discipline absent his long service at the bar and for his community, and 60-day actual suspension was appropriate.

[12] **101 Procedure—Jurisdiction**
135 Procedure—Rules of Procedure
218.00 State Bar Act—Section 6090.5
Respondent's attempts to have clients withdraw pending State Bar complaints as part of settlements of actions which were not for malpractice did not violate statute prohibiting attorneys from conditioning malpractice settlements on agreement by client not to file State Bar complaint. The State Bar may proceed with a disciplinary matter whether or not the complainant is willing. (Trans. Rules Proc. of State Bar, rule 507.)

[13] **171 Discipline—Restitution**
273.30 Rule 3-310 [former 4-101 & 5-102]
Where respondent withdrew $2,500 for attorney's fees from a client's bank account at a time when his representation of the client was improper due to a conflict of interest, restitution of the funds to the client's estate was an appropriate condition of probation.

ADDITIONAL ANALYSIS

Culpability
Found
273.01 Rule 3-300 [former 5-101]
273.31 Rule 3-310 [former 4-101 & 5-102]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
Not Found
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
274.05 Rule 3-400 [former 6-102]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
Aggravation
Found
521 Multiple Acts
571 Refusal/Inability to Account
582.10 Harm to Client
611 Lack of Candor—Bar
Mitigation
Found but Discounted
740.31 Good Character
Discipline
1013.06 Stayed Suspension—1 Year
1015.02 Actual Suspension—2 Months
1017.08 Probation—2 Years
Probation Conditions
1021 Restitution
1024 Ethics Exam/School
1029 Other Probation Conditions
Other
173 Discipline—Ethics Exam/Ethics School

OPINION

STOVITZ, J.:

Respondent Anthony Novo Fonte has requested review of a hearing department decision which found that he violated Rules of Professional Conduct concerning representation of adverse parties; requirements of disclosure, independent counsel, and consent before obtaining an interest adverse to clients; and accounting for legal fees paid in advance. In recommending that respondent be suspended for one year, stayed, on conditions including a two-year probation and sixty days of actual suspension, the hearing judge considered respondent's twenty-five years of practice with no prior discipline and extensive public service, but also considered several aggravating circumstances including serious uncharged misconduct. In our independent review of the record, we share the hearing judge's stated concerns about respondent's recognition of his duty to serve his clients' interests faithfully, and to avoid overreaching them. Accordingly, we concur in the need for actual suspension in this case and uphold the decision and recommendation below.

I. FINDINGS AND CONCLUSIONS

Having independently reviewed the record, we concur with the findings of fact and conclusions of law made by the hearing judge below. They are summarized here, along with a discussion of the three culpability issues raised by respondent on review.

A. The Fairchild Matters.

1. Newport litigation.

In February 1988, Eleanor and Phillip Fairchild hired respondent to defend a civil suit brought against them in Orange County Superior Court for specific performance and damages arising out of the Fairchilds' attempt to cancel a realty sales contract.[1] Respondent asked for and received a $5,000 minimum retainer fee and court filing costs of $176. Respondent's fee for representing the Fairchilds was $180 per hour and he estimated a total fee in the range of $10,000 to $25,000.

Respondent represented the Fairchilds[2] until January 14, 1991, when new counsel substituted in. During the time of respondent's representation, the Fairchilds paid him a total of $14,416 in legal fees plus the $176 for court filing costs. Eleanor Fairchild testified that respondent sent her no bills or accountings between February 1988 and January 1991. When the Fairchilds would come to respondent's office for a meeting, he would tell them how much they currently owed and they would pay it. Between February 1988 and fall 1990, the Fairchilds never complained about the fees.

In late 1990, Mrs. Fairchild requested first personally and then through counsel that respondent provide her with "billing backup" for the legal fees spent defending the Fairchilds in the *Newport* suit. Fairchild had not received any such bill by January 1991 and chose other counsel to represent her. As the hearing judge found, respondent testified that he did not reply to Fairchild's request in writing but claimed that he gave her new counsel the requested information by phone.

Respondent prepared an eight-page summary of services he rendered the Fairchilds in the *Newport* case. He dated it July 8, 1991 (nearly six months after Fairchild substituted new counsel). She testified that she had not seen this summary until the day of her State Bar deposition in May 1992. Respondent testified that he was just giving Fairchild the information her new counsel asked for and that it was adequate.

The hearing judge found several incomplete or unusual aspects about this summary: it did not list specific dates when services were performed (only 6 of 57 entries listed even the month and year); all but

1. This lawsuit, *Newport Pacific Enterprises, Inc.* v. *Fairchild*, case number 544256, will be referred to hereafter as the *Newport* case.

2. Phillip Fairchild died in May 1990.

one of the entries were an aggregation of more than one event, and the billing entries were not strictly chronological. These did not comply with the standards set forth in Business and Professions Code section 6148 (b).[3] Respondent had also charged legal services allegedly performed prior to his retention in the *Newport* case against the $5,000 for fees advanced at the time of the retainer agreement. Noting that the agreement made no mention of these prior services and his own ledger card began as of the retainer agreement, the hearing judge concluded that respondent's uncorroborated testimony was insufficient and that he had unilaterally determined these fees. The hearing judge found that respondent violated rule 4-100(B)(3) of the Rules of Professional Conduct[4] by failing to render appropriate accounts to Fairchild regarding the fees and costs advanced in the *Newport* case.

[1] Respondent was charged with a violation of rule 3-110(A) by failure to provide competent legal services when he failed to file answers to interrogatories in the *Newport* case after he was given a fourth extension of time to do so. In September 1990, he was sanctioned $364, the superior court judge finding that respondent's failure was wilful and without substantial justification. The hearing judge found no basis for the rule 3-110(A) violation, concluding that respondent's failure to respond to the interrogatories when due flowed from a simple calendaring error complicated by a recent computer change. The hearing judge also found that respondent did handle other discovery timely. On review, the Office of the Chief Trial Counsel ("OCTC") does not dispute the judge's findings of non-culpability on this charge. This result was appropriate on this record.

2. Respondent's culpability of violating rule 4-100(B)(3).

[2a] Respondent contends that he did not have to account for the advanced fee in the *Newport* case because it was a retainer and earned on receipt. **[3a]** He also argues that since the word "fees" does not appear in rule 4-100(B)(3), fees are not encompassed in the rule's accounting requirement, and the rule applies only to funds received from the client and placed in a trust account, such as advanced costs, or to property received from a third party for the client, such as settlement proceeds.

[2b] Rule 3-700(D)(2), like former rule 2-111(A)(3) (eff. prior to May 26, 1989), describes a true retainer fee as a "fee which is paid solely for the purpose of ensuring the availability of the member for the matter." The California Supreme Court amplified the definition to some degree in a footnote in *Baranowski* v. *State Bar* (1979) 24 Cal.3d 153, 164, fn. 4, stating, "A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client."

[2c] It is evident that the Fairchilds were paying for more than the respondent's availability. In this case, there is no indication that the respondent made any particular provision to allot or set aside blocks of time specifically devoted to pursuing these clients' claims or that he turned away other business in order to proceed with their matters.

In *Matthew* v. *State Bar* (1989) 49 Cal.3d 784, the Supreme Court found that in two instances an attorney who worked on a $5,000 and a $1,000 "non-refundable retainer" violated former rules 2-111(A)(3) and 8-101(B)(4) (eff. prior to May 26, 1989) by failing to refund the unearned portion of fees in excess of reasonable services when he failed to complete legal services contracted by the clients. Notwithstanding the attorney's characterization of the fees, the Court held that since the attorney had completed only a portion of the services for which he was retained, the fees were partly unearned, and he had an obligation to return the unearned amount. (*Id.* at p. 791.)

3. Unless noted otherwise, all future references to sections are to the Business and Professions Code.

4. Unless noted otherwise, all future references to rules are to the Rules of Professional Conduct of the State Bar effective May 27, 1989, to September 13, 1992.

[3b] An attorney is not permitted to set his or her fees unilaterally. (*McKnight* v. *State Bar* (1991) 53 Cal.3d 1025, 1037.) If a client contests fees charged or paid, the disputed funds must be placed in a trust account until the conflict is resolved. (Rule 4-100(A).) In *Chang* v. *State Bar* (1989) 49 Cal.3d 114, the Supreme Court found that an attorney who had diverted settlement funds into a trust account with his name on it and later misappropriated the funds, also violated predecessor rule 8-101(B)(3) when he failed to turn over bank records and otherwise account to his client when the client disputed the attorney's fee claim. (*Id.* at p. 128.)

[3c] We do not read the scope of rule 4-100(B)(3) as narrowly as respondent. Respondent would limit the duty to provide a proper accounting to funds required to be held in a trust account, or funds or assets received by the attorney from third parties. In contrast to rule 4-100(A), which limits itself to funds received to be held in trust (see *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1151 [rule applies to funds; pledged stock not required to be held in trust]), rule 4-100(B)(3) requires an attorney to maintain records of and account for "all funds, securities, and other properties of a client coming into the possession of the member or law firm." This accounting requirement has been interpreted as including such disparate client properties as restaurant equipment (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 663-664) and rings given as security for fees. (*Garlow* v. *State Bar* (1988) 44 Cal.3d 689, 709.) In *Garlow* v. *State Bar*, *supra*, the attorney had been provided with rings as security for a $3,000 retainer. The Court found that the attorney was obligated to keep adequate records not only concerning the jewelry given to him as security, but also of partial cash payments made by the client to pay the fees she owed the attorney. His failure to keep such records violated former rule 8-101(B)(3). (*Id.* at pp. 707-708, 710.)

[3d] Therefore, we uphold the hearing judge's conclusion that respondent was obligated under rule 4-100(B)(3) to maintain adequate records of his fees drawn against the $5,000 advanced by the Fairchilds and their periodic payments to him thereafter, and to provide them with an appropriate accounting. We also agree that in evaluating the promptness and adequacy of respondent's belated "accounting," it was appropriate to look to the standards set forth in Business and Professions Code section 6148 (b). It was not necessary for respondent to be separately charged with a breach of that statute in addition to violation of rule 4-100(B)(3). For the reasons set forth in the hearing judge's decision, respondent's accounting was insufficient.

3. Failure to disclose adverse interest in drafting of Fairchild trust.

In June 1989 the Fairchilds hired respondent to update their estate plan and draft a living trust. Respondent did the requested work and the following month, respondent came to the Fairchilds' home and they signed the trust agreement respondent prepared. It named the Fairchilds co-trustees, and named respondent as alternate or successor trustee if either Fairchild died, became disabled or was unable to act as trustee. The agreement provided that any trustee had the sole discretion to lend money to anyone including the trustee. The agreement also had a no-contest clause; that is, if any heir or beneficiary contested any trust provision or any action taken by the trustee, his or her rights would end and benefits would be withheld. Respondent stipulated that he did not advise the Fairchilds that they could seek advice of independent counsel regarding this trust agreement. Respondent discouraged naming Mr. Fairchild's daughter as successor trustee or co-trustee, he did not give Mrs. Fairchild time to read over the document before she signed it, and he told her he would be able to help her with taxes and property if he served as co-trustee.

Although respondent disputed it, the hearing judge found that respondent did not give Mrs. Fairchild a copy of the trust agreement until November 1990.

In May 1990, Mr. Fairchild died. Respondent became co-trustee. There is no evidence that he borrowed any funds from the trust, but about six months later, Mrs. Fairchild became wary of respondent. He told her he could get her $5,000 more a month to live on if her residential land were sold and that she should not worry about leaving any money to her stepdaughter or grandchildren. She became upset because the purpose of establishing the trust

was to provide for these heirs. He told her on another occasion that if he were able to get another $100,000 on the *Newport* case, she should split it with him and that the possible additional funds would give him a stronger incentive to work on the *Newport* litigation. He cautioned her not to tell anyone about this agreement. The hearing judge noted that this arrangement would have been improper because under the trust agreement, all proceeds from the *Newport* case became trust assets.

In December 1990 Mrs. Fairchild hired new counsel to review the trust agreement respondent prepared and to seek respondent's resignation as co-trustee. This effort cost Fairchild about $7,000 in legal fees. Her counsel wrote to respondent three times requesting his resignation and ultimately filed a petition in superior court to have respondent removed. In March 1991, respondent began to negotiate for his resignation, on two conditions: that Fairchild release him from liability and thereafter write a letter to the State Bar withdrawing her bar complaint. Fairchild refused to accede to respondent's conditions. Respondent resigned as trustee in May 1991, after a superior court judge instructed him to resign unconditionally.

[4a] The hearing judge concluded that respondent wilfully violated rule 3-300 when he included the clause in the Fairchild trust agreement giving him unrestricted power as a successor or alternate trustee to borrow trust assets without any security and without oversight. The judge found that the clause conferred on respondent an interest in trust property which was adverse to the clients, in that he could extinguish the rights of his clients and the clients' heirs and beneficiaries without any judicial scrutiny. He failed to adequately disclose to the Fairchilds the import of this provision, advise them in writing that they might seek the advice of independent counsel and give them the opportunity to do so, and secure their consent to the terms of the transaction in writing as the rule required.

Respondent argues on review that rule 3-300, which restricts an attorney from entering a business transaction with or acquiring an ownership, possessory, security, or pecuniary interest adverse to a client unless specified criteria are met, does not apply as a matter of law to the facts concerning the creation of the Fairchild trust agreement. He argues that the fact that the trust agreement empowered respondent, as trustee, to loan money from the trust without restriction or security to himself or to others, and stripped any client/beneficiary of all benefits of the trust if he or she should challenge the trustee's (i.e. respondent's) actions, does not create a pecuniary interest adverse to a client until respondent becomes a trustee under the operation of the trust instrument and actually borrows money from the trust. Respondent distinguishes the cases relied on by the hearing judge by pointing out that in most of them, the culpable attorney actually did more than draft an agreement with the loan clause.

[4b] The deputy trial counsel counters that the rule, as interpreted by the Supreme Court, encompasses transactions where it is reasonably foreseeable that the interest acquired may become detrimental to the client. (*Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 599.) No matter what the attorney's motivation may have been, when the attorney acquires the ability to extinguish a client's interest in property, the interest held is adverse. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1058.) We agree with the deputy trial counsel's position and the hearing judge's conclusions.

In *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, the Court analyzed a charge that an attorney, in drafting two trust agreements, had violated the disclosure, advice and consent duties of former rule 5-101 (eff. prior to May 26, 1989), a provision substantively identical to rule 3-300. The Court first rejected the argument that the duties did not apply to transactions which arise in the context of a trust agreement, stating, "The terms of the trusts authorizing self-dealing on the part of [the attorney] clearly come within the rule and do not supersede it." (*Id.* at p. 796.) The Court then reviewed the attorney's conduct in drafting and presenting the proposed trusts, which granted the attorney, as trustee, the sole discretion to loan money from the trust to anyone, similar to the power granted to trustees, including respondent, in the Fairchild trust. The Court concluded that this was an interest adverse to the clients involved and that the attorney had violated rule 5-101 when he failed to explain to the clients the import

of this authority and to advise them to seek independent counsel *before* executing the irrevocable trust. The Court then examined the attorney's conduct as trustee as a separate violation of rule 5-101.

[4c] Under *Schneider*, the trust agreement was required to comply with the rule since it conferred on the attorney a broad power to self-deal as trustee. Respondent was not immediately appointed trustee, as was the case in *Schneider*. Rather, he was designated as alternate or successor trustee if either Fairchild died, became disabled or was unable to act as trustee. Given the age and poor state of health of both Fairchilds, it was anticipated that respondent would assume trustee authority and he did so, after the death of Mr. Fairchild, less than a year after the creation of the trust. Therefore, there is little to distinguish this from the *Schneider* case.

Respondent also improperly analogizes the facts of *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439 to the facts here. In *Respondent C*, the attorney was assigned a third-party note, representing a debt owed to his client, in payment for attorney fees. The client terminated his interest in the property by transferring it to the attorney; in essence, the client simply paid his debt with intangible property (the note) rather than cash. (*Id.* at p. 447.) In contrast, in this case, the clients, as beneficiaries of the trust, retained an interest in the trust property which respondent, acting as trustee, could adversely affect. It is respondent's ability to extinguish his clients' interest in the trust which brings this transaction under rule 3-300. Rule 3-300 does not prohibit an attorney from entering into these kinds of transactions, but mandates fairness, full disclosure, an independent counsel consultation opportunity, and written consent as prophylactic measures if thereby the attorney is to acquire an interest adverse to a client.

[4d] Therefore, we conclude that respondent violated rule 3-300 in drafting and presenting the Fairchild trust agreement by failing to explain in writing the import of his power as successor or alternate trustee to his clients and its possible impact on their interests in the trust, and by not advising his clients in writing to seek the advice of independent counsel. Although respondent secured the consent of his clients through their signatures on the trust document, it was not informed consent, as required by the rule.

The hearing judge exonerated respondent of a moral turpitude charge (Bus. & Prof. Code, § 6106) because it was not factually connected to anything else in the charges. We concur. **[5a]** She also found respondent not culpable of violating rule 3-400(A) by his attempt to limit his liability for professional malpractice because the rule does not prohibit an *attempt* to limit liability and only applies to prospective claims, not to exposure for past malpractice.

[5b] OCTC does not take exception to the hearing judge's reading of the scope of rule 3-400(A). We concur with the hearing judge's interpretation of the rule, and add only this comment. The prior rule, former rule 6-102, prohibited a member from attempting to limit liability.[5] While the State Bar's comments to the Supreme Court on submission of the amended rule indicated that the redrafted rule 3-400(A) "continues the prohibition . . . on attorneys *attempting* to exonerate themselves from or limit liability . . . . [emphasis added],"[6] it is evident from the language of the current rule[7] that it prohibits contracts, not attempts to contract. **[6]** Where words used in a rule are unambiguous, there is no need to go beyond the plain language to extrinsic aids. (*Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 800, 801.)

5. Former rule 6-102 read as follows: "A member of the State Bar shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. This rule shall not prevent a member of the State Bar from settling or defending a malpractice claim."

6. See "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California," State Bar of California (December 1987), p. 36.

7. Rule 3-400(A) states that State Bar members shall not "Contract with a client *prospectively* limiting the member's liability . . . for professional malpractice." (Emphasis added.)

B. The Curtis/Loeloff Matter.

1. Representation of the Curtises.

From about September 1989 to May 1990 Jan and Dan Curtis lived in the home of Erwin and Marguerite Loeloff and provided care to the elderly couple. The Loeloffs had not paid the Curtises for their services but at some point they had agreed to give their home to the Curtises in return for the Curtises' services. The Loeloffs' only heir was Mr. Loeloff's brother.

In May 1990, the two couples had a disagreement and the Curtises moved out of the Loeloffs' home. In July 1990, the Curtises hired respondent for advice as to their remedies for the services they had given the Loeloffs and to explore a possible conservatorship. The Curtises gave respondent $675 in fees. Respondent advised the Curtises that a conservatorship would be inadvisable as it would surely be contested and the public guardian would probably be appointed conservator, rather than the Curtises. In late August 1990 respondent advised the Curtises that he could do nothing more for them.

Shortly thereafter, Mrs. Loeloff's health worsened and she was hospitalized. Mrs. Curtis learned that unless adequate in-home care were provided the Loeloffs, they might be placed in a nursing home. Mrs. Curtis asked respondent to speak to Mrs. Loeloff to explore if the Curtises could return to give in-home care to the Loeloffs. On September 12, 1990, respondent went to the hospital where Mrs. Loeloff was a patient, met with Mrs. Curtis, told her that a conservatorship might be revisited and also told her of the importance of re-establishing good relations with the Loeloffs. He then went to see Mrs. Loeloff, who refused to talk with him since he was the Curtises' lawyer.

2. Representation of the Loeloffs.

When Mrs. Loeloff rebuffed respondent, he immediately went back to Mrs. Curtis and asked her permission to represent Mrs. Loeloff. Mrs. Curtis told respondent verbally that he could do so provided he protect the Curtises' interests. According to respondent, Mrs. Curtis placed no restriction on his representation of Mrs. Loeloff. Although the hearing judge determined that Mrs. Curtis's version was the more credible, she noted that respondent's version would not exculpate him from conflict-of-interest charges because he never spoke to Mr. Curtis about his request to represent Mrs. Loeloff nor did he secure the Curtises' written consent to represent Mrs. Loeloff.

The same day that respondent got Mrs. Curtis's verbal agreement to represent Mrs. Loeloff, he went back to Mrs. Loeloff's hospital room and offered to represent her in negotiations with the Curtises for a home-care arrangement. Mrs. Loeloff agreed that respondent could represent her and the two women agreed to a 30-day trial resumption of home care for the Loeloffs. Respondent told Mrs. Loeloff he would prepare documents to protect both parties' interests and had her execute a power of attorney appointing Mrs. Curtis as Mrs. Loeloff's attorney-in-fact. This document was never filed.

Two days later, September 14, 1990, respondent had both Loeloffs sign powers of attorney naming him as their attorney in fact. That same day, respondent placed his name as co-signatory on the Loeloffs' bank account and immediately transferred $5,000 from the Loeloffs' account to his trust account. Three days later, he withdrew $2,500 as his fees. He also drafted that day an agreement between the Curtises and himself, acting as trustee and agent for the Loeloffs. That agreement recited that respondent was now counsel solely for the Loeloffs and was no longer acting as the Curtises' attorney and that the Curtises consented to respondent drafting this agreement.[8]

Mrs. Curtis and Mrs. Loeloff were each unhappy about the contract respondent drafted and neither party signed it. Respondent continued to deal with the Loeloffs' banks. He directed one bank to

8. This contract also acknowledged that the Curtises had paid respondent $675 in fees, that they had no obligation for the unstated balance of respondent's fees and costs and that he would look only to the Loeloffs to pay this balance.

send the Loeloffs' monthly account statement and canceled checks to respondent's office and he transferred a $26,208 Loeloff savings account to a higher-yielding term account which he placed in his name for the benefit of the Loeloffs. He also drafted a living trust agreement for the Loeloffs but they did not sign it. Respondent finally concluded that a conflict of interest had developed.

3. Respondent's withdrawal from representation.

In October 1990, respondent told both parties to get separate counsel, withdrew from his representation of the Loeloffs, and refunded the remaining $2,500 of the $5,000 he had earlier withdrawn from one of the Loeloffs' accounts. However, he did not return the $26,208 which he had transferred into an account in his name, nor the $2,500 which he had unilaterally withdrawn as fees.

The next month, Mr. Loeloff suffered a stroke and his wife died a few weeks later. Respondent wrote to Mr. Loeloff's brother about a conservatorship for Mr. Loeloff but an attorney representing Mrs. Curtis filed a petition seeking appointment of Curtis as Loeloff's conservator. Curtis's new attorney requested that respondent turn over to him the funds he had taken out of the Loeloffs' bank accounts. Respondent did not relinquish his interest in the Loeloffs' $26,208 account until a month after he was contacted by the State Bar and after two letters from Mrs. Curtis's new attorney. Six months later, in August 1991, respondent sent a "final offer" to Mrs. Curtis, stating he had spent 4.5 hours for Curtis, out of a total 44 hours representing the Loeloffs and Curtises, and his total fee was $7,200. While he thought a court would grant his fee request, respondent offered to return $250 to her and waive any additional fees if she agreed to settle all complaints and disputes.

4. Representation of adverse interests.

The hearing judge concluded that respondent violated the rule against representing adverse interests because he failed to advise both the Loeloffs and Curtises of the conflicts arising from his representation of the Loeloffs and to obtain the written consent of all four to his representation. **[7]** The hearing judge exonerated respondent from a rule 4-100(B)(4) charge that he did not promptly pay over to Mrs. Curtis's new attorney the $26,208 transferred from the Loeloffs' account. The judge reasoned that when Curtis's attorney made his demand, he did not accompany it with adequate authority to oblige respondent to relinquish the funds. On review, OCTC does not dispute this conclusion. The hearing judge also dismissed a moral turpitude charge because, as in the Fairchild matter, the charge was unattached to any specific misconduct. We agree with the hearing judge's conclusions on the rule 4-100(B)(4) and moral turpitude charges.

[8a] On review, respondent urges that his representation of the Loeloffs was consecutive to, not concurrent with, his representation of the Curtises and was not adverse to his prior representation, and that he was not required to comply with rule 3-310(A) until an actual conflict arose during his representation. This interpretation is inconsistent with the evidence and the law. Admittedly, respondent's initial investigation into the Loeloffs' situation was as an attorney for the Curtises. They hired him to protect their interests and seek remedies for the care they had given the Loeloffs. On his first visit to the hospital, Mrs. Loeloff refused to see respondent because she knew he was working on behalf of the Curtises. To secure an agreement from the Loeloffs to reemploy the Curtises, Mrs. Curtis consented to respondent's representation of Mrs. Loeloff so long as he protected her interests as well. Respondent did not withdraw from employment but rather undertook the concurrent legal representation of the Loeloffs and the Curtises. Respondent's draft of the home care agreement and his August 5, 1991, settlement offer to Mrs. Curtis both indicate that he was representing the parties concurrently. Respondent was aware that their interests were in clear conflict as the Curtises demanded payment from the Loeloffs from their prior employment, and a lien or other interest in their home in exchange for caring for them and the Loeloffs desired home care while preserving their assets. The agreement drafted by respondent avoids, instead of resolves, these issues. Rather than protecting the interests of either set of clients, respondent attempted to broker an agreement that was unsatisfactory to all but respondent. Under these facts, respondent was required to obtain the informed written consent of all parties at the outset

assuming, arguendo, that he could have competently performed services on behalf of both clients in this circumstance.

[8b] Even crediting respondent's version of a "consecutive" representation, he would have had to comply with subsection (A) of rule 3-310, because his prior employment by the Curtises involved the same subject matter as his new representation, the care and assets of the Loeloffs. Thus, under either interpretation, all affected clients were required to give their informed written consent to respondent's acceptance of employment by Mrs. Loeloff.

Many years ago, the Supreme Court in *Anderson* v. *Eaton* (1930) 211 Cal. 113, 116 set forth the policy which today underlies the principle of rule 3-310: "It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. [Citation.] By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]"

Respondent clearly breached these principles and wilfully violated rule 3-310(B).

II. PROCEDURAL ISSUES

Before discussing the question of appropriate discipline, we resolve two procedural matters raised by respondent. **[9]** Respondent requested permission for late filing of his petition to augment the record before us to include documents relating to one of his former clients. Thereafter, he also asked us to take judicial notice of two articles published in the *Orange County Register*. At oral argument, we denied both requests. Augmentation petitions are generally granted only if it is demonstrated that the record below is incomplete or incorrect. (Rule 1304, Prov. Rules of Practice of State Bar Court.) As we stated in *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 686, the general rule is not to entertain evidence not heard by the hearing judge unless it is the only means of presenting limited evidence of subsequent rehabilitation. The probate court orders proffered by respondent shed no light on the ethical issues charged in the State Bar Court proceeding. Whether Mrs. Curtis acted properly or not toward Mr. Loeloff is not in issue here. (Cf. *Sodikoff* v. *State Bar* (1975) 14 Cal.3d 422, 431.) It is also unusual for petitions to augment to be granted if contested. Respondent has not demonstrated good cause for us to consider this evidence over the opposition of OCTC.

[10a] Respondent also contends that he was denied due process when his counsel was misled by the hearing judge's comments at the close of the case concerning the appropriate discipline and her deviation from that position thereafter in her written decision. He asserts that his counsel did not fully present his arguments after the hearing judge's remarks led him to believe that she was not considering recommending an actual suspension. OCTC argues that respondent was accorded a fair hearing and disagrees that respondent's counsel was justified in being lulled into complacency or that he failed to make any arguments attacking the imposition of any suspension of his client's license.

[10b] We agree with OCTC. The record reflects the hearing overall was fair and counsel was not only given the opportunity to present any arguments he chose on the issue of discipline but his argument included distinguishing past cases in which actual suspension was imposed. The verbal comments made by the hearing judge, while leaning toward recommending less discipline, were not definitive. However, on page 56 of her written decision, the hearing judge stated clearly why she ultimately recommended more severe discipline than she had earlier verbally suggested. "Where the hearing judge's impressions varied from [her] ultimate written findings of fact and conclusions of law, the written decision controls." (*In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal.

State Bar Ct. Rptr. 32, 42.) In any event, we undertake de novo review of the record as does the Supreme Court. Respondent could not, as a matter of law, rely on the hearing judge's oral or written disciplinary recommendation since it was not binding on us or the Supreme Court. (Trans. Rules Proc. of State Bar, rule 453(a); *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916; *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 541-542.)

III. MITIGATION, AGGRAVATION AND HEARING JUDGE'S RECOMMENDATION

In weighing mitigation and aggravation, the hearing judge noted the very strong mitigation of respondent's 25 years of practice with no prior discipline. Respondent also engaged in extensive civic and bar association activities, serving as mayor of an Orange County city and a director of the Orange County Bar Association. A retired superior court judge praised respondent's character and characterized his offenses as "technical," arising perhaps from zeal to protect clients. Two other attorneys also supported him strongly. The hearing judge gave diminished weight to this character evidence as not representative of a wide variety of references.

The hearing judge pointed to aggravating circumstances of overreaching and uncharged misconduct by respondent, including soliciting Mrs. Loeloff while hospitalized (rule 1-400(C)[9]), removing $2,500 in fees from the Loeloffs' account when he had a conflict of interest in his representation, and trying to induce clients to dismiss their State Bar complaints and possible civil causes against him. In the hearing judge's view, respondent misled the probate court when he stated in his response to the petition to have him removed as trustee in the Fairchild matter that he was entitled to receive compensation for his work on the Fairchilds' trust at a rate of $220.00 when respondent had a binding fee agreement with Mrs. Fairchild for legal fees at a rate of $185.00 per hour. (Bus. & Prof. Code, § 6068 (d).) On review, respondent has not disputed these findings. The hearing judge also concluded that respondent was not candid about the facts at the disciplinary hearing and had still not prepared a proper accounting of services he performed in defending the *Newport* suit. She also found that respondent committed multiple acts of misconduct, resulting in significant harm to Mrs. Fairchild, and that he had demonstrated indifference toward rectification or atonement for the consequences. Weighing all the mitigating and aggravating evidence, the hearing judge recommended a one-year stayed suspension and a two-year probation term on conditions including sixty days of actual suspension.

On review, respondent characterizes what little misconduct he concedes as minor, technical infractions and not done for personal enrichment. He emphasizes his long, previously unblemished legal career, his community service and the testimony of his three character witnesses, and contends that this evidence was not accorded sufficient weight below. He again attacks the veracity and integrity of one of the clients who testified against him. The discipline he urges us to impose is private reproval.

In recommending affirmance of the decision below, OCTC notes that respondent's attack on his former client betrays his lack of understanding of his duties and obligations to clients. As to respondent's characterization of his misconduct as minor, OCTC replies that respondent's attitude toward ethical responsibilities is shortsighted and undermines the moral fiber of the profession.

[11a] Respondent's misconduct includes violations of rules 4-100(B)(3), 3-300, and 3-310. The range of discipline available under the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ("stds.")) and applicable case law ranges from a private reproval to two years actual suspension. (*Hunniecutt* v. *State Bar* (1988) 44 Cal.3d 362, 373, citing *Ritter* v. *State Bar* (1985) 40 Cal.3d 595, 604, fn. 9.) For the violation of rule 4-100(B)(3) alone, the standards

9. Respondent's action also appeared to violate Business and Professions Code section 6152, which prohibits solicitation of legal services in person or by telephone in or about, among other places, public or private hospitals. (See *Rose* v. *State Bar*, *supra*, 49 Cal.3d at pp. 658-659.)

recommend at least a three-month actual suspension. (Std. 2.2(b) [referring to former rule 8-101].) In similar rule 3-300 cases in which the attorney did not have a prior record of discipline, the discipline has encompassed a public reproval for a single instance of holding an interest adverse to a client without proper notice and consent (*Connor* v. *State Bar*, *supra*, 50 Cal.3d 1047); thirty days actual suspension for rule 3-300 violations, mismanagement, and intentional misrepresentations involving two trusts (*Schneider* v. *State Bar*, *supra*, 43 Cal.3d 784); and a two-year actual suspension for a business transaction with a client without notice and consent and the improper solicitation of a client, coupled with a client abandonment, failure to communicate with his clients, and failure to return client property and advanced fees promptly. (*Rose* v. *State Bar*, *supra*, 49 Cal.3d 646.)

[11b] We too are very concerned, as was the hearing judge, by the evidence of overreaching and lack of understanding displayed by respondent in his misconduct and during these disciplinary proceedings. The impropriety of respondent's proposal to Mrs. Fairchild to divert the additional $25,000 recoverable from the *Newport* litigation which was property of the living trust, was compounded by the fact that respondent was a trustee of the Fairchild trust as well. There are numerous instances of overreaching by respondent toward his former clients: soliciting Mrs. Loeloff in person at her hospital bed to represent her in negotiating home care from another client so that she would not have to be placed in a nursing home; attempting to have Mrs. Fairchild and Mrs. Curtis withdraw their complaints lodged with the State Bar[10] **[12 - see fn. 10]**; and withholding his resignation as trustee of the Fairchild trust on condition that Fairchild pay him additional legal fees allegedly owed and release him from any civil liability. Although respondent had every right to defend himself, we are also concerned by his harsh attacks on the motives and candor of both Mrs. Fairchild and Mrs. Curtis at the disciplinary hearing below and before us. It is troubling that while holding himself blameless, he displayed such a controlling attitude toward these clients, two of whom were ill and elderly and thus more vulnerable. The clear and convincing evidence of respondent's improper hospital solicitation of a client and misleading of the superior court as to his fee agreement are alone grounds for actual suspension. The lack of any ameliorative measures or recognition of ethical accountability toward his clients weighs against respondent as well. His long service at the bar and for his community counterbalances misconduct that would otherwise warrant substantial discipline. At the same time, such lengthy practice and professional achievements did not aid respondent in avoiding basic violations of the Rules of Professional Conduct.

[11c] We therefore agree with the hearing judge that a period of actual suspension is required for respondent to examine and understand the serious ethical responsibilities he owes to his clients. **[13]** Restitution of the $2,500 in fees to Mr. Loeloff or his estate is appropriate as well, since respondent's representation of the Loeloffs at the time he removed the funds was improper. (See *Goldstein* v. *Lees* (1975) 46 Cal.App.3d 614, 618.) The other conditions recommended by the hearing decision are appropriate measures to assure the protection of the public and to monitor respondent's rehabilitation.

IV. RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent Anthony Novo Fonte be suspended from the practice of law in this state for a period of one year; that execution of said suspen-

10. **[12]** We concur with the hearing judge that respondent's attempts to have clients withdraw existing State Bar complaints did not violate Business and Professions Code section 6090.5, which provides that a member may be disciplined for requiring "as a condition of a settlement of a civil action for professional misconduct . . . that the plaintiff agree to not file a complaint with the disciplinary agency concerning that misconduct." Neither settlement proposed by respondent was to resolve a malpractice action. Further, both clients had filed complaints with the State Bar when the settlements were proposed and the statute does not address settlements in which the client agrees to withdraw a complaint pending with the State Bar. The State Bar may proceed with a disciplinary matter whether or not the complainant is willing. (Rule 507, Trans. Rules Proc. of State Bar.)

sion be stayed; and that respondent be placed on probation for two years on the following conditions: that during the first sixty days of said period of suspension, respondent be actually suspended from the practice of law in the State of California; and that he comply with the remaining conditions of probation attached to the hearing department's decision filed April 30, 1993. Those conditions include restitution to Mr. Loeloff or his representative of $2,500, delivery to Mrs. Fairchild of a proper accounting of his services in the Newport case and successful completion of the State Bar's Ethics School program and its separate trust account and recordkeeping course.

We also recommend that respondent be required to take and pass the California Professional Responsibility Examination administered by the State Bar's Committee of Bar Examiners within one year of the effective date of the Supreme Court's order in this case. (See *Layton* v. *State Bar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn. 9 as to the difference between the California Professional Responsibility Examination now regularly ordered by the Supreme Court in suspension cases and the multistate Professional Responsibility Examination administered to applicants for admission.) Finally, we adopt the recommendation that costs 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

HENRY DANIEL FANDEY

A Member of the State Bar

No. 90-O-11973

Filed March 28, 1994

SUMMARY

In a single client matter, respondent aided and abetted his client's flight from California in order for the client to avoid complying with a child support order, and was also found culpable of two separate instances of improperly obtaining an interest in the client's property and/or entering into a business transaction with the client, in connection with the sale of the client's home to respondent's parents and the occupancy by the client of respondent's parents' home. Based thereon, the hearing judge recommended that respondent be suspended from the practice of law for 18 months, that such suspension be stayed, and that respondent be placed on 18 months probation on conditions, including 6 months actual suspension. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent requested review, arguing that there was insufficient evidence to support the charges, and that, even if the hearing judge's culpability conclusions were upheld, the discipline should be a reproval or stayed suspension. The State Bar argued in reply that the that the recommended discipline should be increased to three years stayed suspension with one year actual suspension. The review department concluded that respondent was culpable of the aiding and abetting charge, but not culpable of the charges arising out of the property transactions between the client and respondent's parents. Nevertheless, in light of the impact of respondent's misconduct on the integrity of the legal profession, as well as the heightened public concern with payment of child support, the review department found the misconduct sufficiently serious, and the circumstances surrounding the property transactions sufficiently aggravating, to warrant adopting the discipline urged by the State Bar.

COUNSEL FOR PARTIES

For Office of Trials: Ronald E. Magnuson, Allen Blumenthal

For Respondent: Barbara G. Azimov

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**
194 Statutes Outside State Bar Act

In order to promote membership understanding of lawyers' professional obligations and to enhance public awareness of review department dispositions, review department initially followed policy of publishing its opinions in all public matters in which oral argument was held. After reaching point at which automatic publication of all such matters no longer appeared necessary, review department began to publish its opinions in public matters generally in accordance with standards governing other intermediate appellate courts in California. (Cal. Rules of Court, rule 976(b).)

[2] **148 Evidence—Witnesses**
166 Independent Review of Record

Although review department's review of record is independent, it must give great weight to hearing judge's credibility determinations and it is reluctant to deviate from hearing judge's credibility-based factual findings in absence of specific showing of error. Where respondent argued that his version of events was more credible because State Bar's witnesses had reason to be less than truthful, this argument ignored respondent's own obvious similar motive, and was not grounds to depart from hearing judge's credibility determinations.

[3] **142 Evidence—Hearsay**
146 Evidence—Judicial Notice

Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record. Accordingly, where respondent requested review department to take judicial notice of court documents, this would only result in taking notice that various allegations had been made in various legal matters, and would not alter review department's conclusion regarding hearing judge's credibility determination.

[4] **148 Evidence—Witnesses**
162.19 Proof—State Bar's Burden—Other/General
165 Adequacy of Hearing Decision

The testimony of a single witness who is entitled to full credit is sufficient for proof of any fact. Where hearing judge found complaining witness's version of events to be more credible, and such testimony, though at odds with respondent's, was consistent on material issues, review department found no basis to disturb hearing judge's factual findings.

[5] **213.30 State Bar Act—Section 6068(c)**
272.00 Rule 3-210 [former 7-101]

Where respondent did not simply advise client of consequences of not paying child support order, but actively counseled client on ways to accomplish goal of violating order, respondent was culpable of violating statute requiring attorneys only to counsel actions that appear legal or just, and rule prohibiting attorneys from advising the violation of any law or court order.

[6 a, b] **221.00 State Bar Act—Section 6106**

Where respondent, knowing that his client had stopped paying child support and intended to move with the express purpose of avoiding complying with a child support order, provided the client with affirmative help in moving, these facts demonstrated that respondent acted in conscious disregard of his obligation to uphold the law, and his misconduct therefore involved moral turpitude despite his lack of specific intent to help the client avoid the support order.

[7] **273.00 Rule 3-300 [former 5-101]**
There is no requirement, for purposes of the rule of professional conduct prohibiting an attorney from improperly obtaining an interest in a client's property and/or entering into a business transaction with a client, that the attorney represent the client with regard to the particular transaction in question.

[8 a, b] **273.00 Rule 3-300 [former 5-101]**
Where there was no evidence that respondent was a party to or benefited financially from property transactions between respondent's client and respondent's parents in which respondent was closely involved, respondent was not culpable of improperly obtaining an interest in a client's property and/or entering into a business transaction with a client.

[9] **615 Aggravation—Lack of Candor—Bar—Declined to Find**
Where hearing judge did not find respondent's testimony regarding respondent's interpretation of certain events to be credible, record did not, without more, establish that respondent's testimony was less than truthful for purposes of aggravation.

[10] **430.00 Breach of Fiduciary Duty**
551 Aggravation—Overreaching—Found
The relationship between an attorney and client is a fiduciary relationship of the very highest character. In light of such fiduciary obligations, respondent's conduct in arranging real property transactions between respondent's client and respondent's father involved overreaching, where respondent was closely involved with his father and did not safeguard the client's interests in the transactions.

[11 a, b] **204.90 Culpability—General Substantive Issues**
273.30 Rule 3-310 [former 4-101 & 5-102]
551 Aggravation—Overreaching—Found
561 Aggravation—Uncharged Violations—Found
Respondent's simultaneous representation of a client and of respondent's father during the time that respondent arranged real property transactions between the client and the father was an aggravating circumstance in that the dual representation was rife with potential and actual conflicts of interest that could have been, if charged, the basis for additional culpability for violating the rule regarding representation of conflicting interests. The fact that respondent was not found culpable of any misconduct involving the real property transactions did not preclude treating respondent's conduct therein as an aggravating factor, because other related misconduct involving the same client was surrounded by and followed by the attorney's conduct in the real property transactions.

[12 a-c] **213.30 State Bar Act—Section 6068(c)**
272.00 Rule 3-210 [former 7-101]
551 Aggravation—Overreaching—Found
586.11 Aggravation—Harm to Administration of Justice—Found
1091 Substantive Issues re Discipline—Proportionality
1093 Substantive Issues re Discipline—Inadequacy
In light of all relevant evidence and comparable case law, as well as heightened concern regarding enforcement of child support orders, respondent's very serious misconduct of advising and aiding a client in avoiding a child support order, which misconduct was substantially aggravated by respondent's overreaching in arranging real property transactions between the client and respondent's father, warranted increasing recommended discipline to one-year actual suspension coupled with three years of probation, even though review department found respondent culpable of less misconduct than did hearing judge.

ADDITIONAL ANALYSIS

Culpability

Found

213.31 Section 6068(c)
221.19 Section 6106—Other Factual Basis
272.01 Rule 3-210 [former 7-101]

Not Found

221.50 Section 6106
273.05 Rule 3-300 [former 5-101]

Aggravation

Found

543.10 Bad Faith, Dishonesty
582.10 Harm to Client

Found but Discounted

553 Overreaching

Declined to Find

582.50 Harm to Client
595.90 Indifference

Mitigation

Found

710.10 No Prior Record

Found but Discounted

740.33 Good Character
765.32 Pro Bono Work
793 Other

Discipline

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

Probation Conditions

1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge that respondent, Henry Daniel Fandey, be suspended from the practice of law for 18 months, that such suspension be stayed, and that he be placed on 18 months probation on conditions, including 6 months actual suspension. The recommendation is based on respondent's misconduct in a single client matter that involved aiding and abetting the client's flight from California in order for the client to avoid complying with a child support order, and two separate instances of improperly obtaining an interest in a client's property and/or entering into a business transaction with a client.

Respondent requested review, arguing that there is insufficient evidence to support the charges, and that, even if the hearing judge's culpability conclusions are upheld, the discipline should be a reproval or stayed suspension. The Office of the Chief Trial Counsel (OCTC) initially requested review, but later withdrew that request. Instead, that office argues in reply that the record supports all of the hearing judge's findings and, based thereon, that the recommended discipline should be increased to three years stayed suspension with one year actual suspension.

We have independently reviewed the record and conclude that respondent is culpable of the aiding and abetting charge, but not culpable of the charges that he improperly obtained an interest in a client's property and/or entered into a business transaction with the client. Nevertheless, we find the misconduct sufficiently serious and the circumstances surrounding the property transactions sufficiently aggravating to warrant adopting the discipline urged by OCTC.[1] **[1 a, b - see fn. 1]**

FACTS AND FINDINGS

In December 1987, respondent was retained by Bruce Lee to represent him in a child support matter.[2] Lee paid respondent $7,000 as advanced attorney's fees. In March 1988, Lee stipulated to pay $250 per month for support of his two children, ages 9 and 5, plus arrearages. Thereafter, Lee complained to respondent that he was angry and unhappy about having to pay child support. In response, respondent advised Lee that he had three options: pay the child support, go to jail, or disappear. Respondent then provided Lee with two books on how to change his identity.

Lee decided to disappear and respondent went out of his way to help Lee move. After recommending that Lee could vanish to El Paso, Texas, respondent physically assisted Lee in the move. Prior to Lee's

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1. This opinion has been designated for publication because, in our view, it meets the publication standards set forth in rule 976(b) of the California Rules of Court. **[1a]** Since its inception, this review department, in order to promote membership understanding of lawyers' professional obligations and to enhance public awareness of review department dispositions, has followed an initial policy of publishing its opinions in all public matters in which oral argument was held. The review department generally has not published its opinions on ex parte review of volunteer referees or on review of orders in other public matters when the parties did not have the opportunity to participate in oral argument regarding the issues addressed therein. (But see *In the Matter of Mesce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 658.) The review department, however, has recognized that eventually it would wish to follow the practice of other intermediate appellate courts in selectively publishing opinions.

[1b] It is now four years after the review department issued its first published opinion in March of 1990. We have reached the point at which automatic publication of all orally argued public matters no longer appears necessary. Henceforth, the review department intends to publish its opinions in public matters generally in accordance with the standards governing the publication of opinions of other intermediate appellate courts in California. (See Cal. Rules of Court, rule 976(b).)

It is contemplated that in the near future, the Executive Committee of the State Bar Court will be requested to consider a proposal to add to the Rules of Practice a new rule addressing the publication of review department opinions. Until such a rule becomes effective, parties to any case before the review department in which the resulting opinion is not deemed appropriate for publication will be so notified in the opinion and given the opportunity to seek reconsideration under rule 455 of the Transitional Rules of Procedure.

2. Several other attorneys had previously represented Lee in his divorce action.

decision to move to El Paso, respondent had decided to move there also. Lee and respondent assisted one another in moving away from California for mutual convenience. Respondent accompanied Lee on at least four occasions to El Paso, found a new residence in El Paso for Lee, helped Lee pack furniture and furnishings for the purpose of moving to El Paso, loaned Lee his truck and trailer to use in moving to El Paso, and even personally moved some of Lee's personal belongings. Respondent also acted as the guarantor on behalf of Lee in Lee's application to have his utilities turned on in his new residence in El Paso. Respondent also advised Lee on how to avoid leaving a paper trail and traceable monetary assets and told Lee to use cash instead of credit cards when Lee was moving to Texas. Lee stopped making child support payments prior to his move to El Paso.

Lee's home in Irvine, California, had been for sale for some period of time prior to Lee's move to El Paso. Respondent introduced Lee to his parents, Joseph S. and Edith D. Fandey, as potential buyers, and then assisted his parents in subsequent dealings with Lee. Joseph Fandey also obtained advice from respondent regarding legal matters in California.

Joseph Fandey owned several properties and was interested in purchasing additional property to complete a "1031 exchange." (26 U.S.C. § 1031.) Respondent was present during the negotiations between Lee and respondent's father and assisted in the preparation of documents in the sale of Lee's home to the father. Lee's property had been listed at $180,000 and respondent induced Lee to discount the property by $30,000 under the guise of tax savings. The escrow closed in November 1988.[3] Lee received about $53,000 in sale proceeds from the Irvine property. Respondent advised Lee that the transaction should be conducted in cash so that no "paper trail" would exist as to the sale proceeds.

Respondent's father also owned a house on Sterling Place in El Paso. When Lee moved from California in late 1988, he moved into the Sterling Place house. In November 1988, Lee withdrew about $53,000 in cash from his bank account and subsequently delivered the cash to respondent. Respondent placed the cash in a brown paper bag and delivered the money to his father.[4] Lee testified that the $53,000 given to respondent was a down payment for the El Paso property. Respondent and Joseph Fandey, on the other hand, claimed that Lee rented the house and the money was a security deposit. The hearing judge found Lee's testimony to be the more credible.

Lee occupied the El Paso property without having to make any payments. Following Lee's complaint to the New Mexico Bar Association charging respondent with misconduct, Lee was served with a notice to pay rent or quit and notice of termination of tenancy in April 1990, by the Fandeys' attorney.[5] The notice to pay rent or quit indicated that there was no rental agreement and that the amount of past due rent was calculated on a reasonable basis. At the time of the State Bar hearing in this matter, Lee and the Fandeys were suing each other as to the ownership of the El Paso property,[6] and Lee had remained in the Sterling Place house and was paying $1,000 per month to the Texas court.

In mitigation, the hearing judge found that respondent did not have a prior record of discipline

3. The hearing judge found that the escrow company involved in the sale of the Irvine property was owned by respondent's parents. OCTC asserts in its brief on review that the record does not support this finding and we agree.

4. The hearing judge found that respondent had physical control of the cash for a substantial period of time. We do not find support for this finding in the record. Respondent merely stated that he had access to the cash and respondent's father testified that he had the money, not respondent.

5. The record is silent as to the resolution, if any, of the New Mexico Bar Association complaint.

6. An unlawful detainer action was filed by respondent's parents against Lee and Lee cross-complained against respondent and his parents. The cross-complaint apparently alleged fraud and sought title to the property. The record is not clear as to the resolution, if any, of the lawsuits. Respondent asserts in his brief on review that the cross-complaint was dismissed for lack of prosecution and a judgment was entered against Lee for restitution of the El Paso property. However, the record below includes as an exhibit an order from the Texas court which indicates that the cross-complaint was reinstated.

during 11 years of practice prior to the misconduct; that respondent presented several family members (his parents, wife, and three of his children) and one attorney who attested to his good character; that respondent has done volunteer work with Aid to Victims of Crime and the Diabetes Association; that respondent has written a children's book; and that, although he is also admitted to practice law in New Mexico, respondent is currently not practicing as an attorney in any state.

In aggravation, the hearing judge found that respondent's improper advice to his client on how to avoid compliance with a court order was surrounded by dishonesty and overreaching; that respondent's involvement in a business transaction with Lee and failure to avoid adverse interests significantly harmed Lee, the public and the administration of justice, and as a result of respondent's misconduct, there are pending lawsuits with respect to the El Paso property; that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct as shown by his control of Lee's $53,000 which should have been, but was not, deposited into a client trust account until the dispute over the money was resolved; and that respondent displayed a lack of candor during the State Bar proceedings in that he was less than truthful regarding his personal involvement in the sale of the Irvine property.

Count one of the four-count notice to show cause alleged that respondent aided and abetted Lee in Lee's flight from California in order to avoid the child support order in violation of sections 6068 (c) and 6106 of the Business and Professions Code,[7] and former rule 7-101 of the Rules of Professional Conduct of the State Bar of California.[8] The hearing judge concluded that respondent's improper advice to Lee on how to disappear to Texas in order to avoid the child support payments, and his overwhelming involvement in Lee's escape, constituted wilful violations of section 6068 (c) and rule 7-101. However, the hearing judge treated both violations as one for purposes of discipline because they both arose from the same facts and circumstances. The hearing judge also concluded that respondent's conduct in aiding and abetting Lee in evading the child support court order amounted to acts of moral turpitude and dishonesty in wilful violation of section 6106.

Count two of the notice alleged that respondent entered into a business partnership with Lee and received $60,000 from Lee as start-up costs for the partnership in violation of rule 5-101 and section 6106. Lee testified that he gave $60,000 to respondent for the purpose of a future business partnership with respondent, and respondent claimed that he had never received $60,000 from Lee. The hearing judge concluded that the State Bar failed to prove by clear and convincing evidence that Lee gave respondent the $60,000 and therefore concluded that respondent was not culpable in this count.[9]

Counts three and four of the notice involved the sale of the Irvine property and the purchase of the El Paso property, respectively. Count three alleged that respondent entered into a business transaction with Lee by purchasing the Irvine property and count four alleged that respondent entered into a business transaction with Lee by acquiring an adverse interest in the El Paso property in that respondent received $53,000 from Lee for the purchase of the El Paso property and respondent used that money to purchase the house in his father's name. Both counts charged violations of rule 5-101 and section 6106. On respondent's motion at the first day of trial the hearing judge dismissed the section 6106 charges from both counts because the notice did not properly allege such violations. OCTC withdrew its

7. All further references to sections are to the Business and Professions Code, unless otherwise noted.

8. 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.

9. On review, neither party contests the hearing judge's ruling on this count. In light of the hearing judge's unarticulated though clear credibility determination that the testimony of Lee and his second wife, without more, was not sufficient, and the lack of any other evidence showing that Lee gave respondent the money, the record supports the hearing judge's conclusion. No further discussion of this count occurs in this opinion.

opposition to the motion at trial and, on review, does not contest the hearing judge's ruling.

The hearing judge concluded that respondent violated rule 5-101 in both counts three and four by entering into the Irvine and El Paso property transactions without complying with the rule. In count three, the hearing judge found that even though respondent was not a party to the sale of the Irvine property, "the closeness of the relationship between respondent and his parents is tantamount to respondent himself entering into the business transaction with Lee." In count four, it is not clear whether the hearing judge concluded that respondent entered into a business transaction with Lee, or acquired an interest in Lee's property that was adverse to Lee, or both.[10]

In mitigation, the hearing judge found that respondent did not have a record of prior discipline during his 11 years of practice at the time of the misconduct (standard 1.2(e)(i), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (standard[s])); that respondent had demonstrated his good character (std. 1.2(e)(vi)); that he had performed volunteer work for a diabetes association; and that respondent was not currently practicing law.

In aggravation, the hearing judge found that respondent's advice to Lee on how to avoid compliance with the court order was surrounded by dishonesty and overreaching (std. 1.2(b)(iii)); that respondent's misconduct significantly harmed Lee (std. 1.2(b)(iv)); that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct in that he controlled the $53,000 Lee had given him and did not place the money in a trust account pending resolution of the dispute with regard to the funds (std. 1.2(b)(v)); and that respondent displayed a lack of candor during the State Bar proceeding in that he was less than truthful regarding his personal involvement in the sale of the Irvine property (std. 1.2(b)(vi)).

DISCUSSION

Respondent contends on review that the State Bar's witnesses are not credible, that there is insufficient evidence to support the charges, and that the misconduct found by the hearing judge does not warrant the recommended discipline. OCTC argues in reply that we should adopt the hearing judge's findings and increase the recommended discipline.

[2] We are unpersuaded by respondent's contention that the hearing judge's credibility determinations are in error. In effect, respondent is arguing that his version of the events is more credible because the State Bar's witnesses may have had reasons to be less than truthful. Although our review of the record is independent, we must give great weight to the hearing judge's credibility determinations. (Rule 453, Trans. Rules Proc. of State Bar.) We are reluctant to deviate from the hearing judge's credibility-based factual findings in the absence of a specific showing that they were in error. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 638.) No such showing has been made here. Respondent's argument conveniently ignores the obvious motive respondent may have had to be less than truthful and assumes that the hearing judge did not consider all relevant factors in determining credibility. The record provides no basis for this assumption and no basis to depart from the hearing judge's credibility determinations.[11] **[3 - see fn. 11]**

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10. The notice to show cause was not amended and respondent has not asserted any error, either before the hearing judge or us, regarding the variance between the charges in the notice to show cause and the findings.

11. **[3]** By letter dated November 1, 1993, respondent notified us that at oral argument he intended to rely on "judicially noticeable facts" contained in several documents attached to the letter, which he contends are relevant to the issue of the credibility of the State Bar's witnesses. We note that some of the documents predate the trial in this matter and therefore should have been presented to the hearing judge. Respondent offers no explanation for not doing so. Also, as we have explained before, "Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record." (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 254.) Thus, at best, we could judicially notice that various allegations have been made in various legal matters. This would not alter our conclusion with respect to the hearing judge's credibility determinations.

Count One

Respondent's argument in this count that there is insufficient evidence to support the findings is basically a reiteration of his contention, which we rejected above, that the State Bar's witnesses are not credible. He asserts that he presented sufficient evidence to make it equally likely that he is telling the truth and therefore the State Bar has not met its burden of proof. According to respondent, it was Lee's decision to leave California to avoid the child support order and respondent only advised Lee as to what would happen if Lee did not pay the child support. Furthermore, any help respondent provided to Lee in the move was not an attempt on the part of respondent to aid and abet Lee to avoid the support order, but rather was done for mutual convenience as respondent was also moving to El Paso.

The evidence relating to whether respondent counseled or advised Lee to avoid the support order consisted primarily of the testimony of Lee and respondent. Lee testified that he asked respondent what would happen if he did not pay the support and respondent told him he could pay, go to jail, or disappear; that respondent told Lee that if he refused to pay, his best option was to change his name and go elsewhere; that respondent gave Lee two books, one on how to change your identity and the other on getting new identification; that the two books were discussed between respondent, Lee, and their respective wives; that respondent asked Lee where he would go and when Lee told him Colorado or Wyoming, respondent said those destinations were not a good place because they would be the first places people would look for Lee because of Lee's previous ties to those states; that respondent told Lee that he was moving to El Paso and invited Lee to accompany him to see the area; that respondent told Lee that he was thinking of purchasing a house in the mountains of New Mexico and that that would be a good place for Lee to move because no one would find Lee there; that Lee and respondent took several trips to New Mexico and El Paso; that on one of those trips Lee used respondent's brother's name to purchase an airline ticket, and that every time they went anywhere, respondent told Lee to use cash and not credit cards or checks so Lee would not leave a paper trail.

Respondent testified that he did not tell Lee that Lee had three options; that Lee told him that Lee was not going to pay the support; that he urged Lee to pay the support and that he told Lee if Lee did not pay the support, Lee would go to jail; that he never advised Lee to leave; that the books he gave to Lee also included parts that warned of the consequences of changing your identity and he gave Lee those books to caution Lee as to the problems of changing your identity; that he did not tell Lee to change his name; and that he helped Lee move to El Paso because he was moving there and their wives had become friends and wanted to be close to each other.

[4] Although the hearing judge did not detail Lee's testimony in the factual findings, it is clear from the findings that he found Lee's version of the events to be the more credible. As indicated above, we must afford this credibility determination great weight. Lee's testimony, although at odds with respondent's testimony, was consistent on the material issues and was found to be credible. The testimony of a single witness who is entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.) On this record, we do not find any basis to disturb the 1.hearing judge's factual findings.[12] Whether those findings support the legal conclusions of culpability is another issue.

[5] As indicated above, the hearing judge found respondent violated sections 6068 (c) and 6106 and rule 7-101. Section 6068 (c) provides that it is an attorney's duty "To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." Rule 7-101 (now rule 3-210) provided in relevant part that an attorney "shall not advise the violation of any law, rule or ruling of a tribunal unless he believes in good faith

12. We recognize that the dismissal of count two reflects on the hearing judge's assessment of Lee's credibility in that count. Nevertheless, that is not a sufficient reason to disturb the credibility determinations in count one, where there is evidence apart from Lee's testimony.

that such law, rule or ruling is invalid." Respondent informed Lee that Lee could disappear and informed and acquainted Lee on how to disappear by providing Lee with the two books; he advised Lee to use cash in order to avoid detection, and he advised Lee on locations to which Lee could move to avoid detection. Under these circumstances, respondent did not simply advise Lee as to the consequences of not paying the support order; rather, he actively counseled Lee on ways to accomplish the illegal goal of violating the court order. Accordingly, we conclude that the record supports the conclusion that respondent is culpable of wilfully violating section 6068 (c) and rule 7-101.

[6a] The hearing judge also concluded that respondent's conduct in "aiding and abetting Lee in evading" the support order constituted acts of moral turpitude in violation of section 6106. Respondent argues that the assistance he provided to Lee was not an attempt on his part to aid and abet Lee in avoiding the support order, but rather was an act of mutual convenience, citing to the hearing judge's finding that respondent and Lee helped one another in the move to El Paso for mutual convenience. This argument ignores the circumstances surrounding the move. Respondent knew Lee had been ordered to pay support and that Lee intended to move to El Paso and change his identity for the express purpose of avoiding the court order. As the child support was paid through respondent, he was also aware that Lee stopped making the payments prior to the move. Despite this knowledge, respondent helped Lee move, acted as a guarantor on Lee's application to have utilities turned on at the house in El Paso, and advised Lee on ways to avoid detection.

In *In re Young* (1989) 49 Cal.3d 257, the attorney was convicted of violating Penal Code section 32 (accessory to a felony). Young assisted a client with the intent to help the client avoid arrest. The Supreme Court held that Young's crime "necessarily involve[d] moral turpitude since it requires that a party has a specific intent to impede justice with knowledge that his actions permit a fugitive of the law to remain at large. An attorney convicted of this crime necessarily acts with conscious disregard of his obligation to uphold the law." (*Id.* at p. 264.)

[6b] Respondent was not found to have had the specific intent to help Lee avoid the support order. Nevertheless, respondent's knowledge of the order, of Lee's violation of the order by stopping payments prior to the move, and of Lee's express purpose in moving, coupled with affirmative help he provided Lee in moving, demonstrates that respondent acted in conscious disregard of his obligation to uphold the law. We therefore agree with the hearing judge that respondent's misconduct involved moral turpitude in violation of section 6106.

Counts Three and Four

Respondent argues that he is not culpable of violating rule 5-101 in either of these counts because he was not Lee's attorney at the time of the property transactions; he was not a party to the transactions; he did not acquire an interest in the property, and he did not gain financially from the transactions. The record is clear that respondent did have an attorney-client relationship with Lee at the time of the transactions. Respondent represented Lee in a number of matters other than the child support matter. He testified that he remained the attorney of record in some of those matters because Lee did not want to alert the opposing sides to Lee's departure to Texas. **[7]** Respondent does not cite any authority and our research reveals none, requiring, for purposes of rule 5-101, that the attorney represent the client with regard to the particular transaction in question.

[8a] The hearing judge's basis for finding the rule 5-101 violations in these counts was that even though respondent was not a party to the transactions, he was so closely involved that it was tantamount to respondent entering into the transactions and therefore rule 5-101 applied. It is undisputed that respondent was not a party to either transaction and that he did not acquire an interest in either property. Furthermore, no clear and convincing evidence establishes that respondent financially gained from either transaction. Neither party cites any cases and we are not aware of any that have applied rule 5-101 in situations where the attorney was neither a party to, nor financially gained from, the transaction at issue. (See, e.g., *Brockway* v. *State Bar* (1991) 53 Cal.3d 51 [attorney obtained quitclaim deed to client's

property to secure payment of legal fees]; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609 [loan to attorney from client]; *Rose* v. *State Bar* (1989) 49 Cal.3d 646 [attorney induced client to invest settlement proceeds in a business venture and the attorney received corporate stock for procuring financing for the venture]; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300 [attorney persuaded client to loan money from an estate over which client was conservator to attorney's ex-client and attorney received most of proceeds of one of the loans as payment of the ex-client's legal fees]; *Hawk* v. *State Bar* (1988) 45 Cal.3d 589 [attorney acquired note secured by client's property to secure payment of fees]; *Beery* v. *State Bar* (1987) 43 Cal.3d 802 [client loaned settlement proceeds to corporation in which attorney was a principal and attorney personally guaranteed the loan]; *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179 [attorney persuaded client, a charitable corporation, to loan money to a limited partnership in which attorney was a general partner]; *Silver* v. *State Bar* (1974) 13 Cal.3d 134 [attorney purchased house owned by client's former husband which house was the subject of the litigation for which the attorney was hired and was the only asset the former husband had to satisfy the client's judgment].)

[8b] There is no evidence in the record that respondent was a party to or benefited financially from either property transaction. We therefore conclude that respondent is not culpable of violating rule 5-101 in either of these counts. However, as indicated below, we view respondent's conduct in these property transactions as a significant aggravating factor.

Mitigation

With regard to the mitigating circumstances found by the hearing judge, we adopt the finding that respondent had practiced law for 11 years without prior discipline prior to his misconduct. (Std. 1.2(e)(i).) However, we do not accord significant weight to the good character testimony as it was only attested to by respondent's wife and three children and one attorney. (See std. 1.2(e)(vi).) We also do not give great weight to respondent's pro bono work, given its limited nature, and we find little mitigating value on this record to respondent not practicing law.

Aggravation

With regard to the hearing judge's finding in aggravation that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct (std. 1.2(b)(v)), there is no evidence that respondent held the $53,000 for any length of time. He and his father testified that the money was given to the father promptly after it was received from Lee. Respondent's statement that he had access to the money is not inconsistent with this testimony.

[9] Also, we do not find support for the conclusion that respondent was less than truthful in his State Bar testimony regarding the Irvine property transaction. (Std. 1.2(b)(vi).) The only findings supporting this conclusion were that respondent's testimony regarding the $53,000 being a security deposit was "incredible, self-serving and not supported by any evidence," and that respondent's testimony that he was "only acting as a 'messenger boy for the money' in the Irvine-El Paso property dispute was not believable." The hearing judge clearly did not find respondent's testimony on these issues credible, but without more, we cannot conclude that the record establishes by clear and convincing evidence that respondent was "less than truthful" in presenting his interpretation of the relevant events.

We also discount the hearing judge's finding that respondent's advice to Lee on how to avoid compliance with the court order was surrounded by dishonesty and overreaching. We do not find any evidence in the record to support these conclusions separate and apart from the evidence that supports the culpability conclusions in that count.

[10] "The relationship between an attorney and client is a fiduciary relationship of the very highest character." (*Clancy* v. *State Bar* (1969) 71 Cal.2d 140, 146.) In light of respondent's fiduciary obligations to Lee, we conclude that respondent's conduct with regard to the property transactions involved overreaching. Respondent was closely involved with his father in these property transactions. Perhaps because of the conflicting loyalties respondent faced between Lee and respondent's father, respondent did not safeguard Lee's interests in these transactions: he

induced Lee to reduce the sales price of the Irvine property for tax reasons that apparently did not benefit Lee; he did not adequately explain the transactions to Lee or advise Lee to seek independent counsel; he did not ensure that the transactions were properly documented; he advised Lee to conduct the sale and purchase of real property in cash and to that end, accepted $53,000 in cash from Lee in a brown paper bag; and, incredibly, he asserted to his client and at the State Bar proceeding that the $53,000 was a security deposit for the rental of a single family house.

[11a] We also conclude that respondent's representation of Lee in these transactions between Lee and respondent's father was rife with potential and actual conflicts of interest that could have been, if charged, the basis for additional culpability under rule 5-102. The record supports the hearing judge's finding that respondent represented both Lee and respondent's father.[13] The father admitted that respondent provided legal advice to him on matters within California. The consequences that resulted from the real property transactions are the consequences of conflicting loyalties that rule 5-102 was designed to avoid. As was noted long ago by our Supreme Court, the rule against representing conflicting interests is designed not only "to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]" (*Anderson* v. *Eaton* (1930) 211 Cal. 113, 116.) Respondent's relationship with his father required him to choose between conflicting duties to the detriment of Lee. Based on the above, we conclude that the circumstances surrounding the real property transactions aggravate respondent's misconduct under standard 1.2(b)(iii).

[11b] Standard 1.2(b)(iii) provides that it is an aggravating circumstance where the "member's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct . . . ." Respondent argues that his conduct in the property transactions cannot be considered an aggravating circumstance pursuant to this standard because he was not found culpable of any misconduct in these counts and, therefore, there was no misconduct which was surrounded by or followed by overreaching or other ethical violations. We reject this argument on this record. Although the notice to show cause charged four separate counts, the misconduct in this case all involved a single client and all involved essentially the same transaction of aiding Lee to avoid the child support order. Thus, respondent's misconduct in count one of helping Lee disappear, and to that end, moving him to El Paso, was surrounded by and followed by his conduct in the property transactions.

As we have not found respondent culpable of the charged misconduct in counts three and four, we delete the hearing judge's finding in aggravation that respondent's misconduct in these counts significantly harmed Lee. Nevertheless, as indicated above, respondent's misconduct involved a single client and essentially a single transaction and we therefore conclude that harm to Lee is an appropriate aggravating circumstance based on respondent's misconduct in count one. In addition, we agree with the hearing judge that respondent's misconduct in aiding Lee to avoid the child support order significantly harmed the administration of justice. (See std. 1.2(b)(iv).)

Discipline

The hearing judge and OCTC cite to *In re Young*, *supra*, 49 Cal.3d 257, in support of their respective views on the appropriate degree of discipline. Young was actually suspended for four years with credit for three years interim suspension as a result of his conviction. Young knew his client had committed or been charged with a felony and specifically intended to help the client avoid arrest. Young

13. Respondent does not assert on review that this finding, which is outside the charges contained in the notice to show cause, in any way implicated his due process rights. In addition, respondent presented evidence at trial in defense of the claim that he represented his father.

also arranged bail for the client under a false name. (*Id.* at pp. 264-265.)

The parties do not cite and our research has not revealed any recent California cases that involved advising a violation of the law. However, in several older cases, the attorneys were given lengthy suspensions for similar misconduct. In *Goldman* v. *State Bar* (1977) 20 Cal.3d 130, the attorneys were suspended for one year for several instances of improper client solicitation that included advising cappers on how to violate the solicitation laws. The attorneys had approximately ten years of practice with no prior disciplinary record. In *Paonessa* v. *State Bar* (1954) 43 Cal.2d 222, the attorney was suspended for two years for instructing his clients in two annulment matters not to disclose the existence of children of the marriages and to testify falsely regarding the children. In *Townsend* v. *State Bar* (1948) 32 Cal.2d 592, an attorney with a prior record of discipline was suspended for three years for advising a client to make a conveyance of property to defraud a creditor.

OCTC cites to three discipline cases from other jurisdictions involving similar misconduct. In two of these cases, it is not clear from the opinions whether the attorneys were found culpable of acts of moral turpitude. (*In the Matter of Disciplinary Proceedings Against Schrank* (1991) 161 Wis.2d 382 [468 N.W.2d 11]; *State ex rel. Nebraska State Bar Ass'n* v. *Cohen* (1989) 231 Neb. 405 [436 N.W.2d 202].) In *Schrank*, an attorney with no prior record of discipline was suspended for six months for advising a client to hide children from the other parent who had joint custody, for failing to communicate with and return materials to a client, and for failing to cooperate with the disciplinary investigation. In *Cohen*, an attorney with no prior record of discipline was suspended for six months for aiding a client in a plan to hold savings bonds for ransom from the rightful owners and to destroy the bonds if the client did not receive a finder's reward. In the third case, the attorney was found culpable of acts of moral turpitude and was disbarred. (*People* v. *Calt* (Colo. 1991) 817 P.2d 969.) There, the attorney had no prior record of discipline and was found culpable of assisting a client in preparing a fraudulent statement of settlement in an effort to obtain reimbursement for the client under a relocation policy of the client's employer.

In another similar non-California case, the attorney was not found culpable of acts of moral turpitude. (*Matter of Wojihoski-Shaler* (Ind. 1992) 603 N.E.2d 1347.) The attorney was suspended for 30 days by agreed disposition as a result of the attorney's conviction for assisting a company that enabled viewers to see television programs descrambled in violation of federal law. The court characterized the attorney's conduct as counseling another on the theft of property rights, but noted that the attorney was a passive participant in the commission of the crime and that there was no evidence that the attorney sought financial gain through her conduct. (*Id.* at p. 1348.)

We agree with the hearing judge that the misconduct in *In re Young* was more egregious than respondent's misconduct. As indicated above, Young had "a specific intent to impede justice with knowledge that his actions permit a fugitive of the law to remain at large." (*In re Young*, *supra*, 49 Cal.3d at p. 264.) Although respondent acted in conscious disregard of his obligation to uphold the law, as did Young, there is no evidence that respondent assisted Lee with the specific intent to help Lee violate the support order. In addition, Young's conduct in arranging bail for the client under a false name involved dishonesty and constituted a fraud on the court. (*Id.* at p. 265.) No such dishonesty or fraud occurred here.

[12a] Nevertheless, we view respondent's misconduct as more serious than did the hearing judge. Respondent's knowledge of Lee's unlawful purpose in moving, his advice to Lee on how to accomplish that unlawful purpose, and the help he provided to Lee to achieve that unlawful purpose constituted very serious misconduct for an officer of the court. Counseling and aiding clients to violate the law adversely impacts the integrity of the legal profession and the administration of justice, and puts the client in jeopardy of further criminal and/or civil proceedings. Such conduct is flagrant behavior unbefitting an attorney.

[12b] In addition, the enforcement of child support orders is of heightened concern as evidenced by the recent enactment of Welfare and Institutions

Code section 11350.6 and Business and Professions Code section 6143.5. These statutes provide for the suspension of attorneys (as well as other licensed professionals) for non-payment of child support and are a recognition of the seriousness of failing to pay child support in our society.

We also note that Young presented compelling mitigation not found in the present record. The Supreme Court found that Young had good motives for his misconduct in that he intended to convince his client to surrender, not to help his client flee the jurisdiction; that Young undertook appropriate rehabilitative steps; that he had practiced for 20 years without any prior discipline; that he was cooperative with authorities; that he expressed remorse; and that he engaged in the misconduct while suffering from physical, mental, and emotional exhaustion. (*In re Young*, *supra*, 49 Cal.3d at pp. 268-270.) In contrast, respondent had practiced for 11 years without prior discipline and his misconduct was accompanied by several aggravating factors not found in *Young*. Thus, even though we do not view respondent's misconduct as so egregious as Young's, his misconduct was surrounded by less mitigation and more aggravation than Young's misconduct.

In another case similar to *In re Young*, we recommended one year of stayed suspension and 60 days actual suspension. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737.) The attorney was convicted of harboring a fugitive, an offense that involved moral turpitude per se. DeMassa allowed a client indicted on federal drug charges to spend the night in his home. This crime was essentially the same crime committed by Young. We found compelling mitigating circumstances, including DeMassa's belief that he was at all times doing his best to serve the interests of both his client and the criminal justice system. (*Id.* at p. 754.) Good motives were not part of respondent's misconduct.

[12c] We recognize that we have found respondent culpable of less misconduct than did the hearing judge. Nevertheless, we view the misconduct as more serious than did the hearing judge and we consider the circumstances surrounding the property transactions to amount to significant aggravation. We also do not find the compelling mitigating circumstances that were present in *In re Young* and in *In the Matter of DeMassa*. These factors warrant increasing the hearing judge's recommended discipline. On balance, and in light of all relevant evidence and the above cases which imposed discipline ranging from sixty days actual suspension to disbarment for similar misconduct, we conclude that the prospective one-year actual suspension ordered in *Young*, coupled with three years probation as urged by OCTC, is appropriate in the present case.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for a period of three years, that execution of the order of suspension be stayed, and that he be placed on probation for a period of three years on the conditions of probation recommended by the hearing judge, except conditions number 1 and 9, which we modify to reflect an actual suspension of one year. We also recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court and be ordered to take and pass the California Professional Responsibility Examination, as recommended by the hearing judge. Finally, as did the hearing judge, we recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
STOVITZ, J.