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STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GERALD LARRY KLEIN

A Member of the State Bar

No. 86-O-13617

Filed April 27, 1994

SUMMARY

Respondent failed to obey a court order to halt implementation of a writ of execution against his client's estranged husband for spousal support, retained the funds in his trust account despite the husband's demand for their return, and ultimately used the funds to pay himself for the wife's legal fees. The hearing judge found that this conduct involved moral turpitude. In a separate matter, respondent committed minor violations of the conflict of interest rules and neglected a client. In mitigation, respondent had practiced without discipline for a long time before and since the misconduct, and had an impressive and laudable record of community service. The hearing judge concluded that the appropriate discipline was a private reproval. (Hon. Alan K. Goldhammer, Hearing Judge.)

The State Bar requested review, seeking greater discipline. The review department concluded that respondent's retention and use of his client's husband's funds, although it did involve failure to obey a court order and violation of trust fund rules, did not constitute moral turpitude or misappropriation, because the misconduct was the product of respondent's honest, though mistaken and unreasonable, belief that his actions were justified. Nonetheless, based on comparable case law, the review department concluded that, for the protection of the courts and the integrity of the profession, the appropriate discipline was a two-month stayed suspension with no actual suspension, and one year of probation on conditions including making restitution to the client's husband and attending State Bar Ethics School.

COUNSEL FOR PARTIES

For Office of Trials: Dane C. Dauphine, Andrea T. Wachter

For Respondent: Kenneth C. Kocourek

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] **273.30 Rule 3-310 [former 4-101 & 5-102]**

Where respondent represented wife in marital dissolution proceeding, and at respondent's suggestion, husband also hired respondent to represent both clients in joint bankruptcy proceeding, and where there was no evidence that respondent had obtained any pertinent confidential information from wife, respondent's representation of husband did not violate former rule precluding attorneys from accepting employment adverse to a client in a matter in which the attorney has obtained confidential information from the client.

[2 a-c] **273.30 Rule 3-310 [former 4-101 & 5-102]**
720.10 Mitigation—Lack of Harm—Found

Where respondent represented wife in marital dissolution proceeding, and at respondent's suggestion, husband also hired respondent to represent both clients in joint bankruptcy proceeding, and where consent to such joint representation signed by husband stated misleadingly that there was no conflict of interest between clients, and wife consented to joint representation orally but not in writing, respondent violated former rule prohibiting representation of clients with conflicting interests without written consent of all clients. However, where husband had consulted with separate counsel before retaining respondent; potential conflict was remote and no actual conflict materialized; and neither client was harmed, respondent's misconduct was substantially mitigated by surrounding circumstances and was relatively minor.

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

Prolonged delay in proceeding with an inherently urgent legal matter despite the client's repeated requests is sufficient to establish reckless disregard of an attorney's obligation to perform legal services with competence. Where respondent delayed filing bankruptcy petition despite need for prompt action to protect clients from creditors and despite one client's repeated requests that respondent proceed, and respondent also failed to communicate adequately with client regarding bankruptcy, respondent was culpable of reckless failure to perform competently.

[4] **106.30 Procedure—Pleadings—Duplicative Charges**
213.20 State Bar Act—Section 6068(b)
220.00 State Bar Act—Section 6103, clause 1

Where respondent did not display disrespect for any court except insofar as he violated a court order, charge of violating statute requiring respect for courts was properly disregarded as duplicative of charge of violating statute requiring obedience to court orders, which more directly addressed respondent's specific misconduct.

[5 a, b] **141 Evidence—Relevance**
204.90 Culpability—General Substantive Issues
220.00 State Bar Act—Section 6103, clause 1

Regardless of an attorney's belief that a court order was issued in error, the attorney is obligated to obey the order unless the attorney takes steps to have it modified or vacated. The attorney's belief as to the validity of the order is irrelevant to a charge of violating the statute requiring attorneys to obey court orders.

[6] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
430.00 Breach of Fiduciary Duty

Rule requiring prompt payment of entrusted funds upon demand requires attorneys to make such payment not only to the client, but also to a third party with a legitimate claim to those particular

funds. Where respondent improperly collected funds belonging to client's estranged husband, respondent held funds in trust as fiduciary for husband, and failure to turn them over to husband's counsel on demand violated rule.

[7] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
420.00 Misappropriation

By applying funds improperly collected from client's estranged husband to payment of client's debt for attorney's fees, respondent committed a trust account violation. Respondent's honest but mistaken belief in his own right to such funds did not absolve him of such violation. However, such violation did not constitute misappropriation, where respondent's essential ethical shortcoming involved misattributing ownership of funds to client rather than failing to handle them properly as entrusted funds.

[8] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
221.00 State Bar Act—Section 6106
835.10 Standards—Moral Turpitude—Declined to Apply

Review department's review of record is independent, and it may draw its own conclusions from record whether or not a party has requested it to do so. Where hearing judge's conclusion that respondent had committed act of moral turpitude was difficult to reconcile with judge's conclusion as to appropriate discipline, it was appropriate for review department to give particular scrutiny to culpability conclusion as well as degree of discipline, even though respondent had not requested review of moral turpitude conclusion.

[9 a, b] **204.20 Culpability—Intent Requirement**
220.00 State Bar Act—Section 6103, clause 1
221.00 State Bar Act—Section 6106

Where respondent did not intend to deliberately defy a court order and did not have any dishonest or wrongful intent, and where respondent's improper conduct was based on beliefs and understandings which, although not only mistaken but also objectively unreasonable, were honestly held, respondent did not commit acts involving moral turpitude, dishonesty or corruption.

[10 a, b] **595.90 Aggravation—Indifference—Declined to Find**
625.10 Aggravation—Lack of Remorse—Declined to Find
750.10 Mitigation—Rehabilitation—Found

Where respondent was legitimately entitled to fees for services to wife in marital dissolution, and honestly believed that couple had allocated trust funds to husband in marital settlement in order to prevent respondent from applying trust funds to wife's debt for fees, there was not clear and convincing evidence that respondent's failure to make restitution of funds to husband was an aggravating circumstance. Respondent's legal position in defense of his retention and use of husband's funds did not evidence a persistent unwillingness to conform his behavior to ethical standards, and did not undercut the force of his mitigating evidence of subsequent reputable practice and community service.

[11] **745.10 Mitigation—Remorse/Restitution—Found**

Where, after initially failing to perform services regarding joint bankruptcy filed by divorcing couple, respondent provided assistance to both parties in completing bankruptcy at no charge, this was voluntary ameliorative behavior which disciplinary standards are designed to encourage, and was entitled to mitigating weight even though respondent had duty to perform services for wife in any event.

[12] **755.32 Mitigation—Prejudicial Delay—Found but Discounted**

Where notice to show cause was not filed until about five years after misconduct and over a year after State Bar's initial inquiry to attorney regarding misconduct, and attorney had assumed matter had been dropped and thus had not taken steps to preserve recollection, there was some evidence that attorney was prejudiced in legally cognizable fashion by State Bar's delay. However, where attorney did not point to any specific factual issue as to which better-preserved recollection could have materially affected outcome of disciplinary proceeding, delay in prosecution had little weight as mitigating factor.

[13] **220.00 State Bar Act—Section 6103, clause 1**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
801.41 Standards—Deviation From—Justified
824.54 Standards—Commingling/Trust Account—Declined to Apply

Where an attorney disobeys a court order based on an unreasonable interpretation of the order or an untested belief that the order is not valid, or takes money that is not the attorney's based on an unreasonable view of the facts, public discipline is necessary to make clear to the bar, the courts and the public that attorneys face serious consequences for such misconduct. However, where respondent did not pose a threat to the public, and review department concluded that actual suspension was not required to reinforce respondent's understanding of his ethical obligations, no actual suspension was necessary.

[14 a, b] **171 Discipline—Restitution**
802.30 Standards—Purposes of Sanctions

Doing equity is not the principal purpose of restitution in disciplinary proceedings; rather, it is to force disciplined attorneys to confront the consequences of their misconduct in a concrete way, thus serving goals of rehabilitation and public protection. It would not be consistent with purposes of attorney discipline to decline to order an attorney to make restitution of funds which were clearly wrongfully taken, simply on basis of speculation that victim of misconduct might thereby be unjustly enriched.

[15] **162.19 Proof—State Bar's Burden—Other/General**
162.20 Proof—Respondent's Burden
165 Adequacy of Hearing Decision
171 Discipline—Restitution
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Where hearing judge declined to order restitution but offered to reconsider if State Bar could show that misconduct victim had not already been compensated for funds taken by respondent, this ruling misallocated the burden of proof. Once State Bar met its burden to prove initial trust account violation, it was respondent's burden to prove that restitution had in effect already been made by a third party.

[16] **173 Discipline—Ethics Exam/Ethics School**
174 Discipline—Office Management/Trust Account Auditing
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Where there was no evidence that respondent's trust account practices were generally deficient, and respondent's essential ethical shortcoming involved misattributing ownership of funds, not failing to handle them properly as entrusted funds, it was not necessary to require respondent to attend special trust accounting class portion of Ethics School.

ADDITIONAL ANALYSIS

Culpability

Found

220.01 Section 6103, clause 1
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
273.31 Rule 3-310 [former 4-101 & 5-102]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

213.25 Section 6068(b)
221.50 Section 6106
273.35 Rule 3-310 [former 4-101 & 5-102]
420.59 Misappropriation—Other

Mitigation

Found

710.10 No Prior Record
740.10 Good Character
765.10 Pro Bono Work

Standards

801.30 Effect as Guidelines
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863.10 Standard 2.6—Suspension
863.20 Standard 2.6—Suspension

Discipline

1013.02 Stayed Suspension—2 Months
1017.06 Probation—1 Year

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1021 Restitution
1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School

Other

1091 Substantive Issues re Discipline—Proportionality

OPINION

PEARLMAN, P.J.:

Respondent's misconduct in this matter involved failure to obey a court order to halt implementation of a writ of execution for spousal support against his client's estranged husband, the subsequent retention of those funds in his trust account despite the husband's demand for their return, and ultimate use of the funds to pay legal fees which respondent was later awarded in an arbitration against the client. Respondent was also found culpable, in a separate matter, of a violation of the conflict of interest rules and neglect of a client, the effects of both of which were found to be substantially mitigated.

Respondent had practiced for about nine years prior to the misconduct, which occurred in 1985 and 1986, and has continued to practice since then, with no disciplinary record other than the present case. Respondent presented evidence of an impressive and laudable record of community service, as well as other mitigating factors. The issue on which the State Bar seeks our review is whether this mitigation is adequate to justify the hearing judge's conclusion that the appropriate discipline is a private reproval. Before reaching this issue, however, we must determine whether respondent's unjustified retention of his client's husband's funds, and/or his misuse of those funds to pay his client's debt, amounted to moral turpitude as the hearing judge found.

Upon our independent review of the record, we conclude that respondent is not culpable of moral turpitude. Nonetheless, based on comparable case law, we conclude that the appropriate discipline for respondent's conduct, for the protection of the courts and the integrity of the profession, is a two-month suspension, stayed on condition of one year of probation with requirements including restitution and State Bar Ethics School, and passage of the California Professional Responsibility Examination. We do not recommend that respondent be ordered to serve any period of actual suspension.

FACTS AND CULPABILITY FINDINGS

The amended notice to show cause in this matter charged respondent with misconduct in three matters. In the first matter, the hearing judge found no culpability. The State Bar has not disputed this result on review, and we find no reason to disturb it. The hearing judge's findings of fact as to culpability in the second and third matters, which were based in part on stipulated facts, are also not disputed on review; we adopt them, and summarize them here, supplemented with findings of our own based on uncontroverted, credible evidence in the record.

A. The Bankruptcy Matter

[1a, 2a] In the second matter ("the bankruptcy matter"), while representing the wife in a marital dissolution proceeding, respondent advised his client that she should file a bankruptcy proceeding, and that they should determine whether her estranged husband wished to join in and pay the fees for the proceeding. Respondent explained that such an arrangement would benefit both the husband, by discharging him from the community debts, and the wife, by enabling her to avoid paying the attorney's fees for the bankruptcy. The husband agreed and hired respondent in December 1985 to represent both himself and his estranged wife in a joint bankruptcy.

[2b] Before hiring respondent for the bankruptcy, the husband had an opportunity to consult with his own counsel, who was representing him in the dissolution matter. The husband signed a document which was evidently intended to be a consent to the joint representation, but which stated misleadingly that there was no conflict of interest between the two clients. The wife did not sign any consent to the joint representation or any written conflicts waiver. Respondent's uncontroverted testimony, which the hearing judge did not find to be not credible, was that he explained the conflict issues to the wife orally and received her oral consent to the joint representation. Although there was no evidence that this joint representation involved any actual conflicts, it inherently involved potential conflicts.

Due to communication problems between respondent and the husband, which the hearing judge found were respondent's responsibility, respondent failed to obtain all of the necessary information in order to complete the bankruptcy petition properly and include all of the debts sought to be discharged.

Moreover, respondent delayed filing the petition until six months after he had been retained to do so, and only filed it after the husband had complained to the local bar association. By then, the marital dissolution had been completed, rendering the petition subject to dismissal because the two debtors were no longer married.

In July 1986, when respondent's office sent the husband a copy of a notice of meeting of creditors filed in the bankruptcy, he was concerned because the amount of debt shown on the notice appeared to be much too low. His effort to obtain more information about what debts had been included in the petition was rebuffed. In fact, the bankruptcy papers prepared by respondent did not include a complete listing of all the debts identified by the husband.

After the husband learned at a creditors' meeting in August 1986 that the petition might be dismissed due to the marriage dissolution, he visited respondent in person to express his dissatisfaction. Respondent immediately refunded most of the advanced fees the husband had paid him and gave him the file. Shortly thereafter, respondent returned the balance of the advanced fees, as well as advanced costs, with a letter stating erroneously that the bankruptcy petition had been dismissed.

The husband then retained new counsel, who was able to complete the bankruptcy proceeding successfully. Respondent cooperated with and assisted the new counsel at no charge to either party; at that time, respondent was still representing the wife.

[1b] In the bankruptcy matter, the hearing judge found that respondent did not violate former rule 4-101,[1] because that rule only precludes accepting employment adverse to a client relating to a matter in which the attorney has obtained confidential information, and there was no evidence that respondent had obtained any pertinent confidential information from the wife. Under the particular circumstances of this case, we concur with this conclusion.

[2c] The hearing judge also held that respondent's failure to obtain the wife's written consent to the joint representation wilfully violated former rule 5-102(B), and that the misleading nature of the written consent signed by the husband also constituted a "more technical than substantial" wilful violation of that rule. We interpret the judge's characterization of the violation in part as "technical" to mean that it was substantially mitigated by the surrounding circumstances—i.e., that the husband had separate counsel with whom he consulted; that the potential for conflict was remote given the facts; that no actual conflict materialized, and that neither client was harmed. We adopt the judge's conclusions, and, while not condoning the violation, we concur in the judge's view of it as relatively minor.

[3] Finally, the judge held that respondent wilfully violated former rule 6-101(A)(2) by delaying in filing the bankruptcy petition, despite the need for prompt action to protect the clients from creditors and despite the husband's repeated requests that respondent proceed, and also by failing to communicate adequately with the husband. Neither party disputes this conclusion on review, and we find it to be supported by clear and convincing evidence, especially given the hearing judge's credibility determinations to which we give deference. Respondent's prolonged delay in proceeding with an inherently urgent legal matter despite his client's repeated requests is sufficient to establish reckless disregard and thus to constitute a violation of former rule 6-101(A)(2). (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 642.)

B. The Dissolution Matter

The third matter involved in this proceeding ("the dissolution matter") was also one in which respondent represented the wife in a marital dissolution. In December 1984, the husband stipulated to pay the wife $300 per month in spousal support retroactively from October 1984 until the date of

1. All references to former rules, unless otherwise indicated, are to the former Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

trial, which was then scheduled for February 1985. A court order reflecting the December 1984 stipulation was filed in April 1985. Meanwhile, the trial had been continued to April 1985 and was later continued to August 1985.

The husband paid the amounts due for spousal support from October 1984 through February 1985. In May 1985, however, the husband, through his counsel, informed respondent that he did not interpret the stipulated order as requiring the husband to pay spousal support for any period after the originally-scheduled February 1985 trial date. In July 1985, based on his own declaration that the stipulated support order was still in effect, respondent obtained a writ of execution for spousal support payments for March through July, in the amount of $1,500, and commenced proceedings to garnish the husband's wages to collect the amount due.

In August 1985, before any funds had actually been collected from the husband's wages, the trial in the dissolution proceeding commenced in superior court. The first issue tried was whether respondent's client was entitled to collect spousal support under the writ of execution which respondent had obtained in July. The superior court judge ruled orally from the bench that he was going to recall the writ of execution, that no execution would issue between that date and the next scheduled trial date in November 1985, and that there would be no further spousal support order between then and the completion of the trial.

When asked to clarify this order, the judge stated that the support order was now terminated if it had not terminated already, and that the writ of execution was cancelled and recalled. Respondent objected that the judge had no jurisdiction to modify the support order because no motion to do so had been made. The judge then reiterated that he was recalling the writ of execution and that his intent was to preserve the status quo between the parties pending further trial. The minute order reflecting the foregoing proceedings stated that pending trial, the court terminated spousal support forthwith and quashed the writ of execution issued in July 1985.

Neither respondent nor the husband's counsel took any action to seek further clarification or modification of the judge's ruling or to reduce it to a formal order. We accept respondent's credible and uncontroverted testimony that he believed that the judge had acted in excess of his jurisdiction in quashing the writ of execution. Respondent and the State Bar stipulated that respondent disagreed with the order quashing the writ, but that respondent's client did not have sufficient resources to contest it.

After the August 1985 hearing, respondent took no action to rescind the wage garnishment process which he had already set in motion pursuant to the writ of execution. Accordingly, during October 1985, respondent received two checks, totalling $1,523.80, for funds which had been collected from the husband under the garnishment. Respondent placed the funds in his trust account.

Respondent testified that he had an agreement with his client that the $1,523.80 collected from the husband would be applied to the attorney's fees she owed to respondent. The hearing judge made no finding on this issue. Based on respondent's testimony on this point, which was uncontroverted and otherwise credible, we find that respondent and his client agreed and intended to apply this money towards respondent's fees, that respondent believed at all times that the money was his, and that the reason respondent nonetheless retained the money in his trust account was at first that the husband had a claim to it, and later also that a dispute arose between respondent and the wife over the final amount of respondent's bill.

In November 1985, the husband's attorney wrote to respondent and demanded return of the funds. Respondent replied that he considered the funds to be in dispute and would retain them in his trust account pending a court order to clarify the matter. Neither respondent nor the husband's counsel sought or obtained such an order.

Respondent's client, the wife, subsequently became dissatisfied with his services. In December 1985, respondent signed a substitution of attorney in which he was replaced by the wife appearing as her own counsel.

In April 1986, the husband and wife settled their property issues and stipulated to a judgment. The

stipulated judgment provided that the husband would pay the wife $10,000 for her share of the community property, and that the funds collected from the husband under the garnishment, which were still in respondent's trust account, were to become the husband's property and were to be transmitted to him as soon as possible. Thereafter, the husband's counsel again demanded that respondent release the funds, which respondent refused to do. The husband did not take any action to enforce the stipulated judgment as to the funds being held by respondent.

Meanwhile, respondent and the wife had been engaged in a dispute over respondent's attorney's fees for the dissolution. After a fee arbitration hearing in July 1986, respondent was awarded a total of $2,570 in fees and costs to be paid by the wife. In August and October 1986, respondent withdrew from his trust account, and applied to the fees owed him by the wife, the $1,523.80 which he had received from the garnishment of the husband's wages.

In the dissolution matter, respondent was charged with misappropriating the funds collected under the writ of execution, and with violating Business and Professions Code sections 6068 (b), 6103, and 6106,[2] and former rule 8-101(B)(4). We defer our analysis of the section 6106 violation to the discussion portion of this opinion, *post*.

[4] As to section 6068 (b), the hearing judge found that respondent did not display disrespect for any court except insofar as he violated a court order. He therefore disregarded the section 6068 (b) charge as duplicative of the section 6103 charge, which more directly addressed respondent's specific misconduct. Neither party contests this conclusion on review, and we concur with it. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522.)

The hearing judge correctly concluded that respondent's failure to return to the husband the money collected under the writ of execution constituted a violation of the court order quashing the writ. **[5a]** Regardless of respondent's belief that the order was issued in error,[3] **[5b - see fn. 3]** he was obligated to obey the order unless he took steps to have it modified or vacated, which he did not do. (*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 951-952; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403-404.) Accordingly, respondent was properly found culpable of violating section 6103.

[6] We also uphold the hearing judge's conclusion that respondent was culpable of violating former rule 8-101(B)(4) by failing to return the husband's funds upon demand. Former rule 8-101(B)(4) (now rule 4-100(B)(4)) required attorneys to make prompt payment on demand of client trust funds not only to the client, but also to a third party with a legitimate claim to those particular funds.[4] Because respondent should not have collected the funds on the wife's behalf in the first place, he held them in his trust account as a fiduciary for the husband's benefit, and should have turned them over to the husband's counsel as requested.

[7] Moreover, by subsequently applying the husband's funds to satisfy the wife's debt to him for her fees, respondent was culpable of a trust account violation. We decline to characterize this violation as misappropriation because respondent's essential ethical shortcoming involved misattributing the ownership of the funds to the wife, not failing to handle them properly as entrusted funds. (Cf. *In the*

2. All further references to sections are to the Business and Professions Code, unless otherwise noted.

3. [5b] Respondent's belief as to the validity of the order is irrelevant to the section 6103 charge. Accordingly, the hearing judge's finding that respondent acted in "objective bad faith" in disobeying the order is reviewed *post*, in connection with our discussion of moral turpitude.

4. For example, see *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979 (duty of husband's counsel in marital dissolution to account to wife for funds received from husband which wife claimed were community property); *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632-633 (duty to pay statutory medical liens in personal injury matters); *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 693 (duty to distribute funds of bankrupt client to creditors in accordance with order of bankruptcy court).

Matter of Respondent F (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.) If respondent honestly, though mistakenly, believed that he had a right to the funds, this state of mind may absolve him of moral turpitude in this connection (see discussion, *post*), but not of the trust account violation itself. (See *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 329, 332; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 167-170; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 470; see also *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1099; *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 399-400.)

DISCUSSION

A. Moral Turpitude

[8] On review, respondent has not requested that we reverse the hearing judge's conclusion that respondent was culpable of moral turpitude within the meaning of section 6106. However, our review of the record is independent, and although we defer to the hearing judge's credibility-based factual findings, we may draw our own conclusions from the record, whether or not a party has asked us to do so. (See, e.g., *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 596; Trans. Rules Proc. of State Bar, rule 453(a).) Moreover, as the State Bar has pointed out, the hearing judge's conclusion that respondent violated section 6106 is difficult to reconcile with his conclusion as to the appropriate discipline. Accordingly, it is appropriate for us to give particular scrutiny to the former, as well as the latter.

Respondent's wrongful conduct in the dissolution matter began with his failure to take steps to halt the collection of the husband's funds after the August 1985 hearing at which the judge ordered the writ of execution recalled. Respondent then failed to turn the money over to the husband's counsel promptly upon receiving it, and continued to hold the funds in trust after the husband's counsel requested that he release them. Respondent accounted for these actions by explaining (1) that he was confused by the judge's order, and was not sure that it meant that the writ was being recalled as to support amounts already accrued, as opposed to providing that no further spousal support would be ordered, and (2) that he considered the judge's order to have been issued in error and without jurisdiction, but his client did not have the means to contest it.

After respondent became aware of the parties' property settlement agreement, which awarded the funds in his possession to the husband, respondent testified that he still felt justified in his continued failure to turn the funds over to the husband because the wife originally agreed that respondent could use the funds collected from the husband under the writ of execution to pay the wife's debt to respondent for attorney's fees. Subsequently, the wife discharged respondent, and they became engaged in a fee dispute. While this dispute was ongoing, the couple agreed on a property settlement which allocated the entrusted funds to the husband, though providing at the same time that the husband was to pay the wife a considerable sum in cash. Respondent viewed this as a deliberate manipulation of the parties' assets in order to frustrate respondent's ability to collect the fees which the wife owed him. Based on this perception, respondent considered the entrusted funds to belong to the wife notwithstanding the settlement. He thus continued to hold the fees in trust until after he received the fee arbitration award, at which point he applied them to the partial satisfaction of that award.

[9a] The hearing judge's initial decision on culpability found that this course of conduct was grossly negligent and in "objective bad faith." In his final decision, the hearing judge clarified that he did not find that respondent intended to deliberately defy a court order, or had any dishonest, fraudulent, or otherwise wrongful intent. We interpret these findings to mean that the beliefs and understandings upon which respondent based his conduct, though honestly held, were not merely mistaken, but objectively unreasonable. The record amply supports the hearing judge's findings as so interpreted.

The state of mind which the hearing judge attributed to respondent in this case is essentially the same as that found by the Supreme Court in *Sternlieb* v. *State Bar, supra*, 52 Cal.3d 317. In that case, the

Court concluded that "if, as [Sternlieb] testified, she believed that her use of client trust funds [to pay her fees] was authorized by her client, and that her client had the power to give such authorization, that belief was unreasonable." (*Id.* at p. 324.)

Sternlieb represented the wife in a marital dissolution matter. Rent proceeds from the wife's occupancy of the couple's community property residence had been placed in Sternlieb's trust account pursuant to an interim agreement under which they were held in trust for the joint benefit of Sternlieb's client and her estranged husband, pending a final property settlement. Sternlieb began making withdrawals from these entrusted funds to pay her own fees at a time when she could not reasonably have believed that her client had authorized her to do so; moreover, even once she had her client's authorization, she should have known that the husband's permission was also required. (*Id.* at p. 325.) Sternlieb justified her actions on the ground that the husband owed her client more in support arrearages and other debts than the amount of money that was being held in trust. (*Id.* at p. 327.) The Supreme Court concluded that while Sternlieb was culpable of misappropriation and of violating the rules governing the handling of client trust funds, the evidence did not support the finding that she acted dishonestly in violation of section 6106. (*Id.* at pp. 321, 332.)

[9b] The facts regarding the marital dissolution matter in this case, as they bear on respondent's state of mind, are strikingly similar to those in *Sternlieb*. Respondent's belief in the justifiability of his actions was not only mistaken, but unreasonable; however, it was honestly held. As the Supreme Court did in *Sternlieb*, we therefore conclude that respondent did not commit acts involving moral turpitude, dishonesty, or corruption within the meaning of section 6106.[5]

B. Aggravation

The hearing judge found no factors in aggravation. On review, the State Bar contends that respondent's failure to repay the funds to the husband, together with his failure to accede to the conclusions as to culpability in the dissolution matter, shows a lack of recognition of wrongdoing or remorse which should be considered in aggravation under standard 1.2(b)(v) of the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V [hereafter "standard(s)"].)

We disagree. **[10a]** Respondent was legitimately entitled to a certain sum in compensation for his efforts on behalf of the wife, as determined by the fee arbitration award. Had the funds in his trust account belonged undisputedly to the wife, he would have been entitled to apply them towards satisfying the arbitration award once it became binding or was reduced to judgment. In fact, under the couple's marital settlement those funds had been awarded to the husband. However, respondent honestly—and not without a factual basis—believed that the couple had made this allocation deliberately in order to deprive respondent of the opportunity to apply them to the wife's debt for his fees. Under these circumstances, we do not think there is clear and convincing evidence that respondent's failure to pay restitution should be treated as an aggravating circumstance. (Cf. *Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d at pp. 1097, 1100-1101 [where attorneys honestly but mistakenly believed clients had originally authorized them to apply clients' funds to outstanding fees, no aggravating factors found even though clients thereafter disputed that authorization; attorneys had not yet made restitution as of issuance of Supreme Court opinion].)

5. In a supplemental brief, the State Bar cites *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83 and *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404 in support of its position that respondent's extended period of gross negligence constituted moral turpitude. We have concluded that it is not the duration of respondent's misconduct which is the critical factor here, but his honest belief in his right to do what he did. (Cf. *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 726-727.) The evidence in *Wyrick* and *Bouyer* did not show that those attorneys' grossly negligent actions arose from a sincere and honestly held, albeit mistaken and unreasonable, belief that their conduct was fully justified.

C. Mitigation

As the hearing judge noted, respondent's eight to nine years of discipline-free practice prior to the start of his misconduct, coupled with his unsullied record in the equally lengthy period since its conclusion, deserve substantial consideration in mitigation. (See std. 1.2(e)(i); see also *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fns. 12, 13.) Even more significant are respondent's long and very praiseworthy record of exemplary dedication to pro bono work and public service, and the extraordinary showing of good character which he presented through the testimony of numerous witnesses in his local legal community. (See std. 1.2(e)(vi).) These witnesses had reviewed the hearing judge's culpability decision, but nonetheless retained their high opinion of respondent's integrity and their belief that he would not intentionally take money belonging to another. On review, the State Bar challenges the admissibility and weight of some of the character evidence, but even without the disputed items, the record clearly supports the finding that respondent presented an extraordinary demonstration of his good character and reputation in his community.

At oral argument, counsel for the State Bar conceded that respondent showed rectification and atonement for his wrongdoing in the bankruptcy matter. **[11]** However, the State Bar's brief on review disputes the mitigating force of the fact that respondent assisted the husband's new counsel in completing the bankruptcy, pointing out that respondent had a duty to perform services for the wife in any event. This argument ignores the fact that respondent provided his assistance to the husband's counsel without charge to either party, and that the husband was originally brought into the bankruptcy at least partly so that he, not the wife, would bear the burden of paying for the bankruptcy-related legal fees. Respondent should receive mitigating credit for taking responsibility for helping both clients with their bankruptcy at no charge; this is exactly the type of voluntary ameliorative behavior which standard 1.2(e)(vii) is designed to encourage.

The hearing judge also found the State Bar's delay in prosecuting this matter to be a mitigating factor. On review, the State Bar contends that this factor should not be considered due to respondent's failure to make a showing of specific, legally cognizable prejudice. (See std. 1.2(e)(ix).)

[12] The misconduct at issue here occurred in 1985 and 1986. Respondent retained counsel and met with an attorney for the State Bar in connection with the investigation of this matter in mid-1989. The notice to show cause was not filed until August 1991. Respondent testified that during the period of over a year between the State Bar's initial inquiry and the filing of formal charges, respondent assumed the matter had been dropped, and accordingly failed to take any steps to preserve his recollection of the facts as he would have done if he had known that the State Bar intended to pursue the matter. This testimony constitutes at least some evidence that respondent was prejudiced by the delay in a legally cognizable fashion. However, he has not pointed to any specific factual issue as to which a better-preserved recollection would have or at least could have materially affected the outcome of this matter. Accordingly, while we recognize the delay in the prosecution of this matter as a mitigating factor, we give it little weight.

In any event, the delay in prosecution gave respondent the opportunity to demonstrate a significant period of reputable practice and community service not only before, but also after, the occurrence of his misconduct. (See std. 1.2(e)(viii).) In this regard, we give considerable mitigating weight to respondent's showing.

[10b] We recognize that respondent's failure to make restitution to the husband in the dissolution matter undercuts this showing somewhat, but we do not view his legal position in defense of this matter as evidencing a persistent unwillingness to conform his behavior to ethical standards. Rather, it appears to be an isolated incident in which respondent reacted inappropriately to what he perceived to be an unjustified court ruling, which was followed by a deliberate attempt on the part of his former client to avoid paying a legitimate bill for his fees. While not commendable, respondent's conduct in this regard neither undercuts the force of his mitigating evidence nor constitutes a basis for a finding in aggravation.

D. Appropriate Discipline

We have concluded that respondent was culpable in the bankruptcy matter of a minor violation of former rule 5-102(B) and of a violation of former rule 6-101(A)(2). In the dissolution matter, we have concluded that respondent violated section 6103 and former rule 8-101(B)(4), but that this misconduct did not involve moral turpitude. The standards indicate that we should recommend or impose the most severe of the appropriate sanctions for these various violations (std. 1.6(a)), adjusted as appropriate to reflect the balance of aggravating and mitigating circumstances. (See std. 1.6(b).)

The most severe applicable standard is 2.2(b), which provides for a minimum of three months actual suspension, irrespective of mitigating circumstances.[6] However, the standards are only guidelines, and we must also look to comparable case law in determining the appropriate sanction, in order to ensure that the discipline here is not disproportionate to the misconduct or to the sanctions imposed in other similar cases. (Cf. *Dudugjian* v. *State Bar, supra,* 52 Cal.3d at p. 1100 [notwithstanding standard 2.2(b), Court imposed public reproval for attorneys' improper retention of client funds based on honest but mistaken belief that clients had authorized application of funds to attorneys' fees].) Moreover, despite the State Bar's position that respondent did act with moral turpitude, it has only requested that we recommend a forty-five day actual suspension and until restitution is made as a condition of a one-year stayed suspension and two years probation.

In *Sternlieb* v. *State Bar, supra,* 52 Cal.3d 317, which we have already found to be similar in many respects to the marital dissolution matter in this case, the attorney received one year of probation and thirty days of actual suspension. *Sternlieb* only involved one instance of misconduct, whereas this case involves additional misconduct in the bankruptcy matter. However, that misconduct was minor in nature, and by itself, as a first offense, would not warrant any actual suspension. Moreover, respondent's showing of mitigating circumstances is stronger than Sternlieb's due to his extensive showing of pro bono work and community service, and his longer cumulative period of practice without prior discipline or subsequent disciplinary proceedings. The passage of time since respondent's misconduct, during which time his career has progressed not only without further misconduct but also with considerable distinction, also warrants imposing less discipline in this matter than in *Sternlieb,* in which the disciplinary charges were filed less than two years after the misconduct ended.

In *Dudugjian* v. *State Bar, supra,* 52 Cal.3d 1092, the attorneys each received a public reproval, conditioned on restitution and passage of a professional responsibility examination, for applying client funds to fees due to a mistaken but honest belief that the clients had authorized them to do so. In that case, however, there was no question that the funds belonged to the same people who owed the fees, nor did the respondents disobey a court order. Accordingly, respondent's misconduct in this matter is more serious than that of the respondents in *Dudugjian.*

Respondent urges us to impose a private reproval here as we did in *In the Matter of Respondent E, supra,* 1 Cal. State Bar Ct. Rptr. 716, *In the Matter of Respondent F, supra,* 2 Cal. State Bar Ct. Rptr. 17, and *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175. However, none of these cases involved violation of a court order or use of funds belonging to someone other than a client to pay the attorney's fees. *Respondent E* involved a relatively small client overpayment of costs resulting from an isolated bookkeeping error, which was not timely rectified due to a subsequent fee dispute. *Respondent F* involved a fee dispute that did not merit discipline coupled with lack of adequate supervision of a trust account resulting in a minor trust

6. Standard 2.6 also applies, indicating that suspension or disbarment would be appropriate for the violation of section 6103 depending upon the gravity of the offense or the harm, if any, to the victim. Since in this case both the offense and the harm were relatively minor, and the showing in mitigation is very substantial, standard 2.6 does not warrant a sanction greater than the three-month suspension indicated by standard 2.2(b).

account shortfall due to the undetected misdeposit of an unrelated check. *Respondent G* was a client neglect case, and did not involve any mishandling of entrusted funds.

The State Bar has cited four cases, other than *Dudugjian* and *Sternlieb*, as being relevant to the issue of appropriate discipline: *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47; *In the Matter of Hagen*, *supra*, 2 Cal. State Bar Ct. Rptr. 153; *Greenbaum* v. *State Bar* (1976) 15 Cal.3d 893; and *Crooks* v. *State Bar* (1970) 3 Cal.3d 346. *Ward*, *Hagen*, and *Greenbaum* all imposed some actual suspension; however, all are distinguishable.

Ward received a three-month suspension for misconduct which included his collecting, through a combination of client payments and unauthorized withdrawals from client trust funds, $5,000 more than he was entitled to according to his own bills, without even realizing that he had done so. We found Ward culpable of violating section 6106, and distinguished *Sternlieb* and *Dudugjian* on the ground that the latter cases did not involve "extended carelessness or inattention to the trust account" as did *Ward*. (*In the Matter of Ward*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 55.) *Ward* is distinguishable from this matter on the same basis; respondent's conduct here involved an extended period of stubborn insistence on his own unreasonable view of what was right, rather than gross carelessness in handling entrusted funds.

In *In the Matter of Hagen*, *supra*, 2 Cal. State Bar Ct. Rptr. 153, the one-year actual suspension recommendation was based on numerous acts of misconduct which included not only misappropriation of client funds, but also improper business transactions with clients. Hagen was found culpable of violating section 6106 based on his ongoing gross negligence in handling his trust accounts, which resulted in the issuance of trust account checks drawn on insufficient funds. (*Id.* at p. 169.) He also had a prior record of discipline and did not make as persuasive a showing of good character as did respondent here.

The attorney in *Greenbaum* v. *State Bar*, *supra*, 15 Cal.3d 893, who received three months actual suspension, misappropriated funds over and above what he claimed to be owed for fees, and used them for personal purposes. He also regularly commingled personal and client funds in his trust account.

The Court in *Crooks* v. *State Bar*, *supra*, 3 Cal.3d 346, imposed a public reproval for the attorney's knowing disregard of his responsibilities as a fiduciary in handling escrow funds in the sale of a business. The attorney used part of the funds to make certain payments in connection with the business transaction which he mistakenly but in good faith believed the escrow depositor had authorized him to do. He used the remainder to pay personal debts, based on his incorrect belief that he had a right to it. This case does support the State Bar's position that a private reproval is insufficient discipline in this matter; however, it does not indicate that actual suspension is appropriate.

Our decision in *In the Matter of Lazarus*, *supra*, 1 Cal. State Bar Ct. Rptr. 387 is somewhat instructive here. That case involved the unauthorized application of client trust funds to pay the attorney's legitimate bill for fees. The misconduct was found to violate the rules for handling client trust funds, but not misappropriation or moral turpitude. We recommended a two-month stayed suspension with one year probation and no actual suspension. Lazarus's misconduct was less serious than respondent's here, but although he had ten years in practice with no other discipline, he did not have the same outstanding professional record to offer in mitigation as does respondent.

[13] Upon our independent review of the record, we have concluded that public discipline is necessary in this matter in order to make clear to the bar, the courts, and the public that attorneys face serious consequences if they disobey court orders based on an unreasonable interpretation of them or an untested belief that they are invalid, or if they take money which is not theirs based on an unreasonable view of the facts. However, we do not believe that respondent currently poses a threat to the public, or that any actual suspension is required in order to reinforce respondent's understanding of his ethical obligations in the future. Accordingly, based on the circumstances of this case viewed in light of comparable case law, we believe that a two-month stayed

suspension and one year probation, with no actual suspension, will be sufficient discipline.

[14a] We agree with the State Bar that restitution should be ordered as a condition of the discipline in this matter. The hearing judge declined to order restitution on the ground that the State Bar had failed to prove that it would be "equitably appropriate."[7] **[15 - see fn. 7]** However, the State Bar Court is not a court of equity. Although restitution in disciplinary proceedings may be consistent with equity, doing equity is not its principal purpose. Rather, the purpose of requiring disciplined attorneys to pay restitution is to force them to confront the consequences of their misconduct in a concrete way, thus serving the goals of rehabilitation and public protection. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 537; see also, e.g., *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429.)

Thus, for example, in *Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d 1092, the attorneys were ordered to make restitution to their clients even though the Supreme Court accepted the finding that the attorneys had taken the clients' funds in order to apply them to legal fees which the clients legitimately owed. (Compare *id.* at p. 1096 with *id.* at pp. 1100-1101.) If restitution was proper in *Dudugjian*, it is even more so here. At the time he took the funds, respondent had a lawful claim to the sum he was awarded in the fee arbitration. However, his claim was against the wife, not the husband, and although he believed that the funds he took belonged to the wife, the fact is that they did not.[8] **[14b]** It would not be consistent with the purposes of attorney discipline for us to decline to order respondent to make restitution of funds which were clearly wrongfully taken, simply on the basis of speculation that the victim of his misconduct might be unjustly enriched by our order.[9]

The conditions attached by the hearing judge to the reproval required that respondent attend State Bar Ethics School (in addition to the normal MCLE ethics requirement) and take the California Professional Responsibility Examination within one year. We do not generally see the necessity of ordering both Ethics School and the California Professional Responsibility Examination in a reproval case, but because we increase the discipline we concur in the appropriateness of the requirement. In any event, respondent does not contest either of these provisions, and we have set them forth below in the form appropriate for a matter in which stayed suspension and probation are recommended.

[16] The State Bar requests that we also recommend a requirement that respondent also attend the special trust accounting class portion of Ethics School. We do not perceive the necessity for this condition. There is no evidence in the record that respondent's trust account practices are generally deficient. The bankruptcy matter involved no trust account issues, and in the dissolution matter, as noted above, respondent's essential ethical shortcoming involved

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7. [15] The judge stated that he would reconsider this result if the State Bar could show by declarations of the clients that the husband had paid the wife what she was entitled to under their property settlement, without credit for the funds which respondent was holding on the wife's behalf. This proviso improperly put the burden on the State Bar to come forward with evidence that the husband had *not* been compensated for respondent's withheld funds by a reduction of what the husband otherwise owed the wife. The hearing judge misallocated the burden of proof on this issue. The State Bar's burden was to prove the initial trust account violation, which it did. If restitution had in effect already been made by a third party, the relevance of this information would be to support a reduction in the discipline, and it was therefore respondent's burden to prove it. (Cf. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 496.)

8. Restitution was not ordered in *Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d 317, evidently because after the attorney improperly used entrusted community funds to pay the wife's legal fees, those funds were allocated to the wife under the final property settlement. (See *id.* at p. 325.) Thus, although the attorney's timing was improper, she did use her client's own money to pay her bill. In this case, in contrast, the final settlement allocated the entrusted funds to the husband.

9. The determination that respondent should make restitution to the husband as a condition of the discipline in this matter is without prejudice to any claim which respondent may still have against the wife on account of the fee arbitration award.

misattributing the ownership of the funds to the wife, not failing to handle them properly as entrusted funds.

FORMAL RECOMMENDATION

In accordance with the foregoing, we hereby recommend to the Supreme Court that respondent, Gerald Larry Klein, be suspended from the practice of law in the State of California for sixty (60) days, that execution of the order of suspension be stayed, and that respondent be placed on probation for one (1) year on the following conditions:

1. That within one (1) year from the effective date of the Supreme Court's order in this matter, respondent shall:

a. Make restitution to Bernard Bartley, or the Client Security Fund if it has paid Bernard Bartley, in the amount of $1,523.80 plus interest at the rate of 10% per annum from November 19, 1985, until paid in full, and furnish satisfactory evidence of restitution to the Probation Unit, Office of Trials, Los Angeles; and

b. Attend the State Bar Ethics School, take and pass the test given at the end of the session, and provide proof that he has done so to the Probation Unit, Office of Trials, Los Angeles. This requirement is separate and apart from fulfilling the MCLE ethics requirement and is not approved for MCLE credit;

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

3. That during the period of probation, 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 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 subject to assertion of applicable privileges, respondent shall answer fully, promptly, and truthfully any inquiries of the Probation Unit of the Office of Trials which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

5. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation 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;

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

7. 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 sixty (60) days 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 administered by the

Committee of Bar Examiners of the State Bar of California within one (1) year from the effective date of the Supreme Court's order herein.

We further recommend that costs be awarded to the State Bar in this proceeding 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's order herein.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT Q

A Member of the State Bar

No. 93-O-xxxxx

Filed May 17, 1994

SUMMARY

An attorney under investigation by the State Bar filed a motion in the State Bar Court seeking a protective order with regard to contacts between State Bar investigators and clients of the attorney who had not complained to the State Bar. The hearing judge granted the motion to the extent of requiring State Bar investigators and prosecutors to advise the attorney's non-complaining clients regarding the privileged nature of their communications with the attorney. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Both parties sought review. The review department concluded that with one specific, narrow statutory exception for motions to quash investigative subpoenas, the State Bar Court has no jurisdiction over State Bar disciplinary complaints prior to the filing of formal charges, and therefore had no jurisdiction to grant the relief requested by the attorney regarding the investigation, in the absence of a Supreme Court order or rule directing the State Bar Court to consider the attorney's motion.

COUNSEL FOR PARTIES

For Office of Trials: Allen Blumenthal

For Respondent: Diane L. Karpman, Judith A. Fournier

HEADNOTES

[1] **101 Procedure—Jurisdiction**
102.30 Procedure—Improper Prosecutorial Conduct—Pretrial
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
136 Procedure—Rules of Practice

State Bar's motion for emergency relief from hearing judge's order regarding conduct of disciplinary investigation was not properly brought before review department under either rule 350 of Transitional Rules of Procedure or rule 1400 of Provisional Rules of Practice. However, motion by State Bar to stay or vacate order issued by hearing judge based on argument that hearing judge acted without jurisdiction was properly brought under rule 113 of Transitional 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.

[2] **101 Procedure—Jurisdiction**
102.30 Procedure—Improper Prosecutorial Conduct—Pretrial
114 Procedure—Subpoenas

Except with respect to motions to quash investigative subpoenas, the State Bar Court does not have jurisdiction over State Bar disciplinary complaints prior to the filing of formal charges by the Office of the Chief Trial Counsel, and therefore had no jurisdiction to grant relief requested by attorney regarding conduct of disciplinary investigation, absent a Supreme Court order conferring authority to do so.

[3] **101 Procedure—Jurisdiction**
2509 Reinstatement—Procedural Issues

The State Bar Court's statutory exercise of independent decision-making authority over the determination of disciplinary and reinstatement proceedings does not extend to the investigation of such matters.

[4] **101 Procedure—Jurisdiction**
199 General Issues—Miscellaneous

In the statute establishing the State Bar Court (Business and Professions Code section 6086.5), the reference to "committees" which are replaced by the State Bar Court does not include the standing Discipline Committee of the Board of Governors.

[5] **101 Procedure—Jurisdiction**
139 Procedure—Miscellaneous
192 Due Process/Procedural Rights
193 Constitutional Issues
199 General Issues—Miscellaneous

Former disciplinary structure under which local administrative committees had both investigative and fact-finding powers raised due process concerns. Under volunteer State Bar Court system which superseded it, investigative and prosecutorial functions were separated from fact-finding and adjudicative functions. This separation was strengthened and institutionalized by reforms which created independently appointed State Bar Court.

[6 a-c] **101 Procedure—Jurisdiction**
102.30 Procedure—Improper Prosecutorial Conduct—Pretrial
193 Constitutional Issues
199 General Issues—Miscellaneous

Statutory scheme regarding State Bar discipline system does not provide for State Bar Court judges to report to Board of Governors or any of its committees, nor does it require Chief Trial Counsel to report to State Bar Court. Consistent with separation of prosecutorial and judicial roles, State Bar Court has no administrative oversight role with respect to functions of Chief Trial Counsel, and does not have general, plenary authority to supervise the conduct of investigations. Board of Governors and its Discipline Committee have general statutory authority over Chief Trial Counsel and Office of Investigations, subject to review by California Supreme Court.

[7] **101 Procedure—Jurisdiction**
114 Procedure—Subpoenas

The State Bar Court's statutory jurisdiction (Business and Professions Code section 6051.1) to adjudicate motions to quash investigative subpoenas issued by the Office of the Chief Trial Counsel constitutes the sole exception to the State Bar Court's lack of jurisdiction during the investigation phase of disciplinary proceedings.

[8] **101 Procedure—Jurisdiction**
114 Procedure—Subpoenas
193 Constitutional Issues
199 General Issues—Miscellaneous

Review department declined to adopt construction of statute giving State Bar Court jurisdiction over motions to quash subpoenas (Business and Professions Code section 6051.1) which would do violence both to plain meaning of statute and to necessary separation of powers within disciplinary system.

[9] **101 Procedure—Jurisdiction**
102.30 Procedure—Improper Prosecutorial Conduct—Pretrial
119 Procedure—Other Pretrial Matters
159 Evidence—Miscellaneous
192 Due Process/Procedural Rights

When a disciplinary proceeding is pending in State Bar Court, the respondent may be able to argue that evidence sought to be used by the State Bar which was obtained by improper means should be excluded.

[10 a, b] **101 Procedure—Jurisdiction**
102.30 Procedure—Improper Prosecutorial Conduct—Pretrial
194 Statutes Outside State Bar Act
199 General Issues—Miscellaneous

Nothing in the California Rules of Court delegates to the State Bar Court the Supreme Court's general review power over decisions of the State Bar Board of Governors and its committees. However, in the exercise of its inherent authority to regulate the legal profession, the Supreme Court could order the State Bar Court to adjudicate or make findings and recommendations regarding a motion for a protective order regarding a State Bar disciplinary investigation, or could adopt a rule of court giving the State Bar Court jurisdiction over such motions generally.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

This matter arises from a State Bar investigation[1] in which counsel for the attorney under investigation (who has been referred to for convenience throughout these proceedings as "respondent") filed a motion in the State Bar Court Hearing Department seeking a protective order with regard to contacts between State Bar investigators and clients of respondent's who had not complained about respondent to the State Bar.

The assigned hearing judge denied respondent's motion except in one respect. The judge granted relief to the extent of requiring the State Bar's investigators and prosecutors to advise respondent's non-complaining clients or former clients that communications between them and respondent are privileged; that they, as the holder of that privilege, may choose to waive that privilege without respondent's permission; and that they may consult an attorney of their choice if they are unsure of their rights and privileges. The hearing judge declined to stay her order pending review.

The State Bar, represented by the Office of the Chief Trial Counsel ("OCTC"), filed a motion for emergency relief addressed to the review department, as well as a motion for a stay of the hearing judge's order. The motion stated that it was based on rule 1400 of the Provisional Rules of Practice and rule 350 of the Transitional Rules of Procedure. Respondent's counsel opposed both of OCTC's motions, and also filed a separate motion on respondent's behalf seeking review under rule 1400(e)(vii) of the Provisional Rules of Practice of the hearing judge's order insofar as it denied respondent's motion in part.

[1] In an order issued upon the Presiding Judge's referral of the matter to the review department in bank, we ruled that OCTC's motion for emergency relief was not properly brought under either any provision of rule 1400 of the Provisional Rules of Practice or rule 350 of the Transitional Rules of Procedure. However, inasmuch as the State Bar's motion sought to stay or vacate an order issued by a hearing judge based on the argument that the judge acted without jurisdiction in issuing the order, we concluded that the motion was properly brought under rule 113 of the Transitional Rules of Procedure.

Both respondent's and the State Bar's motions were set for oral argument in light of the novelty and importance of the issues raised. Pending review, we stayed the hearing judge's order, but issued an order of our own in order to preserve the status quo, permit meaningful review, and prevent irreparable injury to either party pending our determination of the threshold issue as to whether the State Bar Court has jurisdiction to order relief of the type sought by respondent.[2]

[2] Having given thorough consideration to this matter following briefing and oral argument, we have concluded that with one specific, narrow exception, there is no provision in the State Bar Act, the

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1. By statute, as well as under rules adopted by the State Bar Board of Governors, this matter, like all investigation matters, is confidential. (Bus. & Prof. Code, § 6086.1 (b); Trans. Rules Proc. of State Bar, rules 220-224.) However, because of the novelty and importance of the issues raised in this proceeding, we informed the parties of our intention to publish this opinion in an anonymous form, and afforded them an opportunity to object prior to such publication.

2. Our order provided as follows: "1. The . . . order of the hearing judge which is the subject of the State Bar's motion for emergency relief is hereby STAYED; [¶] 2. The Office of the Chief Trial Counsel of the State Bar, and its attorneys, investigators, agents, and employees: [¶] (a) shall not initiate any further contact or communication regarding respondent with clients (including former clients) of respondent, and [¶] (b) shall not respond to contacts or communications relating to the above-titled investigation matter from respondent's noncomplaining clients (or former clients) except to inform them that such communication has been temporarily halted by court order. [¶] This order shall not in any way prohibit or limit employees of the Office of the Chief Trial Counsel from communicating in any way with any client or former client of respondent who has filed or shall in the future file a complaint with the State Bar regarding respondent. [¶] 3. All applicable time limits, if any, relating to the above-titled investigation, or any possible prosecution arising therefrom, shall be TOLLED from the date of this order until further order of the Review Department."

California Rules of Court, or the Transitional Rules of Procedure which gives the State Bar Court jurisdiction over State Bar disciplinary complaints prior to the filing of formal charges by the Office of the Chief Trial Counsel. Accordingly, in the absence of a Supreme Court order specifically conferring authority upon it to consider motions of this type, the State Bar Court has no jurisdiction to grant or recommend the relief requested by respondent in this matter.

[3] Business and Professions Code section 6086.5 authorizes the State Bar Court to exercise authority in place of the Board of Governors of the State Bar (hereafter "Board") over "the *determination* of disciplinary and reinstatement proceedings." (Emphasis added.) This independent decision-making authority does not extend to the *investigation* of such matters. **[4]** As pointed out by respondent's counsel, Business and Professions Code section 6086.5 does refer to the State Bar Court's service in place of Board-appointed "committees." Read in the context of the historical development of the disciplinary system as reflected in the State Bar Act, however, this reference is clearly to the local administrative committees which once served as the Board's representatives in disciplinary matters. (See Bus. & Prof. Code, §§ 6040-6043).[3] **[5 - see fn. 3]** In order to make sense of the statutory scheme as a whole, the reference to "committees" in section 6086.5 cannot be read to include the Discipline Committee,[4] which by statute is the body to which the Chief Trial Counsel reports and is accountable. (*Id.*, § 6079.5 (a).)

[6a] Just as the statutory scheme does not provide for the State Bar Court judges to report to the Board or any of its committees, it would be inappropriate to read sections 6086.5 and 6079.5 in such a way as to require the Chief Trial Counsel to report to the State Bar Court. In short, consistent with the appropriate separation between the prosecutorial and judicial roles in the discipline system, the State Bar Court has no administrative oversight role with respect to the functions of the Chief Trial Counsel. The State Bar Court simply has jurisdiction over court proceedings in which the Chief Trial Counsel's office is involved as the representative of the State Bar as an institutional party.

[7] The one exception to the State Bar Court's lack of jurisdiction during the investigation phase of disciplinary proceedings is its statutory jurisdiction under Business and Professions Code section 6051.1 to adjudicate motions to quash subpoenas, including investigative subpoenas issued by OCTC. (See Bus. & Prof. Code, § 6049 (b); rules 300-314, Trans. Rules Proc. of State Bar.) **[6b]** We cannot construe this statute to give the State Bar Court general, plenary authority to supervise the conduct of investigations generally. **[8]** Such a construction would do violence both to the plain meaning of the statute and to the necessary separation of powers, and we decline to adopt it. (See *Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 800-801 [courts should not go beyond clear, unambiguous language of statutes]; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 760.)

Moreover, a subpoena is essentially a court order, as to which disobedience is punishable by contempt. (Bus. & Prof. Code, §§ 6050, 6051.) Thus, there is a significant distinction between giving the State Bar Court jurisdiction to adjudicate the validity and proper scope of a subpoena, which involves the normal judicial function of interpreting and enforcing court orders, and interjecting the court into the extraordinary role of exercising broad supervisory authority over the day-to-day conduct of investigations.

[9] Interpreting this court's jurisdiction in the foregoing manner does not leave respondent without

3. [5] The former local administrative committees had investigative as well as fact-finding powers, but this structure raised due process concerns. It was superseded in 1979 by the salutary separation of the investigative and prosecutorial functions from the fact-finding and adjudicatory functions which came into being under the former volunteer State Bar Court system and were further strengthened and institutionalized by the 1988 reforms that created the current independently appointed State Bar Court. (See Bus. & Prof. Code, §§ 6079.1, 6086.65 (enacted in 1988).)

4. We use the statutory term "Discipline Committee" (see Bus. & Prof. Code, § 6079.5 (a)) to refer to the standing Board committee which deals with matters related to attorney discipline. The actual name of the committee has changed from time to time depending on the other subject matters (e.g., admissions, attorney competence, client assistance) assigned to the Discipline Committee at different times.

a remedy if, once a disciplinary proceeding is pending in this court, respondent can argue by appropriate motion that any evidence sought to be used by the State Bar which was allegedly obtained by improper means should be excluded. (See *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 224-230 [setting forth analysis for application to State Bar disciplinary proceedings of criminal or civil procedural rules such as the exclusionary rule].)

Moreover, respondent is not without other remedies during the investigation process itself. **[6c]** The Board and its Discipline Committee have general statutory oversight authority over the Office of the Chief Trial Counsel, including the Office of Investigations which is a part thereof.[5] (See, e.g., Bus. & Prof. Code, §§ 6044, 6079.5.) Their actions in turn may be reviewed by the Supreme Court under rule 952(d) of the California Rules of Court. **[10a]** Contrary to respondent's contention, there is nothing in the California Rules of Court which delegates the Supreme Court's general review power under rule 952(d) to the State Bar Court.[6] **[10b - see fn. 6]**

In this connection, we requested the parties to inform us whether the Board or its Discipline Committee had issued any directive to the Chief Trial Counsel regarding the conduct complained of by respondent in this matter, either in this specific matter or in general. In response, counsel have submitted a 1987 Board resolution setting forth the Board's policy regarding State Bar investigators' authority to interview non-complaining clients of a State Bar member against whom a complaint has been filed. This resolution is persuasive evidence that the Board does indeed exercise general supervisory authority over OCTC's investigation function. If respondent's counsel believe that the Board's 1987 policy should be changed, or that it is being violated in this instance, these contentions raised during the investigation are properly addressed to the Board or the Discipline Committee, not the State Bar Court.

Respondent contends that the process by which the Discipline Committee and the Board act is too time-consuming to provide meaningful relief to attorneys who believe they or their clients are threatened by improper use of OCTC's investigative powers. If true,[7] this contention might constitute grounds for a petition to the Supreme Court, but it does not change the fact that the applicable statutes, rules of court, and Board rules all assign the supervision of disciplinary investigations to the Discipline Committee and the Board, subject to Supreme Court review, and not to the State Bar Court.

For the foregoing reasons, we vacate all orders heretofore issued in this matter by either department of the State Bar Court restricting the conduct of the investigation in this matter and we dismiss this proceeding in its entirety for lack of jurisdiction.[8] Accordingly, we do not address the merits of respondent's contentions regarding alleged improprieties in the investigation of the complaint against him. This disposition is effective forthwith.

We concur:

NORIAN, J.
STOVITZ, J.

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5. Shortly before oral argument, respondent sought leave to file a belated motion to augment the record with a memorandum from the Chief Court Counsel of the State Bar Court to its Executive Committee which was included in the public agenda for a recent meeting of that Executive Committee. The memorandum suggests possible amendments to the State Bar Act. It does not address any question at issue here, including whether the Board possesses or exercises oversight authority over the investigation of disciplinary matters. Thus, even if otherwise admissible, the document which respondent's counsel sought to add to the record is irrelevant to the issues raised in this proceeding. Accordingly, at oral argument we denied respondent's motion.

6. **[10b]** In the exercise of its inherent authority to regulate the legal profession (see, e.g., *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-301; *Stitt* v. *State Bar* (1978) 21 Cal.3d 616), the Supreme Court could order the State Bar Court to adjudicate or make findings and recommendations regarding a motion such as respondent's in a particular case, or could adopt a rule of court giving the State Bar Court jurisdiction over such motions generally.

7. There is no evidence in the record that respondent or his counsel contacted the Board or the Discipline Committee regarding this matter until just three weeks prior to oral argument.

8. In light of our disposition of this matter, OCTC's motion to strike portions of the declarations submitted by respondent's counsel is denied as moot.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

IVAN O.B. MORSE

A Member of the State Bar

No. 88-O-10896

Filed June 1, 1994

[Editor's note: Review granted, Jan. 5, 1995 (S041048); State Bar Court Review Department opinion superceded by *In re Morse* (1995) 11 Cal. 4th 184. The State Bar Court Review Department opinion previously published at pp. 24 - 40 has been deleted from the *California State Bar Court Reporter*.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HEROICO M. AGUILUZ

A Member of the State Bar

No. 90-O-14710

Filed June 2, 1994

SUMMARY

Respondent concurrently represented two clients with potentially conflicting interests. He continued this representation after an actual conflict of interest arose between the clients without seeking written consent from them. His repeated failure to comply with court requirements resulted in the dismissal of his clients' suit. One client died, and he failed to inform the surviving client of the suit's dismissal. Later, he withdrew from representation without notice to, or consent from, the surviving client. Also, he did not promptly notify representatives of his deceased former client about the receipt of trust funds on that client's behalf. Because of respondent's inadequate supervision of his staff and inadequate attention to his professional duties, his office sought damages from an insurer on behalf of the surviving client, from whose representation he had already withdrawn, and later filed a pleading in the already-dismissed suit in which the surviving client purported to sue the deceased client.

The hearing judge concluded that respondent had represented conflicting interests without the written consent of both clients, had repeatedly failed to perform legal services competently, and had withdrawn from employment on behalf of the surviving client without taking reasonable steps to avoid foreseeable prejudice, but had not violated the rule requiring prompt notification to the client of the receipt of a client's funds. Finding no mitigating circumstances and non-final prior discipline as an aggravating circumstance, the hearing judge recommended that if respondent's prior discipline became final, which subsequently occurred, respondent should receive a one-year stayed suspension and a two-year probation, conditioned on a sixty-day actual suspension. (Richard D. Burstein, Judge Pro Tempore.)

Respondent sought review. The review department adopted the hearing judge's culpability conclusions, but added the conclusion that respondent had violated the rule requiring prompt notification of the receipt of client funds. Also, the review department identified a significant aggravating circumstance not assigned by the hearing judge: that respondent showed indifference toward atonement and demonstrated a clear lack of insight into the wrongfulness of his conduct. The review department recommended that respondent's period of actual suspension be increased to ninety days, and that he be ordered to comply with rule 955, California Rules of Court.

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

Counsel for Parties

For Office of Trials: Allen Blumenthal

For Respondent: Heroico M. Aguiluz, in pro. per.

Headnotes

[1 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
135 Procedure—Rules of Procedure

Liberal amendment of a notice to show cause is permitted before trial when the accused attorney has ample opportunity to prepare a defense to the amended charges. (Trans. Rules Proc. of State Bar, rule 557.) Where respondent claimed that citations to Rules of Professional Conduct in original notice to show cause were inadequate, but these citations were corrected or clarified by an amended notice to show cause five months before start of trial; where such amendments were properly permitted; and where the amended notice afforded respondent reasonable notice of the charges even though it did not discuss the legal scope of the charged rules, respondent's claims of procedural error lacked merit.

[2 a-c] **273.30 Rule 3-310 [former 4-101 & 5-102]**

The rule of professional conduct on conflicts of interest exists to avoid placing attorneys in positions where even through an exercise of good faith, they would seek to reconcile or depreciate differing interests of clients and render their representation of any one client less effective as a result. There is an inherent potential conflict of interest between a driver and passenger in an automobile accident case. An attorney who wishes to represent them both does not per se violate ethical constraints, but must disclose to both clients in a fair and understandable manner the potential conflicts of representing each of them and obtain the written consent of both clients.

[3] **273.30 Rule 3-310 [former 4-101 & 5-102]**

Where respondent represented both driver and passenger in an automobile accident case, an actual conflict of interest developed between the two clients once respondent learned that the other driver's insurer had taken the position that respondent's driver client was liable. Thus, respondent was required to disclose the actual conflict to both clients and obtain their written consent to his continued representation of them.

[4] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]

Where respondent's repeated failure to comply with superior court requirements led to the ultimate dismissal of his clients' suit; respondent failed to inform the clients of the dismissal; and, after one client died, respondent precipitously withdrew from representing the surviving client and at the same time sought damages for the surviving client against the deceased former client, respondent wilfully violated the rules against repeatedly failing to perform legal services competently and against withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to a client's rights.

[5] **280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]**

Where respondent received an insurance check to cover medical benefits for a deceased former client, respondent's giving notice to a medical clinic which had a lien on the funds did not excuse

respondent's duty to inform the representative or relatives of the client about the receipt of the check. Respondent's failure to do so wilfully violated the rule requiring an attorney to notify a client promptly of the receipt of the client's funds.

[6 a-d] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
273.30 Rule 3-310 [former 4-101 & 5-102]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
511 Aggravation—Prior Record—Found
591 Aggravation—Indifference—Found
621 Aggravation—Lack of Remorse—Found
801.45 Standards—Deviation From—Not Justified
824.10 Standards—Commingling/Trust Account—3 Months Minimum
1093 Substantive Issues re Discipline—Inadequacy

Where respondent violated trust account rules but did not commit misappropriation, and respondent also violated conflict of interest rules, failed to perform competently, and abandoned a client, and there was no evidence in mitigation but the misconduct was aggravated by a prior record of discipline and by respondent's lack of insight into the wrongfulness of his conduct, and where respondent failed to provide evidence that he had put in place changes in office practices to guard against further misconduct, review department included 90 days of actual suspension as part of recommended discipline, rather than 60 days as recommended by hearing judge.

[7] **591 Aggravation—Indifference—Found**
621 Aggravation—Lack of Remorse—Found
805.10 Standards—Effect of Prior Discipline

Where respondent blamed his office administrator, his clients, and the insurer of one of his clients for his difficulties rather than looking to his own ethical responsibilities, this lack of insight, coupled with his lack of sensitivity to basic ethical principles, called for greater discipline than his prior entirely stayed suspension.

[8] **591 Aggravation—Indifference—Found**
802.30 Standards—Purposes of Sanctions

The key concern in arriving at a disciplinary recommendation is the protection of the public. In that regard, review department considered that evidence about respondent's change in office practices as a result of serious ethical violations was limited to his termination of the services of his office administrator, and that it was unclear whether respondent had put in place any changes to guard against a recurrence of these violations.

[9] **204.90 Culpability—General Substantive Issues**

An attorney has a nondelegable duty to exercise reasonable supervision of his or her staff.

ADDITIONAL ANALYSIS

Culpability

Found

270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
273.31 Rule 3-310 [former 4-101 & 5-102]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]

Standards

901.30 Miscellaneous Violations—Suspension
901.40 Miscellaneous Violations—Suspension

Discipline

1013.06 Stayed Suspension—1 Year
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

173 Discipline—Ethics Exam/Ethics School
175 Discipline—Rule 955

OPINION

STOVITZ, J.

The record we review demonstrates what can happen in an attorney's handling of a simple personal injury matter when the attorney responsible, here respondent Heroico M. Aguiluz, is insensitive to basic principles of professional standards and fails to reasonably supervise his staff. What did happen is that respondent undertook the concurrent representation of clients with potentially conflicting interests; he continued that representation when an actual conflict of interest arose without seeking required written client consent to the continued representation; he failed repeatedly to handle competently the suit he filed for his clients, resulting in its dismissal. One of the clients died. He then failed to inform the surviving client that the case had been dismissed; he later unilaterally withdrew from employment of this client without client notice or consent; and he failed to promptly notify representatives of his since-deceased client of the receipt of trust funds on that client's behalf. Because of respondent's inadequate supervision of staff and inadequate attention to his professional duties, his office sought damages from an insurer for the client as to whom he had already withdrawn from employment. Two months later, his staff filed a "first amended complaint" in the already-dismissed suit in which one client purported to sue his other since-deceased client.

After hearing the evidence, a State Bar Court hearing judge pro tempore found respondent culpable of wilfully violating provisions of the Rules of Professional Conduct relating to conflicts of interest, repeated incompetent performance of services and improper withdrawal from employment. The hearing judge found no mitigating circumstances but found aggravating respondent's prior misconduct resulting in discipline of stayed suspension recommended by this court in *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32 (hereafter "*Aguiluz I*") and ordered by the Supreme Court effective March 20, 1993. (Min. order filed Feb. 18, 1993 (S027125).)

In the present matter, the hearing judge made his recommendation in the alternative because *Aguiluz I* was not final at the time. In the event that recommendation became final (which has since happened), the hearing judge recommended that respondent be suspended for one year, that that suspension be stayed and that respondent be placed on a two-year probation on conditions including actual suspension for sixty days, attendance at the State Bar's Ethics School, completion of six hours of law office management courses, the submission of a law office management plan to his assigned probation monitor referee and passage of the California Professional Responsibility Examination. The hearing judge recommended that respondent's period of probation be concurrent (but not retroactive) to the period of probation ordered by the Supreme Court in *Aguiluz I*.

Respondent sought our review, contending that he was not given proper notice of the charges; that the record does not support the hearing judge's conclusions of culpability; and that, at most, the discipline should be reproval. The State Bar, represented by the Office of the Chief Trial Counsel (OCTC), disputes respondent's attack on the notice of charges and defends the hearing judge's findings, conclusions and suspension recommendation.

Independently reviewing the record, we adopt the hearing judge's findings as corrected in a minor way and his conclusions; we adopt an additional conclusion of culpability, and we recommend the hearing judge's suspension with the exception that respondent be actually suspended for 90 rather than 60 days and that he comply with the provisions of rule 955, California Rules of Court re notices to clients, courts and opposing counsel.

I. FACTS

On November 29, 1988, Elmer Penate and Jose Sandoval were involved in an auto accident in Los Angeles. Penate was driving the car in which he and Sandoval were riding. They claimed that the driver of the other car, Daniel Passamaneck, ran a red light and hit them. Sandoval had neck, back and shoulder pains and Penate was injured as well. On the day of the accident, they were treated at the Holy Spirit Medical Clinic and they also retained respondent to

represent them in seeking damages from Passamaneck.[1]

Respondent did some investigation of his clients' claim. He obtained a witness's statement which supported his clients' version of liability and he sent this information with a claim to Passamaneck's insurer. On May 15, 1989, Passamaneck's insurer denied the claim based on its evidence that Passamaneck entered the intersection on the green light and that Penate had admitted liability to Passamaneck and another witness at the scene. In July 1989 respondent forwarded to Passamaneck's insurer evidence of his clients' damages and made a settlement demand. The insurer rejected it for the reasons given in May and named the witness it relied on as the one to whom Penate admitted liability. By this time, respondent had doubts as to the validity of his clients' claim.[2]

In August 1989 respondent filed suit for his clients against Passamaneck, notwithstanding the doubts he had about his clients' case.[3] This suit was subject to court rules on trial court delay reduction ("fast track"). After filing suit, respondent failed to follow the superior court's "fast track" requirements to serve the summons and complaint within 60 days after he filed suit. He also failed to file proof of service of summons and complaint within 60 days after he filed suit. Finally, he did not seek an extension of time to take those steps. Respondent admitted in his testimony that he conducted no discovery.

In the meantime, by March 2, 1990, respondent had learned of Penate's earlier death (which was unrelated to the auto accident) and had also learned that Penate's insurer had paid Passamaneck's claim in full. On March 2, respondent directed his office administrator, his daughter Lucille Penalosa, to send a letter to client Sandoval withdrawing from employment on the sole ground that liability rested with Penate. This letter was sent. Respondent considered that he had no duty to speak to Sandoval first before sending the letter since respondent decided he did not want to represent Sandoval further. However, the next day, March 3, Penalosa sent a demand letter to Penate's insurer asking for $12,000 for Sandoval. Penalosa enclosed evidence of Sandoval's medical expenses totaling $2,570. The only explanation respondent had for the sequence of the two documents was the one Penalosa had given him: that the demand letter had been prepared for mailing prior to the withdrawal letter but had apparently been delayed. Respondent testified that there was no purpose served by sending a demand letter after deciding to withdraw from employment.

On March 9, 1990, the superior court ordered respondent to show cause in an April 4, 1990, hearing why sanctions, including case dismissal, should not be ordered for failing to comply with the superior court's fast-track filing requirements. On March 16, 1990, Penalosa signed respondent's name to a notice of lodging of proof of service due months earlier in the civil action.[4] However, respondent did not appear at the April 4 hearing and the action was dismissed.

On April 30, 1990, after the action had been dismissed, Penalosa signed respondent's name to, and filed in superior court in the Passamaneck action,

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1. The hearing judge's finding that the clients retained respondent on November 29, 1922, to represent them in a "November 11, 1988" accident was obviously in error as to the year of engagement (1988) and was also incorrect as to the date of the accident (November 29).

2. The statement of the clients' witness, Catalino Miranda, did not refute Passamaneck's insurer's position that Penate had admitted liability at the scene. Miranda wrote in part about what he heard at the accident scene, "They [the drivers] were talking in English and I could'n't [sic] understand." (Exh. E.)

3. Since the accident occurred in November 1988, and no governmental entity appeared to be involved, respondent had three more months to develop the facts to file suit before the statute of limitations barred personal injury claims. (See Code Civ. Proc., § 340, subd. (3).) Of course, respondent was not required to await the last days of the limitations period before filing suit, but when he was asked below why he filed suit in light of his doubts as to the validity of his clients' claim, respondent testified that it had to be done to let the (civil) court decide where the truth lay.

4. Respondent had no recollection of this proof of service. The document Penalosa had prepared showed that service on Passamaneck had been effected two weeks earlier by the Los Angeles County Marshall's office. Respondent testified that he did not authorize filing of this service proof.

a "first amended complaint." This complaint purported to name plaintiff Sandoval against defendant Penate. Although respondent testified that it was his practice to review all civil complaints prepared by his office before filing and to sign them, it is undisputed that respondent did not see this "amended complaint" before its filing. He and Penalosa each suggested in their testimony that the unauthorized amendment was the fault of Penate's insurer which took advantage of Penalosa by representing that amending the complaint would get a recovery for Sandoval.

In June 1990, when respondent learned of the "first amended complaint," he filed a dismissal of the entire action without prejudice. Sometime later, he fired Penalosa.

In November 1988, respondent had signed a medical lien in favor of the clinic which treated Penate. On about June 28, 1990, respondent received a $1,000 insurance check representing medical payment ("med-pay") benefits for the since-deceased Penate. On July 3, 1990, respondent deposited the check into his client trust account. He saw no need to contact Penate's relatives about this payment as he thought his retainer agreement allowed him to accept it. That same day, he paid himself $400 in fees on these med-pay funds, also relying on his retainer agreement. There is no evidence that he sought to report the receipt of these funds to Penate's heirs or the medical provider.[5] At trial, he testified that he kept the $600 balance in his trust account as he was hoping that Penate's relatives would contact him. In September 1991, almost 15 months after he received Penate's med-pay funds, he turned over the $600 balance to the medical provider.

II. EVIDENCE IN MITIGATION AND AGGRAVATION

Respondent offered no evidence in mitigation. Specifically, he did not show that any steps have been taken to improve his office procedures (beyond his firing of Penalosa).

The OCTC introduced evidence of respondent's prior record resulting in a recommendation of stayed suspension made by this court in 1992 in *Aguiluz I*, which has since become final by Supreme Court order filed after the hearing judge's recommendation. In *Aguiluz I* we found that during the first part of 1986, while representing the owners of a residential care home in defending administrative proceedings brought against them by the State of California, respondent failed to act competently and abandoned their interests without returning their file or protecting them from avoiding foreseeable prejudice. In following the basic recommendation of the hearing judge for a one-year suspension stayed on conditions of a two-year probation, we considered mitigating evidence of pro bono service and the tragedy of the death of respondent's son in December of 1985. However, we also observed that the record showed that respondent lacked insight into the consequences of his misconduct and that harm was caused to his clients who were required to pay another attorney to undertake their representation after respondent's abandonment. Effective March 20, 1993, the Supreme Court adopted the discipline we recommended in *Aguiluz I*. (Min. order filed Feb. 18, 1993 (S027125).)

III. HEARING JUDGE'S FINDINGS, CONCLUSIONS AND RECOMMENDATION

In the present proceeding, the hearing judge found respondent culpable of wilful violation of former rule 5-102(B), Rules of Professional Conduct and its successor provision, rule 3-310(B),[6] by concurrently representing the conflicting interests of Penate and Sandoval without the informed, written consent of each.

The hearing judge also found respondent culpable of wilfully violating rule 3-110(A) by

5. The medical lien recited that respondent agreed to withhold the cost of Penate's treatment from any "settlement, judgment or verdict." Respondent took the position that Penate's medical pay funds did not constitute a "settlement, judgment or verdict."

6. Unless noted otherwise, all references to rules are to the provisions of the Rules of Professional Conduct in effect after May 26, 1989, and references to former rules are to those predecessor provisions in effect between January 1, 1975, and May 26, 1989. Reference to former rule 3-310(B) is to the provision in effect from May 27, 1989, to September 13, 1992.

intentionally, recklessly or repeatedly failing to perform legal services competently for his clients and of wilfully violating rule 3-700(A)(2) by withdrawing from employment on Sandoval's behalf without taking reasonable steps to avoid foreseeable prejudice. On the charge that respondent violated the Rules of Professional Conduct relating to trust accounts, the hearing judge found respondent not culpable concerning his handling of Penate's $1,000 med-pay funds.

The hearing judge found no mitigating circumstances, but found respondent's prior discipline to be "some evidence of an aggravating circumstance." Since respondent's prior discipline was not final at the time of his recommendation, the judge below gave alternative recommendations as to discipline. (See Trans. Rules. Proc. of State Bar, rule 571.) In the event that respondent's prior discipline became final prior to the discipline in this proceeding (which ultimately occurred), the hearing judge recommended that respondent be suspended for one year, that that suspension be stayed and respondent be placed on probation on conditions including a 60-day actual suspension. The probation and stayed suspension were recommended to be concurrent if any such period remained on respondent's earlier suspension. The judge expressly recommended that those periods not be retroactive to the start of the earlier discipline.[7]

IV. DISCUSSION

A. Procedural Contention

Before discussing questions of culpability and degree of discipline, we address respondent's two claims of procedural invalidity of the notice to show cause and of the first amended notice to show cause. We find both claims of error meritless.

[1a] Regarding the original notice to show cause filed in August 1991, respondent complains of the adequacy of citations to three Rules of Professional Conduct he allegedly violated. However, those rule citations were corrected or clarified by an amended notice to show cause ordered to be filed in May of 1992, five months before the start of trial.

[1b] Regarding the amended notice to show cause, respondent complains that the clarifying textual and rule citation amendments were not the type of amendments allowed under the governing rule, rule 557, Transitional Rules of Procedure of the State Bar. The OCTC points out in its brief that it sought the hearing judge's permission to amend the notice, respondent opposed the motion, the motion to amend the notice was granted well before trial and the types of amendments made were within the scope of rule 557. We agree with the OCTC and also observe that rule 557 provides for a liberal amendment procedure prior to trial when the accused has ample opportunity to prepare a defense to the amended charges. (Cf., e.g., *Marquette* v. *State Bar* (1988) 44 Cal.3d 253, 264-265; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 688.) The key issue is whether the amended notice afforded respondent reasonable notice of the charges. (Bus. & Prof. Code, § 6085; see, e.g., *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929.) We hold that it did.

B. Culpability

We have considered the briefs filed by both parties prior to and after oral argument concerning issues of culpability as well as degree of discipline.

1. Conflicting interests

[2a] Late last year, in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 615-616, we discussed thoroughly the conflict-of-interest issues surrounding an attorney's joint representation of a driver and passenger in an automobile accident case. After analyzing relevant disciplinary and civil decisions of the Supreme Court

7. In addition to "standard" conditions of probation, other conditions recommended were development of a defined law office management/organization plan approved by a probation monitor referee; providing evidence of completion of six hours of approved law office management courses within a specified time; attendance at the State Bar's Ethics School, and passage of the California Professional Responsibility Examination, unless respondent was required to take that test as part of his prior discipline.

and Courts of Appeal, and statutory and decisional changes in tort law, we concluded that the Rules of Professional Conduct in effect in 1984, even prior to the 1992 amendment of rule 3-310, encompassed an attorney's concurrent representation of driver and passenger; for in those situations, there was an inherent potential of conflict of interest. Our decision in *Sklar* was filed only five days before oral argument in this proceeding and we afforded the parties an opportunity for post-argument briefing.

In seeking to distinguish *Sklar* and the cases we cited in *Sklar*, respondent contends that potential conflicts were not included within the scope of former rules 5-102(B) and 3-310(B). OCTC disagrees. We need not repeat our analysis in *Sklar*, but we see nothing in respondent's arguments which causes us either to reconsider or deviate from our *Sklar* holding. **[2b]** Indeed, in our view, this case shows precisely why the rule of professional conduct on conflicts of interest exists: to avoid placing attorneys in positions where even through an exercise of good faith, they would seek to reconcile or depreciate differing interests of clients and render their representation of any one client less effective as a result. (See *Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 616, discussing *Anderson* v. *Eaton* (1930) 211 Cal. 113, 116-118.) Without following the disclosure and written consent requirements of the rules, respondent assumed that client Sandoval would not sue client Penate. Even if such an assumption were correct, it does not show absence of conflicting interests and is no defense to lack of compliance with the requirements of the rule.[8] **[1c - see fn. 8] [3]** Moreover, as found by the hearing judge, in this case, an *actual* conflict of interest developed once respondent learned on May 18, 1989, of Passamaneck's insurer's position three days earlier that liability rested with one of respondent's clients, Penate. Still, respondent did not comply with the disclosure and written consent requirements of the rule. He is therefore culpable of wilful violation of former rule 5-102(B) whether or not that rule applied to potential conflicts.

[2c] We did not hold in *Sklar* nor do we hold in this case that concurrent representation of a driver and passenger in an automobile accident case is a per se violation of ethical constraints. However, an attorney facing such representation must disclose to both clients in a fair and understandable manner the potential conflicts of representing each of them and obtain the written consent of both clients, if the attorney wishes to continue representing them.

2. Lack of competency and improper withdrawal

[4] The hearing judge's conclusions that respondent wilfully violated rules 3-110(A) and 3-700(A) were also established by clear and convincing evidence. Having chosen to sue on both Penate's and Sandoval's behalf, respondent's repeated failure to comply with superior court requirements led to the ultimate dismissal of their suit after respondent failed to attend an order-to-show-cause hearing. Any difficulty he experienced serving Passamaneck could not be remedied by silence or inaction. His precipitous withdrawal from Sandoval's representation was not based on the conflict of interest but on his unilateral conclusion that Sandoval lacked a valid cause of action, and occurred at the same time that he was separately seeking $12,000 for Sandoval from the insurer of his now-deceased former client. He never communicated with either Sandoval or anyone on Penate's behalf to advise them of the dismissal of the suit he had originally filed against Passamaneck. He intentionally withdrew from Sandoval's employment yet could never explain adequately why his staff was seeking damages for Sandoval at the same time.

3. Failure to notify Penate's heirs of receipt of med-pay funds

[5] Respondent was under an obligation under rule 4-100(B)(1) to promptly notify his client, Penate, of the receipt in 1990 of the $1,000 in medical pay funds. The hearing judge found that "there appears to

8. **[1c]** We reject as without merit, respondent's argument that the amended notice to show cause failed to notify him that potential conflicts were within the scope of the charged rules. As we stated *ante*, respondent was given reasonable notice of the Rules of Professional Conduct at issue and he has not shown how the notice prejudiced him because it did not include discussion of the legal scope of the rule.

be evidence" that respondent gave this notice to the lien claimant (i.e., the medical clinic). The judge therefore exonerated respondent of the charge of wilful violation of this rule. OCTC has not disputed this conclusion on review. However, we are charged with undertaking an independent review of the record and we may make findings and conclusions at variance with those of the hearing judge. (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 14; see also *Aguiluz I, supra*, 2 Cal. State Bar Ct. Rptr. at p. 42.) There was no clear evidence that respondent notified the medical clinic of the receipt of the $1,000 and in any case, giving such notice would not excuse respondent's duty at least to attempt to notify Penate's representative or heirs of the receipt of funds. The evidence is clear that respondent did not attempt to contact Penate's representative or relatives regarding the receipt of these funds. We hold that he therefore wilfully violated rule 4-100(B)(1).

C. Degree of Discipline

[6a] Consulting the Standards for Attorney Sanctions for Professional Misconduct ("standards"; Trans. Rules Proc. of State Bar, div. V; see, e.g., *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 499), we are guided to recommend at least three months of actual suspension for respondent's violation of rule 4-100(B)(1) standing alone. (Std. 2.2(b).) His other violations of the Rules of Professional Conduct would each warrant reproval or suspension according to the harm involved. (Std. 2.10.)

[6b] We agree with the hearing judge's assessment that there is no evidence in mitigation but there is aggravation in respondent's prior suspension which was not final until after these proceedings were decided by the hearing judge. In addition to the aggravating circumstance of respondent's previous suspension, we conclude that a significant aggravating circumstance is one not assigned by the hearing judge: that respondent has shown indifference toward atoning for his misconduct (std. 1.2(b)(v)) and has demonstrated a clear lack of insight into the wrongfulness of his conduct. (See *Natali* v. *State Bar* (1988) 45 Cal.3d 456, 467; *Sodikoff* v. *State Bar* (1975) 14 Cal.3d 422, 432.) **[7]** Respondent chose to blame his daughter, Penalosa, his clients, Penate and Sandoval, and Penate's insurer for his difficulties rather than looking to the responsibilities he had as a member of the State Bar to follow all provisions of the Rules of Professional Conduct. This lack of insight coupled with his lack of sensitivity toward basic ethical principles of professional conduct call for enhanced discipline beyond the entirely stayed suspension of his prior.

[8] The key concern in arriving at a disciplinary recommendation is the degree to which the public needs protection from respondent. (See std. 1.3; *In the Matter of Rodriguez, supra*, 2 Cal. State Bar Ct. Rptr. at p. 501; *Mepham* v. *State Bar* (1986) 42 Cal.3d 943, 948.) In that regard, evidence in this record about respondent's change in office practices as a result of this matter was limited to his termination of the services of his eldest daughter. We are thus left to guess whether respondent has put in place any changes to guard against the serious errors which occurred in, inter alia, repeatedly failing to comply with court rules governing litigation for which he was responsible; withdrawing in an improper manner at the same time that he was demanding damages for the same client, and filing suit on behalf of one client against another recently deceased client. **[9]** Respondent has a nondelegable duty to reasonably supervise his staff. (*Spindell* v. *State Bar* (1975) 13 Cal.3d 253, 259-260; *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 520-521.) **[6c]** Nothing in respondent's testimony shows his acknowledgment of responsibility to supervise his staff adequately or evidence of improved office procedures to prevent reoccurrence of these grossly negligent acts.

Neither the hearing judge nor the parties cited any comparable cases in assessing discipline. In *Sanchez* v. *State Bar* (1976) 18 Cal.3d 280, the Supreme Court imposed a three-month actual suspension on an attorney who had no prior discipline and who had grossly neglected two personal injury actions. As did respondent, Sanchez claimed to have been unfamiliar with the acts of secretaries in his office who, according to Sanchez, were filing com-

plaints or taking (or not taking) other steps in his clients' cases. The Supreme Court rejected Sanchez's claim that the recommended discipline was excessive. Much more recently, in *Aguiluz I*, we reviewed Supreme Court disciplinary decisions in which attorneys with no prior discipline had been found culpable of failure to perform services for and abandonment of a *single* client. In the cases we discussed, the discipline ranged from no actual suspension to 90 days actual. (2 Cal. State Bar Ct. Rptr. at pp. 45-46.) We noted that in *Aguiluz I*, the misconduct did not span a considerable length of time compared to the other cases we analyzed. (*Id.* at p. 46.) We also credited several significant mitigating circumstances, which we do not have in the present record. (*Id.* at p. 44.)

[6d] Considering all relevant circumstances, we adopt the recommendation of the hearing judge based on *Aguiluz I* having become final, except that we recommend 90 days actual suspension as a condition of probation and we also recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court.

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Heroico M. Aguiluz, be suspended from the practice of law in this state for one year, that execution of such suspension be stayed and that he be placed on probation for two years on conditions including actual suspension for the first ninety days of probation, and all other conditions and duties set forth on pages 11 through 14 of the hearing judge's decision including that respondent be required to pass the California Professional Responsibility Examination (CPRE) within one year of the effective date of the Supreme Court's order.[9] We recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court as is customarily ordered in such cases. Finally, we also follow the hearing judge's recommendation that respondent be ordered to pay costs pursuant to Business and Professions Code section 6068.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

9. Although that requirement was contained in *Aguiluz I*, we take judicial notice of our own records which reflect that for good cause surrounding respondent's taking of the CPRE, we relieved him from that requirement in that matter.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HUNSDON CARY STEWART

A Member of the State Bar

No. 90-C-14677

Filed June 20, 1994; reconsideration denied, August 2, 1994

SUMMARY

Respondent, an experienced family law attorney, became involved in an altercation with police who had been summoned when respondent refused to leave his estranged wife's apartment. As a result, respondent was convicted of misdemeanor battery on a police officer. The hearing judge found that respondent's conviction did not involve moral turpitude but did involve misconduct warranting discipline, and recommended two years stayed suspension, two years probation, and sixty days actual suspension. (Hon. Christopher W. Smith, Hearing Judge.)

Respondent sought review, urging his version of the facts, pressing claims of procedural error and bias by the hearing judge, and seeking dismissal of the proceeding. The review department rejected respondent's procedural contentions and claims of bias, and noted that respondent's conviction conclusively established the elements of his offense, including the reasonableness of the force used by the arresting officers. Considering aggravating circumstances including respondent's prior discipline, use of alcohol, and lack of appreciation for the seriousness of his misconduct, the review department adopted the hearing judge's recommended discipline.

COUNSEL FOR PARTIES

For Office of Trials: Allen Blumenthal

For Respondent: H. Cary Stewart, in pro. per.

HEADNOTES

[1 a, b] **613.90 Aggravation—Lack of Candor—Bar—Found but Discounted**
621 Aggravation—Lack of Remorse—Found
Where respondent falsely described incident leading to respondent's battery conviction, such conduct did not so much involve lack of candor as it manifested respondent's obsession with his view of facts and lack of insight into seriousness of his actions, itself an important factor bearing on need for measurable 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] **101 Procedure—Jurisdiction**
106.90 Procedure—Pleadings—Other Issues
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
1699 Conviction Cases—Miscellaneous Issues

Notice to show cause under rule 550 of Transitional Rules of Procedure of State Bar is not required in conviction referral proceeding. Pursuant to Supreme Court's delegation of authority to State Bar Court in conviction referral matters (Cal. Rules of Court, rule 951(a)), only State Bar Court referral order and notice of time and place of hearing are needed to initiate a conviction referral proceeding.

[3] **101 Procedure—Jurisdiction**
106.10 Procedure—Pleadings—Sufficiency
131 Procedure—Procedural Issues re Admonitions
135 Procedure—Rules of Procedure
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1699 Conviction Cases—Miscellaneous Issues

Supreme Court and State Bar Court have unquestioned jurisdiction over attorneys' convictions of crime whether or not they are eligible for summary disbarment. There is no requirement that notice of time and place of hearing in conviction referral matter charge commission of "serious" offense for which admonition would be unavailable (Trans. Rules Proc. of State Bar, rule 415), or offense for which State Bar Court may recommend summary disbarment.

[4] **141 Evidence—Relevance**
1699 Conviction Cases—Miscellaneous Issues

Where referral order arising out of attorney's criminal conviction calls for hearing and decision on degree of discipline to recommend if hearing judge finds that facts and circumstances surrounding conviction involve moral turpitude or other misconduct warranting discipline, hearing judge may consider wide variety of evidence surrounding conviction as part of relevant facts and circumstances.

[5] **103 Procedure—Disqualification/Bias of Judge**

Where respondent not only declined to challenge hearing judge for bias in timely manner but also expressed belief that such judge was a fair and good judge, and did not assert bias until after judge heard evidence on culpability and expressed tentative finding that respondent was culpable, and record showed that judge was fair and receptive to hearing all relevant evidence, respondent's claim of racial bias on judge's part was without merit and did not appear to be made in good faith.

[6 a, b] **103 Procedure—Disqualification/Bias of Judge**
178.90 Costs—Miscellaneous
199 General Issues—Miscellaneous

Statute providing for respondents to pay costs of disciplinary proceeding upon determination of sanction of public reproval or greater discipline, and also providing for assessment of costs against State Bar in case of complete exoneration of attorney, is neutral in its application. Moreover, since salaries of State Bar Court judges are set by statute and are unaffected by assessment or collection of costs by State Bar, and State Bar Court's ruling on costs is only a recommendation to Supreme Court that costs be assessed, cost statute does not provide basis for alleging bias of State Bar Court judges based on alleged personal financial interest.

[7] **103 Procedure—Disqualification/Bias of Judge**

There is no basis for charging impropriety simply because a judge judged prior proceedings involving the same lawyer. Fact that hearing judge in conviction referral proceeding had presided over respondent's prior disciplinary proceeding did not make such judge a percipient witness to improperly considered evidence, nor had such judge functioned as investigator in prior proceeding.

[8] **191 Effect/Relationship of Other Proceedings**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1691 Conviction Cases—Record in Criminal Proceeding

Conviction of violation of criminal statute is conclusive evidence of guilt of elements of that crime. Where respondent was convicted of battery on a police officer engaged in performance of official duties, and such officer's use of excessive force would have required finding that officer was not engaged in performance of official duties, respondent's conviction precluded State Bar Court from considering his claim that police initiated altercation or used excessive force in incident leading to respondent's conviction.

[9 a-c] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1527 Conviction Matters—Moral Turpitude—Not Found
1531 Conviction Matters—Other Misconduct Warranting Discipline—Found

Where respondent, an experienced family law attorney, drank a strong alcoholic beverage prior to visiting with his young child, and then trespassed on his estranged wife's apartment; intimidated her when she requested that he leave; engaged in an altercation with police who attempted to escort him out of the apartment, and was hostile and used racial epithets to police when being taken away under arrest, respondent's conduct surrounding his criminal conviction for battery on a police officer did not involve moral turpitude but did involve misconduct warranting discipline. Given respondent's experience, he should have attempted to defuse a risky domestic incident; instead, he created one with a serious risk of harm.

[10 a-d] **691 Aggravation—Other—Found**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1699 Conviction Cases—Miscellaneous Issues

Disciplinary conviction referral cases in which assaultive behavior was the principal offense have generally resulted in suspension of varying degrees. In matter arising from misdemeanor conviction for battery on police officer, it was an aggravating circumstance that respondent provoked a dangerous and risky confrontation with police responding to his own domestic disturbance notwithstanding respondent's significant experience as a practicing lawyer in handling family law matters. Where this and other aggravating circumstances clearly outweighed mitigating ones, discipline of two years stayed suspension, two years probation, and 60 days actual suspension was abundantly fair and warranted.

[11] **710.55 Mitigation—No Prior Record—Declined to Find**

Where respondent's 17 years of practice without misconduct had been considered a compelling mitigating circumstance in respondent's first disciplinary proceeding, this factor was not properly considered mitigating in respondent's second disciplinary proceeding.

[12] **801.41 Standards—Deviation From—Justified**
805.59 Standards—Effect of Prior Discipline

Where respondent's prior and current misconduct were just a year apart and were of fundamentally different nature, and respondent's prior discipline had not been imposed until after his later

misconduct and he could not have learned from it, and State Bar did not call for greater discipline than imposed in earlier matter, review department declined to apply standard calling for greater discipline in subsequent matter.

ADDITIONAL ANALYSIS

Aggravation

Found

511 Prior Record

521 Multiple Acts

Mitigation

Found

735.10 Candor—Bar

Standards

801.30 Effect as Guidelines

Discipline

1613.08 Stayed Suspension—2 Years

1615.02 Actual Suspension—2 Months

1617.08 Probation—2 Years

Probation Conditions

1023.10 Testing/Treatment—Alcohol

Other

102.40 Procedure—Improper Prosecutorial Conduct—During Trial

114 Procedure—Subpoenas

173 Discipline—Ethics Exam/Ethics School

OPINION

STOVITZ, J.:

Respondent, Hunsdon Cary Stewart, was convicted in 1990 in Los Angeles Municipal Court of the misdemeanor of battery on a police officer. (Pen. Code, § 243, subd. (c).) In July 1991, after the State Bar transmitted to us respondent's conviction (which had become final), we referred it to our court's hearing department. We asked that department to hold a hearing as to the discipline to recommend if the hearing judge found that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline. (Bus. & Prof. Code, §§ 6101-6102; Cal. Rules of Court, rule 951(a).)

The hearing judge found that moral turpitude did not surround respondent's conviction but that misconduct warranting discipline did. The hearing judge took into account respondent's 1992 suspension for other misconduct and recommended that he now be suspended for two years, that that suspension be stayed and that respondent be placed on probation for two years on conditions including sixty days actual suspension.

Respondent seeks our review, urging at length his version of the facts that he was the victim of battery, not its perpetrator. He presses several claims of procedural error, disputes the basis for his discipline and seeks dismissal of the proceeding. The State Bar, represented by the Office of the Chief Trial Counsel ("OCTC"), urges that we adopt the hearing judge's decision and follow his recommendation. After our independent review of the record, we agree with OCTC and uphold the hearing judge's findings, conclusions and recommendation. As we shall discuss, respondent's conviction is conclusive evidence of his guilt of battery on a police officer. It occurred while respondent, experienced in the practice of family law, was under the influence of alcohol and embroiled in his own domestic dispute. Especially considering respondent's recent prior discipline, the hearing judge's recommendation of suspension is entirely appropriate and fully warranted.

I. FACTS AND CIRCUMSTANCES OF RESPONDENT'S CONVICTION

The findings of the hearing judge are fully supported by the record. We summarize them and the essential parts of the record as well. At the time of the hearings below, respondent had been in law practice 22 years. About 30 percent of his practice had been in family law matters and he estimated he had handled 200 such matters, including cases involving child custody. Respondent's conviction arose out of his own domestic dispute.

On the evening of Sunday, May 27, 1990, respondent lived in an apartment in West Los Angeles separated from his wife, who lived with her family members in another apartment in the same building. His wife had custody of the couple's 18-month-old son, Logan, and respondent was scheduled to visit with Logan. Shortly before respondent picked up Logan, he had been drinking one or two drinks of "Yukon Jack," a 100-proof alcoholic drink he had never tried before.[1] The electricity in his apartment had been turned off and Logan was upset at the darkness. Respondent took Logan upstairs to his wife's apartment to see if she would allow respondent to continue visiting Logan there. She refused and when respondent told his wife he would take Logan back to his apartment, his wife protested, grabbed Logan from respondent and attempted to close the apartment door. Respondent firmly told his wife he had a legal right to visit Logan in her apartment. By citing Penal Code sections, respondent intimidated his way into his wife's apartment. Unknown to respondent, someone in his wife's apartment called the Los Angeles Police Department.

Two uniformed police officers responded. After speaking with respondent's wife, the officers saw respondent in his wife's apartment and one of the officers, McNally, told respondent he was not welcome in the apartment and would have to leave. At

1. The record supports the hearing judge's findings that at different times in his testimony, respondent gave different reasons for why he had been drinking.

first, respondent cooperated with the officers but refused to leave his wife's apartment without Logan. When McNally reached for respondent's arm to escort him from the wife's apartment, respondent jerked away from McNally. When McNally again reached for respondent's arm, respondent grabbed McNally's upper body in a "bear hug." The two struggled while respondent continued to hold onto McNally. To free himself from respondent, McNally forcibly pushed respondent away. Respondent stumbled several feet, striking his face on a door bell attached to the apartment's front door. The two continued to struggle on the floor for about ten seconds until respondent was finally handcuffed either by McNally or his partner. McNally and respondent each sustained cuts and bruises in the struggle and McNally's uniform shirt was torn.

Respondent was placed in the police car in handcuffs for transport to a hospital and then jail booking. While waiting for the officers to depart, respondent became abusive, directing profanities toward both officers. These included racial epithets toward McNally, who was African-American. When respondent arrived at the hospital, he again became abusive at the officers and was asked by a hospital staffer to quiet down. After departure from the hospital, respondent remained calm and was booked at a jail facility without further incident.

On August 17, 1970, respondent was convicted by jury verdict of a misdemeanor violation of Penal Code section 243, subdivision (c). The criminal court suspended sentence and imposed a two-year probation on conditions including two days in jail (with credit for the two days served), attendance at thirty meetings of Alcoholics Anonymous and forty hours of community service.

Respondent testified that officer McNally instigated the conflict by punching him several times. According to respondent, McNally continued to beat him at his wife's apartment and again at the hospital. He also testified that at the hospital, the officers' supervisor, Sergeant Wakefield, also beat respondent and threatened to kill him. At the State Bar Court hearing below, the hearing judge heard the testimony of McNally and respondent and concluded that none of the officers struck respondent as he had claimed and that whatever force the officers used on respondent was reasonable in the circumstances.

II. OTHER EVIDENCE BEARING ON DISCIPLINE

The hearing judge considered two factors in mitigation: that respondent had had no prior discipline for 17 years after admission to practice until he had engaged in the misconduct which had given rise to his prior discipline and that he had participated in the disciplinary proceedings. The hearing judge considered aggravating that respondent's misconduct involved multiple acts of wrongdoing: his trespass of his wife's apartment, even after she requested he leave, and his resistance twice of McNally's efforts to get him to leave that apartment. **[1a]** The judge also considered aggravating respondent's false description of the incident to "either or both this Court and the Los Angeles Police Department" and his related lack of candor. The hearing judge concluded that in his presentation to the court, respondent showed indifference to the seriousness of his misconduct and the potential harm which could have resulted from his failure to obey the police officers' directions.

Respondent's prior discipline was also considered aggravating. Effective July 25, 1992, the Supreme Court suspended him from the practice of law for one year, stayed the suspension and placed him on probation for three years on conditions including actual suspension for ninety days. The Supreme Court's order was based on State Bar Court findings that in defending two clients in a civil lawsuit in 1988 and 1989, respondent recklessly failed to perform legal services competently; commingled entrusted funds with his personal funds; failed to pay out entrusted funds promptly on demand; and engaged in moral turpitude by misappropriating $1,000 in client funds. In the prior matter, the hearing judge considered several significant mitigating circumstances.[2]

2. The hearing judge was the same in both the prior matter and in the present conviction referral matter.

III. DISCUSSION

Respondent levies a barrage of objections to the decision below as well as asserting at length his own version of the facts. He concludes that his conviction was not of a disciplinable offense. He also urges a number of procedural claims to seek to show that due process was not afforded him. We analyze first respondent's claims of procedural error.

A. Claims of Procedural Error

[2] Respondent contends first that this proceeding was commenced without the necessary referral from the Supreme Court and without a notice to show cause. He cites rules 550 and 551 of the Transitional Rules of Procedure of the State Bar. Respondent is apparently confused between original proceedings brought under article V of the State Bar Act (Bus. & Prof. Code, §§ 6075-6090)[3] and conviction referral proceedings brought under article VI of that act. (§§ 6101-6102.) The former type of proceeding does require filing a notice to show cause under rule 550 of the Transitional Rules of Procedure of the State Bar.[4] However, rule 551(a) makes it clear that a notice to show cause under rule 550 is not required in the case of a conviction referral proceeding. As the deputy trial counsel points out, the Supreme Court has authorized this court to exercise its referral powers in certain proceedings including this conviction referral. (Cal. Rules of Court, rule 951(a).) Accordingly, only a notice of time and place of hearing referring to our order of referral was necessary to initiate this proceeding. That order was filed and served on respondent to start these proceedings. No error occurred.[5] **[3 - see fn. 5]**

[4] Having incorrectly assumed that a notice to show cause was required under rule 550, respondent contends without citing any authority that the nature of the charges changed and that there "was a 100% variance" between the notice issued and the hearing judge's findings. Again, we see no error. Our order of referral called for a hearing and decision on the degree of discipline to recommend if the hearing judge found that the "facts and circumstances surrounding" respondent's violation of Penal Code section 243, subdivision (c) involved moral turpitude or misconduct warranting discipline. This referral was in accordance with Supreme Court precedent. (See, e.g., *In re Carr* (1988) 46 Cal.3d 1089, 1090.) Recently, in *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688-689, in discussing the proper scope of rebuttal evidence in a conviction referral proceeding, we observed that the Supreme Court has properly considered a wide variety of evidence surrounding the conviction as part of the relevant facts and circumstances. The evidence considered here by the hearing judge was well within the proper scope of facts and circumstances which can be considered in a conviction referral proceeding.

Respondent complains of "draconian" acts of the hearing judge which allegedly denied him the opportunity to call any defense witness except himself and required him to compress his case to a few hours. But the record shows that respondent received an abundantly fair opportunity to present evidence favorable to himself and, in a timely manner, he could have sought subpoenas for the testimony of witnesses to aid him had he wished to do so. (§§ 6049 (a)(3), 6085.)

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

4. Unless noted otherwise, all references hereafter to rules are to the provisions of the Transitional Rules of Procedure of the State Bar.

5. [3] Also without merit is respondent's claim that the notice of time and place of hearing was invalid because it did not direct him to show cause why be should not be disciplined for a "serious" crime as set forth in rule 415 or section 6102. There is no such requirement in a notice of time and place of hearing on a conviction referral. The reference in rule 415 to a "serious offense" is not to a charging requirement but just to a class of offenses for which admonition is ineligible as a disposition. Section 6102 (c) does not even nse the term "serious" to describe a crime. That section does refer to convictions of certain crimes for which we may recommend summary disbarment. (See, e.g., *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71.) The Snpreme Court and State Bar Court have unquestioned jurisdiction over attorneys' convictions of crime whether or not they are eligible for summary disbarment. (See discussion *post.*)

[5] Finally, respondent's broad claims of racial bias and financial interest on the part of the hearing judge are without merit. In the circumstances of this case, respondent's claim of alleged racial bias on the judge's part does not appear to be made in good faith. We agree with the position of the deputy trial counsel that the record shows that respondent not only declined to challenge the hearing judge for bias in a timely manner but expressed the belief that the hearing judge was both a fair and good judge. Only after the hearing judge heard all of the evidence bearing on culpability and expressed a tentative finding that respondent was culpable of misconduct warranting discipline, did respondent assert bias. Our de novo review of the record shows that the judge was eminently fair and receptive to hearing all relevant evidence. (See *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 41; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 688-689.)

[6a] Respondent's claim of financial bias on the part of the hearing judge is apparently rooted in the power of the judge to recommend that respondent be directed to pay the costs of this disciplinary proceeding. Section 6086.10 so provides upon a determination of a sanction of a public reproval or greater discipline. Section 6086.10 also provides for assessment of costs against the *State Bar* in case of a complete exoneration of an accused attorney. The statute is thus neutral in its application and, as discussed above, nothing in this record indicates bias of the judge below in deciding respondent's culpability. In any event, respondent assumes incorrectly that these costs pay the hearing judge's salary. The salaries of State Bar Court hearing judges are set by statute at the same level as judges of the California municipal courts (§ 6079.1 (d)), and the salaries of the presiding judge and the review judges are set by statute at the same level as judges of the California superior courts. (*Id.*; § 6086.65.) These salaries are unaffected by the assessment or collection of costs by the State Bar.

[6b] Moreover, both the hearing judge's ruling in this case and our independent recommendation on review themselves are not the final determinant of costs but simply recommend that an order of the Supreme Court be issued. Since regulation of attorneys is within the inherent and plenary power of the Supreme Court (e.g., *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-302; § 6087) an order assessing costs of attorney disciplinary proceedings is clearly within its power and it has given its imprimatur to the legislation specifying the manner in which costs can be assessed in these proceedings. (§ 6086.10.)[6] Nothing in that statute suggests that State Bar Court judges have any personal financial interest in such assessment.

[7] Respondent's final claim of judicial bias arises from his assertion that because the hearing judge was the same judge who presided over respondent's prior disciplinary matter, the judge was a percipient witness to evidence improperly considered. We reject the claim of error. Respondent's reliance on *In re Murchison* (1955) 349 U.S. 133 does not aid him for that case involved the same judge presiding over a grand jury matter and a later contempt arising from conduct before the same grand jury. Although respondent asserts that the hearing judge investigated the facts concerning his prior disciplinary proceeding, the record shows only that he judged that proceeding, not that he was an investigator in it. There is no basis for charging impropriety simply because a judge judged prior proceedings involving the same lawyer. (Cf. *Paradis* v. *Arave* (9th Cir. 1994) 20 F.3d 950, 958 [no showing of bias where trial judge also presided over co-defendant's trial].) Indeed, respondent made no motion to recuse the judge when the judge below was assigned. In any event, as we shall discuss, *post*, in this proceeding respondent's conviction of crime was conclusive evidence of his guilt.

Finally, we reject as wholly unsupported respondent's generalized suggestions of misconduct

6. The assessment of costs is common in various types of litigation and courts which have discussed the award of costs state the general rule that the right to recover costs in judicial proceedings depends solely on statute. (See *Miller* v. *American Honda Motor Co.* (1986) 184 Cal.App.3d 1014, 1018.)

on the part of the deputy trial counsel who opposed respondent in the trial of this case.

B. Culpability

[8] We start with the well-settled principle that respondent's conviction of violation of Penal Code section 243, subdivision (c) is conclusive evidence of guilt of the elements of that crime. (See, e.g., *In re Larkin* (1989) 48 Cal.3d 236, 244; *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.) Thus there can be no doubt that respondent committed battery on a police officer engaged in the performance of official duties. (See *People* v. *Delahoussaye* (1989) 213 Cal.App.3d 1, 7.) As the Court of Appeal observed in *Delahoussaye*, if, in arresting a person, a peace officer uses excessive force, that officer is not engaged in the performance of official duties within the meaning of Penal Code section 243. (*Ibid.*) In our view, respondent's final conviction, after he had an opportunity to press his claim of excessive police force, does not allow us to consider his principal defense in this proceeding. (Compare *In the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 589 [claim of self-defense inconsistent with elements of conviction of assault with a firearm].) Even if we could consider such claim, there is no convincing evidence to support it.

[9a] OCTC accepts the hearing judge's conclusion that the facts and circumstances surrounding respondent's crime do not involve moral turpitude but do involve misconduct warranting discipline. We agree with the judge that moral turpitude was not involved based on our analysis in *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 214-217, in which that attorney was convicted of several drunk driving offenses some of which involved assaultive or uncooperative conduct toward arresting officers.

[9b] However, we also agree with the hearing judge that the entire course of respondent's conduct surrounding his conviction demonstrates an adequate basis for finding misconduct warranting his discipline. Respondent admitted that he had drunk a 100-proof alcoholic beverage prior to visiting with his 18-month-old son, Logan. Although this is the first time respondent drank such a strong beverage, he consumed alcoholic beverages daily. He appeared not to be drunk when he was with Logan but was under the influence of alcohol. Respondent trespassed on his wife's apartment and when she requested he leave, he berated her with a citation of code sections designed to intimidate her. Instead of acceding to the authority of the police officers who arrived, respondent grabbed Officer McNally in a bear hug and continued to struggle with the officer while both were on the ground. Respondent continued to be hostile to the officers when being driven away from the scene. His use of racial epithets toward McNally was inexcusable.

In *In the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 590-591, we concluded that the facts and circumstances of the attorney's offense of assault with a firearm involved misconduct warranting discipline but not moral turpitude. In that case, we observed that the attorney, who was himself a trained, experienced reserve police officer, engaged in a confrontation placing innocent parties at great risk of harm and a passenger in another vehicle was seriously injured. [9c] Although a firearm was not involved in this case, and McNally's injuries were minor, even cursory legal research reveals the great risk of injury to persons in family disputes in which police are called to try to restore order when those police officers are threatened with harm. (See, e.g., *People* v. *White* (1991) 227 Cal.App.3d 886; *Dyer* v. *Sheldon* (D.Neb. 1993) 829 F.Supp. 1134, affd. mem. (8th Cir. 1994) 21 F.3d 432.) As an experienced attorney who had handled 200 family law matters, respondent was undoubtedly well aware of such risk. Instead of using his experience and knowledge to defuse a very risky domestic incident, he created one with serious risk of harm. His conduct was disciplinable. (See also *In re Otto* (1989) 48 Cal.3d 970 [attorney's convictions for assault by means likely to produce great bodily injury and infliction of corporal injury on a cohabitant of the opposite sex involved misconduct warranting discipline].)

C. Degree of Discipline

[10a] Past disciplinary conviction referral cases in which assaultive behavior was the principal offense have generally resulted in suspension of varying

degrees. (See *In re Hickey* (1990) 50 Cal.3d 571 [repeated acts of violence toward spouse and others coupled with failure to properly withdraw from legal representation in another matter; no prior record; alcoholism underlaid offense; three-year stayed suspension, thirty-day actual suspension]; *In re Otto, supra*, 48 Cal.3d 970 [two-year stayed suspension, six-month actual suspension]; *In re Mostman* (1989) 47 Cal.3d 725 [solicitation to commit assault by means of force likely to produce great bodily harm; five-year stayed suspension, two-year actual suspension; two prior reprovals considered]; *In re Larkin, supra*, 48 Cal.3d 236 [assault with a deadly weapon and conspiracy to commit such assault; strong mitigation including no prior record; three-year suspension stayed on conditions of a one-year actual suspension].)

[11] We do not consider mitigating that respondent had practiced for 17 years before committing his prior misconduct. Respondent's years of practice without prior discipline were considered a compelling mitigating circumstance in respondent's prior disciplinary proceeding. We disagree with the hearing judge that this factor ought to be considered again.

We agree with the hearing judge's assignment of aggravating weight to the nature of respondent's criminal conduct, involving also trespass and resistance twice of McNally's authority; to respondent's indifference to the seriousness of his misconduct and the potential harm to himself and others which could have resulted from the situation; and to his prior record of discipline. **[1b]** Regarding the lack of candor found by the hearing judge to be aggravating, we see that factor as more of a manifestation of respondent's obsession with his view of the facts and his lack of insight into how serious his actions were. The latter is itself an important factor bearing on the need for measurable discipline. (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 765.)

[10b] We also consider as aggravating that respondent acted as he did to provoke a dangerous and risky confrontation with police responding to his own domestic disturbance notwithstanding all of the experience he had as a practicing lawyer in handling family law matters. (Cf. *In the Matter of Anderson, supra*, 2 Cal. State Bar Ct. Rptr. at p. 215; *In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 249, 251.)

[12] Regarding respondent's prior record of discipline, standard 1.7(a), Standards for Attorney Sanctions for Professional Misconduct (standards) (Trans. Rules Proc. of State Bar, div. V), ordinarily guides that the discipline in a subsequent matter be more severe than that in the prior matter. Were we to follow standard 1.7(a) literally, we would be obligated to recommend here more than the 90-day actual suspension imposed by the Supreme Court in respondent's prior discipline. However, following the guidance of the Supreme Court, we have observed that the standards do not mandate the discipline to recommend (e.g., *In the Matter of Moriarty, supra*, 1 Cal. State Bar Ct. Rptr. at p. 251) and we have declined to apply standard 1.7(a) when the prior and later offenses were contemporaneous. (See *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 351.) Although not exactly contemporaneous, the acts in the prior were just a year apart from those here and also were of a fundamentally different nature. (See *In the Matter of Anderson, supra*, 2 Cal. State Bar Ct. Rptr. at p. 217.) Moreover, respondent's prior discipline had not been imposed until after his assault conviction and respondent could not have learned from his prior discipline. Finally, in considering whether to apply standard 1.7(a), we have weighed OCTC's position supporting the hearing judge's recommendation and not calling for greater discipline than imposed in the prior case.

[10c] Aggravating circumstances clearly outweigh mitigating ones and the degree of discipline recommended by the hearing judge, which OCTC supports, is abundantly fair and warranted.

IV. RECOMMENDATION

[10d] For the reasons stated, we recommend that respondent, Hunsdon Cary Stewart, be suspended from the practice of law for two years, that execution of suspension be stayed and that respondent be placed on probation for two years concurrent to the probation ordered by the Supreme Court in

case number S025589 on the conditions recommended by the hearing judge in this matter, including that respondent be actually suspended from law practice for the first 60 days and that he participate in the State Bar's program on substance abuse. Since respondent's prior suspension was recent, we follow the hearing judge's recommendation that respondent not again be required to pass the California Professional Responsibility Examination or to complete the State Bar Ethics School program, since he is under the duty to complete those requirements in Supreme Court case number S025589.

Finally, we adopt the hearing judge's recommendation that costs incurred by the State Bar in the investigation and hearing of this matter 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

CHARLES CLINTON HUNTER

A Member of the State Bar

Nos. 91-O-02488, 91-O-05101, 91-P-07913

Filed June 20, 1994; reconsideration denied, August 2, 1994

SUMMARY

In these consolidated proceedings involving a probation revocation matter and two original disciplinary matters, respondent's default was entered because he failed to answer the notices to show cause. In the probation revocation matter, respondent was found to have violated three of his probation conditions. Based thereon, the hearing judge recommended that respondent's prior disciplinary probation be revoked; that the stay of his prior suspension be set aside; that he be suspended from the practice of law for three years, with the execution of that suspension stayed; that he be placed on probation for five years on conditions including an actual suspension of one year and until he demonstrates his rehabilitation, present fitness and learning and ability in the law; and that he be inactively enrolled as a member of the State Bar.

In the two original disciplinary matters, which involved four client criminal law matters, respondent was found to have failed to make scheduled court appearances, failed to file pleadings, failed to comply with numerous court orders, failed to perform services competently, and failed to refund an unearned fee. Based thereon, the hearing judge recommended that respondent be suspended for three years, with the execution of that suspension stayed, and that he be placed on five years probation on conditions including actual suspension for one year and until respondent makes certain specified restitution and, if respondent's actual suspension exceeds two years, until he demonstrates his rehabilitation, present fitness and learning and ability in the law. (Hon. JoAnne Earls Robbins, Hearing Judge.)

The State Bar requested review, arguing, among other things, that the recommended discipline should be increased to disbarment because respondent's misconduct constituted a pattern of misconduct demonstrating habitual disregard for the interests of clients and because respondent's past and present misconduct indicated that he was not a good candidate for probation. Respondent requested review of the hearing judge's denial of his motions for relief from default, but the review department denied the request, finding that the hearing judge's ruling was well within her discretion.

Although the review department did not find that respondent's misconduct constituted a pattern of misconduct, it did find that respondent's prior and present misconduct demonstrated his extreme indifference to complying with court orders and indicated that a further grant of probation was inappropriate. Based thereon, the review department recommended in the probation revocation matter that respondent's 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.

be revoked, that the stay of his three-year suspension be set aside, and that he be actually suspended from the practice of law for three years. In the original disciplinary matters, the review department recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: No appearance (default)

HEADNOTES

[1] **110 Procedure—Consolidation/Severance**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
194 Statutes Outside State Bar Act
1099 Substantive Issues re Discipline—Miscellaneous
1719 Probation Cases—Miscellaneous

Because time to seek Supreme Court review is shorter for probation revocation matters than for original disciplinary matters, it is necessary to make separate discipline recommendations when such cases are consolidated. (Cal. Rules of Court, rule 952(a), (b).)

[2] **107 Procedure—Default/Relief from Default**
130 Procedure—Procedure on Review
136 Procedure—Rules of Practice

Where respondent's default had been entered in hearing department, and motion for relief from default was denied, respondent's sole remedy on review was to seek review of denial of relief from default. (Prov. Rules of Practice, rule 1400(e)(vii).)

[3 a, b] **107 Procedure—Default/Relief from Default**
167 Abuse of Discretion

Where respondent was repeatedly warned by hearing judge concerning consequences of continued inaction regarding seeking relief from default, but respondent failed to seek such relief for over a year after his first default was entered and more than six months after he had actual notice of the proceedings, and where respondent made no sufficient showing justifying such extraordinary delay, hearing judge was well within her discretion in denying relief from default, and review department denied respondent's request for review of such ruling.

[4] **135 Procedure—Rules of Procedure**
162.11 Proof—State Bar's Burden—Clear and Convincing
162.12 Proof—State Bar's Burden—Preponderance of Evidence
214.10 State Bar Act—Section 6068(k)
1099 Substantive Issues re Discipline—Miscellaneous
1713 Probation Cases—Standard of Proof
1714 Probation Cases—Degree of Discipline

In original disciplinary proceedings for violation of statute requiring adherence to conditions of disciplinary probation, standard of proof is clear and convincing evidence, and discipline may be disbarment. In proceedings on motion to revoke probation, standard of proof is preponderance of

evidence and recommended actual suspension may not exceed entire period of stayed suspension. (Trans. Rules Proc. of State Bar, rules 610-614 (eff. Jan. 1, 1993).)

[5] **586.31 Aggravation—Harm to Administration of Justice—Found but Discounted**
1719 Probation Cases—Miscellaneous
Where harm to administration of justice was inherent in respondent's probation violation, it would be duplicative to find such harm as an aggravating circumstance.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
107 Procedure—Default/Relief from Default
563.10 Aggravation—Uncharged Violations—Found but Discounted
In default proceeding for violation of probation, review department deleted findings in aggravation based on probation violations not charged in notice to show cause.

[7] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
Where same misconduct was found in each of two consolidated matters, review department dismissed allegations of such misconduct in one matter, because disciplining respondent for same misconduct in both matters would not be appropriate.

[8] **220.00 State Bar Act—Section 6103, clause 1**
230.00 State Bar Act—Section 6125
Even though respondent was ineligible to practice law on day he was ordered to appear in court on behalf of a client, this did not relieve him of his obligation to appear as ordered. He was obligated to do everything in his power to obey court's order short of practicing law, and at a minimum should have been physically present in court and given accurate information about his eligibility to practice. This would not have constituted the practice of law.

[9] **582.50 Aggravation—Harm to Client—Declined to Find**
Review department declined to find in aggravation that respondent's misconduct resulted in prolonging client's pretrial custody unnecessarily, where there was no evidence of disposition of client's criminal case and client could have been given credit for pretrial custody if convicted.

[10] **582.10 Aggravation—Harm to Client—Found**
595.90 Aggravation—Indifference—Declined to Find
Where sole evidence of respondent's indifference toward rectification of or atonement for misconduct was failure to refund unearned advanced fee, and such misconduct also formed basis for finding in aggravation of harm to client, finding of indifference to rectification or atonement was rejected as duplicative.

[11] **107 Procedure—Default/Relief from Default**
611 Aggravation—Lack of Candor—Bar—Found
621 Aggravation—Lack of Remorse—Found
An attorney's lack of concern for the disciplinary process and failure to appreciate the seriousness of the charges is a factor in aggravation. Where respondent displayed a lack of appreciation of the necessity for timely, meaningful participation in the disciplinary process, as demonstrated by his repeated attempts to appear without timely seeking relief from default in both the hearing and review departments, despite repeated warnings by the court, respondent's dilatory conduct was an aggravating factor.

[12 a-c] **172.19 Discipline—Probation—Other Issues**
220.00 State Bar Act—Section 6103, clause 1
611 Aggravation—Lack of Candor—Bar—Found
802.30 Standards—Purposes of Sanctions
1714 Probation Cases—Degree of Discipline

Primary aims of attorney disciplinary probation are protection of public and rehabilitation of attorney. Greatest amount of discipline for violating probation conditions is merited for breaches of probation conditions significantly related to misconduct for which probation was given, especially when circumstances raise serious concern about public protection or show probationer's failure to undertake rehabilitative steps. Where misconduct for which respondent was placed on probation included practicing law in violation of court order, and respondent's current misconduct also involved violating numerous court orders and was aggravated by failure to participate in disciplinary proceeding, and where respondent's probation violations involved two of very first steps required by probation conditions, these factors indicated that respondent had a persistent problem with conforming his conduct to requirements of law, raised serious concerns for need to protect public, and showed that respondent had failed to even begin to take steps to rehabilitate himself. Accordingly, imposition of entire period of stayed suspension was appropriate discipline for respondent's violation of probation.

[13] **535.90 Aggravation—Pattern—Declined to Find**

Habitual disregard of client interests is ground for disbarment. However, only the most serious instances of repeated misconduct over a prolonged period of time can be characterized as demonstrating a pattern of wrongdoing. Thus, the number of clients involved is but one factor to be considered.

[14 a, b] **213.20 State Bar Act—Section 6068(b)**
220.00 State Bar Act—Section 6103, clause 1
586.11 Aggravation—Harm to Administration of Justice—Found
611 Aggravation—Lack of Candor—Bar—Found
1093 Substantive Issues re Discipline—Inadequacy

Where, in representing four criminal clients, respondent violated six court orders, was held in contempt four times, failed to appear at scheduled court hearings nine times, and had warrants issued against him three times, and where respondent had breached two separate disciplinary orders and defaulted in current disciplinary proceeding, respondent's misconduct reflected disdain and contempt for the orderly process and rule of law and inability to conform to the most basic duties of an attorney. These facts, coupled with lack of mitigation, demonstrated that risk of future misconduct was great and indicated that respondent was not a good candidate for probation and/ or suspension.

[15 a-c] **176 Discipline—Standard 1.4(c)(ii)**
511 Aggravation—Prior Record—Found
806.10 Standards—Disbarment After Two Priors
1093 Substantive Issues re Discipline—Inadequacy

The aggravating effect of prior discipline may be diminished if misconduct underlying prior discipline occurred contemporaneously with misconduct currently under consideration. However, where at time respondent committed current misconduct, he was either involved in disciplinary process or was actually on disciplinary probation, this indicated that respondent's prior discipline had very little impact on his behavior, and demonstrated respondent's inability to conform his conduct to ethical norms. In such circumstances, greater showing required in reinstatement would

better protect public than showing required to return to practice after suspension under standard 1.4(c)(ii). Accordingly, application of standard calling for disbarment for third imposition of discipline was appropriate.

ADDITIONAL ANALYSIS

Culpability

Found

213.21 Section 6068(b)
214.11 Section 6068(k)
220.01 Section 6103, clause 1
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
1751 Probation Cases—Probation Revoked

Not Found

214.05 Section 6068(j)

Aggravation

Found

521 Multiple Acts

Standards

861.10 Standard 2.6—Disbarment
861.20 Standard 2.6—Disbarment

Discipline

1010 Disbarment
1815.09 Actual Suspension—3 Years

Other

146 Evidence—Judicial Notice
166 Independent Review of Record
171 Discipline—Restitution
172.50 Discipline—Psychological Treatment
175 Discipline—Rule 955
1715 Probation Cases—Inactive Enrollment

OPINION

NORIAN, J.:

We review a hearing judge's recommendation that respondent, Charles Clinton Hunter, be disciplined as the result of his misconduct in a probation revocation matter and two original disciplinary matters. Respondent's default was entered in all three cases because he failed to answer the notices to show cause. The original disciplinary matters were consolidated by the hearing judge at trial and the probation revocation matter was consolidated with the original disciplinary matters on review. The hearing judge filed two opinions: one for the probation revocation matter and one for the original disciplinary matters.

In the probation revocation matter, the hearing judge recommended that respondent's prior disciplinary probation be revoked; that the stay of his prior suspension be set aside; that he be suspended from the practice of law for three years, with the execution of that suspension stayed; and that he be placed on probation for five years on conditions including an actual suspension of one year and until he complies with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (standard[s]). The hearing judge also inactively enrolled respondent as a member of the State Bar, effective August 1, 1993, pursuant to section 6007 (d) of the Business and Professions Code.[1] The recommendation was based on respondent's violation of three of his probation conditions: failing to file a quarterly report; failing to make himself available to his probation monitor to review the terms and conditions of his probation; and failing to maintain his current address with State Bar membership records.

In the original disciplinary matters, the hearing judge recommended that respondent be suspended for three years, with the execution of that suspension stayed, and that he be placed on five years probation on conditions including actual suspension for one year and until respondent makes certain specified restitution and, if respondent's actual suspension exceeds two years, until he complies with standard 1.4(c)(ii). The recommendation was based on respondent's misconduct in four client criminal law matters that involved failing to make scheduled court appearances, failing to file pleadings, failing to comply with numerous court orders, failing to perform services competently, and failing to refund an unearned fee.

The discipline in the original disciplinary cases was recommended to be "completely independent" of any other discipline in effect at the time of the Supreme Court order in those cases. The discipline recommendations in both the probation revocation and original disciplinary matters are written such that, if adopted, the discipline imposed in these two matters would run concurrently, but with different start and end dates.

The State Bar, represented by a deputy trial counsel from the Office of the Chief Trial Counsel (OCTC), requested review, arguing, among other things, that the review department should increase the recommended discipline to disbarment because respondent's misconduct constitutes a pattern of misconduct demonstrating habitual disregard for the interests of clients and because respondent's past and present misconduct indicates that he is not a good candidate for probation. We have independently reviewed the record in this matter. Based thereon, we agree that disbarment is appropriate although we do not find that respondent's misconduct constitutes a pattern of misconduct. We do find that the past and present misconduct demonstrates respondent's extreme indifference to complying with court orders and indicates that a further grant of probation is inappropriate.

[1] Because the time frame within which a party can seek Supreme Court review of our opinion is

1. All further references to sections are to the Business and Professions Code unless otherwise stated. Inactive enrollment under section 6007 (d) may be ordered upon the finding of a probation violation incident to a probation that included stayed suspension when the discipline recommended for the probation violation includes a period of actual suspension.

much shorter for the probation revocation matter than for the original disciplinary matters (compare rule 952(a) and (b), Cal. Rules of Court), it is necessary for us to make separate discipline recommendations, even though the cases are consolidated. In the probation revocation matter, we recommend that respondent's probation be revoked, that the stay of his three-year suspension be set aside, and that he be actually suspended from the practice of law for three years. In the original disciplinary matters, we recommend that respondent be disbarred from the practice of law.

BACKGROUND

The notice to show cause in the probation revocation proceeding was filed on November 22, 1991, and was properly served on respondent at his official membership records address. Respondent did not file an answer to the notice and his default was entered on May 12, 1992, and notice thereof was properly served on respondent on the same date. Notices to show cause were filed in each of the original disciplinary proceedings, one on October 30, 1991, and the other on April 16, 1992, and both were properly served. Respondent did not file an answer to either notice and his default was entered on January 2, 1992, and August 4, 1992, respectively.

Although the cases were not consolidated, numerous joint pretrial conferences were held, both before and after respondent's default was entered in the various cases. Respondent was permitted to appear specially at those conferences held after his default was entered. At each of these conferences, respondent was advised by the hearing judge of the importance of filing answers to the notices to show cause or motions to set aside his default. Despite making numerous promises to file answers or motions seeking relief from his default, respondent did not file a motion to set aside his default until January 20, 1993, the date that had been set for trial of all three of the matters. At that time, the hearing judge advised respondent that his motion was lacking in several respects, granted him additional time to file supplemental papers, and continued the trial date. Respondent failed to file supplemental documents and the hearing judge denied the motion to set aside the defaults. Respondent did not seek review of this ruling as permitted by rule 1400(e)(vii) of the Provisional Rules of Practice. At the continued trial date, respondent appeared and orally requested that his default be set aside and that he be allowed to participate, which the hearing judge denied. Respondent thereafter left the courtroom and trial proceeded on a default basis.

After OCTC requested our review, oral argument was calendared for March 23, 1994. Notice of the argument date was served on OCTC on February 15, 1994, and a copy of the notice was sent to respondent as a courtesy notwithstanding his default. On March 16, 1994, respondent filed an application for postponement of oral argument and for leave to file a responsive brief on review, a request for relief from default, and a motion for dismissal of the proceedings. In this application, respondent sought a continuance of oral argument on the ground that he needed additional time to prepare the various motions. By order filed March 23, 1994, the Presiding Judge denied the requested relief.

Respondent was present at oral argument but was not permitted to participate due to his default and his failure to seek review of the hearing judge's denial of his motion for relief from default. On June 3, 1994, respondent submitted a motion for relief from defaults. This was followed on June 7 by two requests for judicial notice, a request for augmentation or correction of the record, and a proposed consolidated answer. By letter dated June 9, 1994, respondent advised us that he had just reviewed the Presiding Judge's order of March 23, 1994, and discovered that she had ruled that **[2]** the sole remedy available to respondent on review was to seek review of the hearing judge's order denying his motion for relief from default. Respondent requested in this letter that we construe his papers as seeking that remedy. We need not do so, however, because on June 14, 1994, respondent submitted papers directly seeking review under rule 1400(e)(vii) of the Provisional Rules of Practice of the hearing judge's denial of respondent's motions for relief from default which

were filed on January 20, 1993, and renewed and denied orally in open court on March 29, 1993.[2]

[3a] Respondent's defaults were entered in the respective proceedings on January 2, 1992 (case number 91-O-02488); May 12, 1992 (case number 91-P-07913), and August 4, 1992 (case number 91-O-05101). The record shows that respondent had actual notice of these proceedings at least by May 21, 1992, when he was permitted to appear specially at a status conference despite the prior entry of his default in two of the three matters. Despite repeated warnings from the hearing judge regarding the consequences of continued inaction, respondent did not seek relief from default until January 20, 1993. This was over a year after his first default was entered, more than six months after he had actual notice of the proceedings, and well over seventy-five days after the entry of the last of his three defaults. (See rule 555.1(b), Trans. Rules Proc. of State Bar [motion to set aside default must be filed within 75 days of entry of default]; see also *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 83, 85 [75-day time limit is not jurisdictional, but greater showing must be made after time limit has passed].) No sufficient showing justifying this extraordinary delay was made in either respondent's motions to the hearing judge or his motions before us.

[3b] Under the circumstances, the hearing judge's denial of respondent's motion for relief from default was well within her discretion, and we decline to disturb it. Accordingly, respondent's request for review of the denial of his motions for relief from default, filed June 14, 1994, is denied. The Clerk is directed to return to respondent the papers which he submitted on June 3 and June 7, 1994, as his defaults preclude him from filing them, with the exception of his proposed consolidated answer, which shall be received solely as an exhibit to his request for review of the denial of his motions for relief from default.

FACTS AND FINDINGS

We adopt the following findings of fact from the record and the hearing judge's findings. Respondent was admitted to the practice of law in California in December 1980.

A. Probation Revocation Matter (91-P-07913)

1. Culpability

By order filed July 10, 1991 (S020837; State Bar Ct. No. 86-O-12077), the California Supreme Court suspended respondent from the practice of law for three years, stayed execution of that suspension, and placed him on probation for five years with conditions, including thirty days actual suspension. Discipline was imposed in this prior matter based upon findings that respondent had commingled personal funds in his trust account on two occasions, had written checks against his trust account on three occasions when there were insufficient funds in the trust account to cover the checks, and had practiced law on two occasions while suspended from the practice of law due to his nonpayment of State Bar membership fees. This misconduct occurred in 1985, 1987 and 1988.

The other conditions of respondent's probation included a requirement that respondent report quarterly to the State Bar's probation department, a requirement that respondent promptly review the terms and conditions of the probation with his assigned probation monitor, and a requirement that respondent maintain his current address with the State Bar and report any changes to the State Bar and the probation department as prescribed by section 6002.1. The Supreme Court's order was effective August 9, 1991.

On August 13, 1991, the probation department mailed a letter to respondent at his official membership address, postage prepaid, reminding him of the Supreme Court's order and the terms and conditions of his probation. The letter also notified respondent of his assigned probation monitor, provided him with the monitor's address and telephone number, and included copies of the Supreme Court's order and the probation conditions. On October 25, 1991, respondent met with a staff member of the probation

2. Respondent also submitted a request that we take judicial notice of an order of the hearing judge which is part of the record in this proceeding. We accept this request as ancillary to respondent's request for review under rule 1400(e)(vii), and grant it. However, it does not affect our disposition of the underlying request.

department. During the course of that meeting, respondent informed the staff member that his membership records address was not correct. The staff member advised respondent to report the change as required by the probation conditions and respondent stated he would do so.

Respondent failed to file his first quarterly report which was due on October 10, 1991. Respondent failed to communicate with or make himself available to his probation monitor to review the terms and conditions of his probation. Respondent failed to notify the State Bar and the probation department of his change of address until December 9, 1991. The hearing judge concluded that respondent wilfully failed to comply with the above conditions of his probation in violation of sections 6068 (k) and 6103.

2. Mitigation/aggravation

No mitigating circumstances were found. In aggravation, the hearing judge found that respondent had a prior record of discipline, consisting of the discipline for which the probation was imposed (std. 1.2(b)(i)); that respondent's misconduct evidenced multiple acts of wrongdoing, in that respondent failed to comply with at least three separate conditions of his probation (std. 1.2(b)(ii)); that respondent's misconduct was followed by another uncharged violation of probation, in that he failed to take and complete a law office management or organization class within one year (std. 1.2(b)(iii)); that respondent significantly harmed the administration of justice, in that his failure to comply with the conditions of probation rendered it impossible for the State Bar to monitor respondent's behavior to determine his compliance with the Supreme Court's order of July 10, 1991 (std. 1.2(b)(iv)); and that respondent displayed indifference to the order of the Supreme Court by failing to take any affirmative action whatsoever to attempt compliance with the Supreme Court's order, which indifference was shown by respondent's failure to file four additional quarterly reports which were due January 10, 1992; April 10, 1992; July 10, 1992; and October 10, 1992 (std. 1.2(b)(v)).

B. Original Disciplinary Matters
(91-O-02488; 91-O-05101)

1. Miranda Matter

Respondent represented Carlos Miranda in a criminal case then pending in a municipal court. The matter was initially set for preliminary hearing on April 8, 1991, but was continued to the next day. The court ordered the parties and their counsel to appear for the hearing on April 9 at 10:30 a.m. Although the defendants, other counsel and witnesses appeared on April 9, respondent did not. About 2 p.m. that day, the court received a telephone call from another court, indicating that respondent was at that other court. Respondent appeared later in the afternoon of April 9 before the municipal court in which Miranda's case was pending. He was summarily held in contempt of court for his failure to appear for the preliminary hearing. The court set a hearing on respondent's contempt for April 11, 1991.

On April 11, 1991, respondent was found in contempt of court and fined $100. The court then granted respondent's request that he be given until the late afternoon of April 11, 1991, to pay the fine. Although the court remained open until 6 p.m. on April 11 in order to allow respondent to pay his fine, he failed to do so. He did not appear or otherwise communicate with the court on that day or on April 12, 15 or 16, 1991. The court made many attempts, to no avail, to call respondent on those dates. The court then found respondent in contempt for failure to pay the fine as ordered and directed him to appear for a hearing on that issue on April 26, 1991, at 1:30 p.m. The disposition of the second contempt action is not determinable on this record.

The notice to show cause in the Miranda matter charged that respondent violated sections 6068 (b) and 6103, and rule 3-110(A) of the Rules of Professional Conduct.[3] The hearing judge found that respondent's failure to appear at the continued preliminary hearing on April 9 was a wilful violation of section 6068 (b); that respondent's failure to appear

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. These rules are substantially the same as the current Rules of Professional Conduct which took effect September 14, 1992.

at the preliminary hearing and failure to pay the contempt fine constituted wilful violations of section 6103; and that respondent's failure to appear on his client's behalf was a wilful violation of rule 3-110(A).[4]

2. Carlon Matter

Respondent appeared with and on behalf of Ramon Carlon on February 7, 1991, in a municipal court in which Carlon was charged with misdemeanor traffic violations. Respondent entered a plea of not guilty on his client's behalf and the case was continued to March 7, 1991, for a pretrial hearing and a motion to suppress evidence. Respondent and his client failed to appear on March 7, 1991, resulting in the court ordering a bench warrant for Carlon's arrest. The warrant was held to the next day. As of March 8, 1991, the court had received no communication from Carlon or respondent, and the bench warrant was ordered issued.

The warrant was recalled on April 23, 1991, when Carlon appeared in court without respondent. On this occasion the case was continued to April 29, 1991, with Carlon ordered to appear on that date for the pretrial hearing. The court notified respondent by telephone to appear with Carlon on April 29. Respondent failed to do so, despite receiving actual notice of his obligation. On that date respondent was relieved as counsel for Carlon.

The notice to show cause in this matter charged violations of sections 6068 (b) and 6103, and rule 3-110(A). The hearing judge found that respondent's failure to appear as directed in court on March 7 and April 29, 1991, was in wilful violation of sections 6068 (b) and 6103; and that his failure to appear on his client's behalf was a reckless failure to perform legal services competently in wilful violation of rule 3-110(A).

3. Reyes Matter

On or about March 27, 1991, respondent appeared in a superior court on behalf of Jose Reyes in a criminal action. At this appearance, respondent moved to set aside a guilty plea Reyes had entered prior to respondent's entry into the case. Hearing on this motion was set for April 22, 1991, in order to allow respondent to brief the motion.

Respondent appeared on April 22, was granted a continuance to April 30, 1991, and was ordered to file points and authorities regarding his motion by April 26, 1991. Respondent failed to file the points and authorities. On April 30, 1991, respondent appeared over three hours late. The court continued the Reyes matter to May 1, 1991, and ordered respondent to appear on that date. The court also issued an order to show cause (OSC) directing respondent to appear on May 13, 1991, to show cause why he should not be sanctioned for failing to appear on time and failing to file the points and authorities; and the court ordered respondent to file a declaration in response to the OSC by May 10, 1991.

On May 1, 1991, the hearing on the Reyes motion to set aside the plea was continued to May 2, 1991. On May 2, respondent was again ordered to file points and authorities for the Reyes motion by May 9, 1991, and the hearing on that matter was continued to May 22, 1991. Respondent failed to file the points and authorities in the Reyes matter by May 9, 1991. Respondent failed to file the declaration in response to the OSC by May 10, 1991. On May 13, 1991, the hearing on the OSC was continued to May 22, 1991, and a second OSC was issued for respondent's failure to file the declaration responding to the first OSC. The second OSC was also calendared for May 22, 1991.

On May 22, 1991, the court denied Reyes's motion to set aside his plea and sanctioned respondent in the amount of $750, payable within 15 days, for failing to file the points and authorities in the Reyes matter. Also on May 22, the court continued the hearing on the second OSC to June 19, 1991, and ordered respondent to file a declaration in response to this second OSC by June 14, 1991. Respondent failed to pay the $750. Respondent failed to file a

4. Rule 3-110(A) provides that "A member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently." The hearing judge did not specify whether the violation of this rule was based on an intentional, reckless or repeated failure to perform legal services competently.

declaration responding to the second OSC by June 14. Respondent failed to appear on June 19, 1991. The court issued an attachment directing that respondent be taken into custody with bail set in the amount of $2,500, and issued a third OSC directing respondent to show cause why he should not be held in contempt for failure to pay the sanctions. The record is silent as to events occurring after the June 19 date.

The notice to show cause in this matter charged violations of sections 6068 (b) and 6103, and rule 3-110(A). The hearing judge found that respondent's failure to obey the court orders to appear at various times, properly plead his client's motion, pay the sanctions, and file responsive declarations to the court's OSC's constituted wilful violations of sections 6068 (b) and 6103; and that respondent's failure to properly plead Reyes's motion and appear for the hearing on the motion constituted a wilful violation of rule 3-110(A).[5]

4. Tami Matter

In March 1991, Pedro C. Tami employed respondent to represent him in a criminal matter then pending in a superior court. In April 1991, Tami paid respondent $2,500 as advanced attorneys fees, and in late May or early June 1991, paid respondent an additional $3,000 in advanced attorneys fees.

Tami's arraignment was scheduled for May 13, 1991. Tami appeared for his arraignment without respondent. As a result of respondent's non-appearance for the arraignment, the court, at Tami's request, continued the arraignment to the next day. Respondent failed to appear for Tami's arraignment on May 14, and the court continued the arraignment to May 15, 1991. At that time, respondent appeared with Tami. Respondent stated that he would be filing a number of motions on Tami's behalf, which the court ordered to be heard on June 14, 1991.

Respondent appeared at the time set for the hearing on the motions on June 14, 1991, but had not filed any pleadings in support of those motions. Respondent requested a continuance in order to file the indicated pleadings. The court granted respondent's request and continued the case to July 12, 1991.

Respondent failed to appear on July 12, 1991, and had not filed any of the pleadings by that date. Respondent did send a message to the court indicating that the documents would be forthcoming. Also on July 12, the court confirmed the July 15, 1991, trial date which had previously been set. Respondent appeared on July 15, 1991, and, at his request, the hearing on the motions was continued to August 2, 1991, and the trial date was vacated. Respondent did not file any pleadings in support of the motions on or before July 15, 1991.

On August 2, 1991, respondent appeared late in court and attempted to file documents with the court in support of his motions. The motions calendared to be heard on August 2, 1991, were respondent's motions for discovery (including a motion to compel the disclosure of an informant), to dismiss and to suppress evidence. Since the prosecuting attorney had not been given appropriate notice of these motions, and the pleadings did not comply with statutes or local rules in other respects, the court declined to file the pleadings. On the morning of August 2, 1991, pursuant to necessary waivers exercised by a law enforcement agency, the court was able to entertain at least one of respondent's motions. That motion sought discovery of material allegedly contained in a peace officer's personnel file, and the motion was denied. During the afternoon of August 2, 1991, the court heard and denied respondent's motion to dismiss pursuant to Penal Code section 995. Having also denied the respondent's motion to continue the suppression motion, the court proceeded to hear that motion. The court was unable to conclude its hearing on this final motion, which resulted in the court ordering a continuance to August 9, 1991, at 10:30 a.m. The court ordered respondent, who was personally present when the order was made, to appear at

5. Again, the hearing judge did not specify whether the violation of rule 3-110(A) was based on intentional, reckless or repeated failure to perform legal services competently.

the date and time set for the continued hearing or be subject to arrest.

On August 8, 1991, respondent contacted the court and indicated that he would be suspended from the practice of law for 30 days, effective August 9, 1991. This was the first indication the court had that respondent was about to be suspended. Respondent promised the court that he would seek an extension of the effective date of his suspension. Respondent called the court back later, stated he had been unsuccessful in obtaining an extension, and was told by court staff that he should still appear on August 9, 1991, as previously ordered. The court contacted a State Bar employee in order to ascertain the status of respondent's request for an extension regarding the effective date of his suspension and later received a message stating that the State Bar had no record of any such extension being sought by respondent.

Respondent failed to appear on August 9, 1991. He contacted the court by telephone on that date to indicate that he would not be appearing, but did not present any good cause for not doing so. The court issued a body attachment for respondent's arrest, with bail set in the amount of $10,000. Respondent was found in contempt of court for failing to appear. The court also ordered respondent relieved from representing Tami and appointed the public defender in his place. Although the defendant, the prosecuting attorney, and at least one witness appeared for the hearing, the court was required to continue the hearing in order to give the public defender's office a reasonable opportunity to speak with Tami and prepare its case.

Respondent was arrested on the court's warrant on or about December 31, 1991, and posted bail to appear on January 10, 1992. Respondent failed to do so. When respondent failed to appear on January 10, the court issued a no-bail bench warrant. Respondent was arrested on this warrant on or about January 17, 1992, and was detained in custody for approximately five days. Respondent was ordered released on his written promise to appear in court on January 29, 1992. Respondent failed to appear on January 29, 1992. On or about January 30, 1992, the court again found respondent in contempt, but took no further action on this contempt matter because respondent had already served five days in jail. The court instead referred the matter to the State Bar.

Respondent never refunded to Tami any of the $5,500 Tami had advanced him for fees. The hearing judge determined that $5,000 of the funds Tami advanced respondent were unearned at the time respondent's employment to Tami was terminated.[6] On several occasions Tami attempted to contact respondent in order to obtain a refund of the unearned advanced fees, but was unable to do so because respondent's telephone was disconnected and respondent had moved from his former office.

The notice to show cause in this matter charged violations of sections 6068 (b) and 6103, and rules 3-110(A) and 3-700(D)(2). The hearing judge found that respondent's failure to obey the court's orders to appear at various times and failure to properly plead his client's motions were wilful violations of sections 6068 (b) and 6103; that respondent's repeated and reckless failure to competently represent his client prior to respondent's suspension amounted to a wilful violation of rule 3-110(A); and that respondent's failure to return the unearned advanced fees was a wilful violation of rule 3-700(D)(2).

5. Membership Address

Pursuant to section 6002.1, attorneys are required to maintain on the State Bar's official member records, among other things, a current office or other address for State Bar purposes and to report any

6. In discussing the amount of restitution to be made, the hearing judge credited respondent with earning $500. However, the hearing judge stated that "Respondent's performance of even that amount of work is doubtful." (Decision, p. 26.) There is no evidence of the amount of time respondent may have spent on the Tami matter or the agreed hourly compensation. Thus, crediting respondent with $500 or any other specific amount is speculative. We need not resolve this issue in view of our disbarment recommendation. We also note that respondent's future actions in this regard will be relevant in the event he applies for reinstatement. (See, e.g., *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674-675.)

address changes within 30 days. On October 25, 1991, respondent told a staff member of the State Bar's probation department that his official address was not correct. The staff member advised respondent to report his correct address to the State Bar and respondent agreed to do so; however, mail sent to respondent using his official address in mid-November 1991 was returned as undeliverable. Respondent did not report his address change until December 9, 1991.

The notice to show cause in this matter charged a violation of section 6068 (j), which makes compliance with section 6002.1 part of an attorney's duties. The hearing judge concluded that respondent's failure to timely report his change of address was a wilful violation of section 6068 (j).

6. Mitigation/Aggravation

No mitigating circumstances were found. In aggravation, the hearing judge found that respondent had a record of two prior disciplinary matters. (Std. 1.2(b)(i).) The first was the discipline imposed by the Supreme Court's order of July 10, 1991. The second was the probation violation currently pending before us. Although the probation violation case is not final, the hearing judge exercised her discretion and considered it pursuant to rule 571, Transitional Rules of Procedure of the State Bar. However, the hearing judge significantly reduced the weight accorded to the probation violation as an aggravating circumstance because the misconduct in the probation violation matter occurred after the misconduct found in the original disciplinary cases.

The hearing judge also found in aggravation that respondent's misconduct involved multiple acts of wrongdoing occurring over a substantial time period (std 1.2(b(ii)); that respondent's misconduct caused significant harm to Tami and others (std. 1.2(b)(iv)) in that Tami was harmed by being deprived of the funds he advanced respondent and by his having to remain in custody while respondent needlessly delayed his case, and in that respondent harmed the administration of justice by his conduct in relation to Tami, Reyes, Carlon and Miranda because many court proceedings had to be continued without cause and the courts, clients, opposing counsel and witnesses wasted considerable time due to respondent's failure to conduct his affairs properly and as directed; and that respondent's continued failure to refund the unearned fees to Tami, and to acknowledge any wrongdoing concerning his handling of matters for Tami, Reyes, Miranda or Carlon, demonstrated "indifference toward rectification of or atonement for the consequences of his misconduct" (std. 1.2(b)(v)).

DISCUSSION

OCTC argues on review that the review department should find an additional aggravating factor in that respondent failed to cooperate with the State Bar proceeding; that we should delete the mental health probation condition of probation from the probation revocation case;[7] that we should conclude that respondent's misconduct constitutes a pattern of misconduct demonstrating habitual disregard for the interests of clients; and that we should increase the recommended discipline to disbarment because the misconduct constitutes a pattern and because respondent is not a good candidate for probation.

Our review of the record in this matter is independent; we may adopt findings and conclusions that differ from the hearing judge's, provided we give great weight to the hearing judge's factual findings resolving issues pertaining to testimony; and we are

7. The hearing judge's asserted basis for recommending this condition of probation in the probation revocation case was that she had numerous opportunities to observe respondent and, based thereon, she was convinced that respondent has psychological or emotional problems. The hearing judge believed that counseling would "greatly improve Respondent's ability to deal with deadlines, authority figures, and responsibilities." In *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, the hearing judge recommended a mental health condition of probation because of the "troublesome attitude" Koehler had displayed to her during the hearing. We deleted that condition because "no clear or expert evidence was presented that respondent had a specific mental or other problem requiring psychiatric treatment." (*Id.* at p. 629.) Such evidence was also lacking here in both the probation revocation and original disciplinary cases. In any case, our discipline recommendation obviates the need to consider any conditions of probation.

not limited to the issues raised by the parties. (Rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 229.) Thus, before we turn to OCTC's contentions, we briefly address the hearing judge's legal conclusions even though they are not challenged by OCTC.

A. Culpability

1. Probation Revocation Matter

We first note that the hearing judge concluded that her findings of fact regarding culpability in this matter were established by clear and convincing evidence. The record supports this conclusion. We also agree with the hearing judge that respondent is culpable of failing to comply with the terms and conditions of his probation in wilful violation of sections 6068 (k) and 6103.[8] **[4 - see fn. 8]**

In aggravation, we conclude that respondent has a record of prior discipline (std. 1.2(b)(i)), consisting of the discipline for which probation was originally imposed and the recommended discipline in the present original disciplinary matters (see std. 1.2(f); rule 571, Trans. Rules Proc. of State Bar; see also *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 539); that his misconduct involved multiple acts of wrongdoing in that he violated three separate conditions of probation (std. 1.2(b)(ii)); and, as discussed below, that respondent has failed to cooperate in the disciplinary proceeding (std. 1.2(b)(vi)).

We delete the remaining aggravating circumstances found by the hearing judge. **[5]** The harm to the administration of justice (std. 1.2(b)(iv)) that occurred was inherent in the violation of probation and therefore would be duplicative. (See, e.g., *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 240 [harm to the administration of justice inherent in unauthorized practice of law].) **[6]** The findings in aggravation regarding respondent's failure to take and complete a law office management or organization class and failure to file four additional quarterly reports are based on violations of probation not charged in the notice to show cause in this default proceeding and therefore must be deleted. (*In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 213.)

2. Original Disciplinary Matters

In the Miranda and Reyes matters, we conclude that respondent's violations of rule 3-110(A) were the result of his reckless failure to perform services competently. **[7]** The misconduct in the membership

8. [4] Effective January 1, 1993, our rules of procedure provide for alternative procedures upon an attorney's violation of disciplinary probation. (See rules 610-614, Trans. Rules Proc. of State Bar.) Pursuant to these rules, upon reasonable cause to believe that a condition or conditions of probation have been violated, OCTC may charge the probation violation in either or both an original disciplinary proceeding based on the attorney's violation of section 6068 (k) or a motion to revoke probation. (Rule 610, Trans. Rules Proc. of State Bar.) In an original disciplinary proceeding, the standard of proof is clear and convincing evidence (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239), and the discipline could be disbarment (std. 2.6). In a motion to revoke probation, the standard of proof is the preponderance of the evidence (§ 6093; rule 610.5, Trans. Rules Proc. of State Bar), and any actual suspension recommended may not exceed the entire period of stayed suspension (rule 611, Trans. Rules Proc. of State Bar).

The rules of procedure in effect prior to January 1, 1993, provided for a single procedure in which the State Bar Court issued a notice to show cause upon reasonable grounds to believe that an attorney had violated a condition or conditions of probation. (See former rules 610-613, Trans. Rules Proc. of State Bar.) The standard of proof in such a proceeding was the preponderance of the evidence. (Former rule 613, Trans. Rules Proc. of State Bar.)

The notice to show cause in the current proceeding was filed in November 1991 and charged respondent with violating sections 6093 (b), 6068 (k), and 6103. The notice also informed respondent that he could be suspended or disbarred as a result of the alleged probation violations.

In view of our discipline recommendation in this probation matter and our conclusion that clear and convincing evidence was presented, we need not and do not decide whether actual snspension for a period exceeding the entire period of stayed suspension could be imposed in this proceeding or which standard of proof applies.

address matter is the same misconduct which formed the basis for the violation of probation in the probation revocation matter. Disciplining respondent for the same misconduct in both the probation revocation and original disciplinary cases would not be appropriate. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 535.) We therefore dismiss the membership address matter. Other than noted above, we adopt the hearing judge's culpability conclusions in the original disciplinary cases.[9] **[8 - see fn.9]**

In aggravation, we conclude that respondent has a record of prior discipline as found by the hearing judge (std. 1.2(b)(i)); that respondent's misconduct involved multiple acts of wrongdoing (std. 1.2(b)(ii)); and that his misconduct significantly harmed the administration of justice, and significantly harmed Tami in that Tami was deprived of the $5,500 he paid respondent (std. 1.2(b)(iv)).

We delete the remaining aggravating circumstances found by the hearing judge. **[9]** The hearing judge found that respondent's lack of diligence resulted in harm to Tami (std. 1.2(b)(iv)) in that Tami unnecessarily remained in custody approximately three months more than otherwise would have been the case. The record is silent as to the eventual disposition of the Tami matter. Tami was charged with a felony and if he was convicted and sentenced to jail, he would have been given credit for the time he was in custody. (See Pen. Code, § 2900.5.) Without knowing how the case was resolved, we conclude that this finding is not supported by clear and convincing evidence.

[10] We also do not find clear and convincing evidence supporting the hearing judge's finding that respondent displayed indifference toward rectification of or atonement for the consequences of his misconduct toward his clients. (Std. 1.2(b)(v).) Respondent's failure to refund Tami's money formed the basis for the finding in aggravation that he significantly harmed Tami and it would be duplicative for that same finding to form the basis for the finding in aggravation that respondent displayed indifference toward rectification of or atonement for the consequences of his misconduct. Furthermore, no evidence was adduced from the clients regarding respondent's failure to acknowledge his wrongdoing to them, and respondent's default precluded him from doing so in the State Bar proceeding.

OCTC argues that we should find in aggravation that respondent failed to cooperate in the disciplinary proceeding. The hearing judge cited *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074, in declining to find noncooperation as an aggravating circumstance. Bledsoe failed to answer the notice to show cause, his default was entered, and he thereafter failed to appear at the disciplinary trial. After an attorney's default is entered in a disciplinary proceeding, no further notices are required to be served on the attorney, including the notice of the trial date. (Rule 552.1, Trans. Rules Proc. of State Bar.) In recommending disbarment, the hearing referee in *Bledsoe* was influenced by Bledsoe's failure to appear at the trial. The Supreme Court held that "While petitioner must certainly bear all adverse consequences of his noncooperation with the State Bar, i.e., admission of the charged misconduct and exclusion from the proceedings, we do not believe he should be doubly penalized for not attending a hearing of which he was not given notice." (*Bledsoe* v. *State Bar, supra*, 52 Cal.3d at p. 1080.)

[11] The issue in the present case, however, is not respondent's failure to appear at trial, but his lack of appreciation of the necessity for timely, meaningful participation in the disciplinary proceeding. The Supreme Court has long held that an attorney's lack of concern for the disciplinary process and failure to appreciate the seriousness of the charges is a factor in aggravation. (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 447, 451; *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 507.) Respondent has displayed a similar atti-

9. **[8]** In the Tami matter, even though respondent was in fact ineligible to practice law on August 9, 1991, this did not relieve him of his obligation to appear in court as ordered. He was obligated to do everything in his power to obey the court's order short of practicing law, and at a minimum should have been physically present in court and given the court accurate information about his eligibility to practice. This would not have constituted the practice of law.

tude toward the disciplinary process as demonstrated by his repeated attempts to appear without timely seeking relief from default in both the hearing and review departments, despite repeated warnings by the court. Accordingly, we find respondent's dilatory conduct to be an aggravating factor in both the original disciplinary and probation revocation cases. (Cf. *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 406.)

B. Discipline

As indicated above, we make separate discipline recommendations for the probation revocation and original disciplinary matters. As OCTC's arguments regarding discipline are primarily directed to the original disciplinary matters, we will address them below in our discussion of that issue.

1. Probation Revocation Matters

[12a] The primary aims of attorney disciplinary probation are the protection of the public and the rehabilitation of the attorney. (*In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 299.) "If we measure an attorney's violations of probation against those aims, the greatest amount of discipline would be merited for violations which show a breach of a condition of probation significantly related to the misconduct for which probation was given. This would be especially significant in circumstances raising a serious concern about the need for public protection or showing the probationer's failure to undertake rehabilitative steps." (*In the Matter of Potack, supra,* 1 Cal. State Bar Ct. Rptr. at p. 540.)

[12b] Part of respondent's prior misconduct for which he was placed on probation involved practicing law in violation of the Supreme Court order suspending him. The current violations of probation also involve violating the Supreme Court order imposing the probation. Furthermore, respondent's misconduct in the present original disciplinary proceedings involves numerous violations of court orders and is aggravated by his failure to participate in the disciplinary proceeding. These factors indicate to us that respondent has a persistent problem with conforming his conduct to the requirements of the law and raise serious concern for the need to protect the public.[10]

[12c] We also note that respondent's probation violations, failing to file the first quarterly report and failing to make himself available to his probation monitor to review the terms and conditions of his probation, are two of the very first steps required of respondent under the probation conditions. Thus, respondent's probation violations involve his failure to even begin to take steps to rehabilitate himself. Based on the above, the aggravating circumstances, and the absence of mitigating circumstances, we conclude that the imposition of the entire period of the stayed suspension is the appropriate discipline in this matter.

2. Original Disciplinary Matters

[13] Habitual disregard of client interests is ground for disbarment. (*Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 566; *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 15; std. 2.4(a).) In urging disbarment, OCTC argues that a pattern of misconduct was established because in respondent's past and present disciplinary cases, he was found to have "inadequately represented a total of five clients in matters actively pending before criminal courts." This argument seems to focus almost exclusively on the number of clients involved. We believe the Supreme Court has a different view of what constitutes a pattern. "In our prior cases we have held that only the most serious instances of repeated misconduct over a prolonged period of time could be characterized as demonstrating a pattern of wrongdoing." (*Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14.) Thus, the number of clients

10. We also note that we recently ordered respondent's interim suspension from the practice of law, effective May 20, 1994, based on his criminal conviction in February 1994 for practicing law while suspended. (§ 6126 (b).) (Order filed April 18, 1994, State Bar Ct. No. 92-C-18877.) As this matter has not as yet resulted in discipline or a recommendation for discipline, the conviction has not influenced our conclusions in these matters currently under review.

involved is but one factor to be considered. However, we need not decide whether respondent's misconduct constitutes a pattern because we find independent reason to recommend his disbarment.

OCTC cites *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563 in support of its argument that respondent is not a good candidate for suspension and/or probation. Taylor had repeatedly practiced law while suspended, failed to comply with his criminal probation, and failed to participate in both the pending and past disciplinary proceedings. We concluded that these facts coupled with the other misconduct reflected Taylor's disdain and contempt for the orderly process and rule of law and demonstrated that the risk of future misconduct was great. Based on this, we concluded that Taylor was not a good candidate for suspension and/or probation and we recommended disbarment.

In *Taylor*, we cited *Baca* v. *State Bar* (1990) 52 Cal.3d 294 and *Barnum* v. *State Bar* (1990) 52 Cal.3d 104 in support of our disbarment recommendation. Baca did not have a record of prior discipline. He was found culpable of moral turpitude misappropriation of over $2,300 as well as other misconduct, and he failed to cooperate with the State Bar in the disciplinary proceedings. The Supreme Court disbarred Baca in light of the seriousness of the misconduct and the lack of mitigation. The Court noted that Baca's failure to participate in the disciplinary proceeding reflected a disdain and contempt for the orderly process and rule of law and that such conduct deserved severe discipline.

In a single client matter, Barnum had collected an unconscionable fee, disobeyed several court orders compelling him to return the fee, and failed to participate in the disciplinary proceeding. Barnum had been disciplined on one prior occasion for wilful neglect of two sets of clients and failure to return papers and unearned fees to the clients, which the Court characterized as essentially the same misconduct as the then current misconduct: "taking fees from the client and then failing to earn or return them." (*Barnum* v. *State Bar, supra*, 52 Cal.3d at p. 111.) In addition, Barnum's prior discipline imposed a period of probation, which Barnum was subsequently found to have violated. The Court concluded that Barnum was "not a good candidate for suspension and/or probation. He has breached two separate terms of our prior disciplinary order, leading to the imposition of additional sanctions. He also defaulted before the State Bar here and in one other proceeding." (*Id.* at p. 106.)

[14a] Respondent's misconduct in the present matter is as serious as the misconduct in *Baca*, *Barnum*, and *Taylor*. In his representation of the four criminal clients, respondent violated approximately six separate court orders, was held in contempt approximately four times, failed to appear at scheduled court hearings approximately nine times, and had body attachments and/or arrest warrants issued against him approximately three times. The wilful violation of court orders alone is egregious misconduct. "Other than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney." (*Barnum* v. *State Bar*, *supra*, 52 Cal.3d at p. 112.)

Respondent was admitted to practice in this state in 1980 and committed his first acts of misconduct in 1985. The present matters under review represent respondent's second and third disciplinary matters since that time. He has committed misconduct in 1985, 1987, 1988, 1991, and 1992. This record by itself causes grave concern that the risk of future misconduct is great.

[14b] Respondent has breached two separate disciplinary orders of the Supreme Court and has defaulted in the current disciplinary proceedings. His conduct before the courts of record and the State Bar Court reflects his disdain and contempt for the orderly process and rule of law and his inability to conform his conduct to the most basic duties of an attorney. These facts coupled with the lack of mitigation demonstrate again that the risk of future misconduct is great and indicate that respondent is not a good candidate for probation and/or suspension.

The standards also suggest that disbarment is appropriate here. Wilful disobedience of court orders should normally result in disbarment or suspension depending on the gravity of the offense or the harm to the victim. (Std. 2.6.) As indicated above, respondent's misconduct is very serious. In addition,

the harm to the administration of justice was extensive. The trial court judges involved in respondent's current misconduct spent significant amounts of time and resources trying to compel respondent's meaningful presence in court rather than in adjudicating the criminal matters before them.

[15a] Standard 1.7(b) provides for disbarment for an attorney's third imposition of discipline unless the most compelling mitigating circumstances clearly predominate. No mitigating circumstances are present here.

[15b] The hearing judge rejected the application of standard 1.7(b) in the original disciplinary cases "because Respondent's misconduct in his probation violation case occurred after the misconduct found herein." The misconduct in the probation revocation case actually occurred during the same time period as the misconduct in the original disciplinary cases. The aggravating effect of prior discipline may be diminished if the misconduct underlying the prior discipline occurred contemporaneously with the misconduct then under consideration. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.) However, at the time respondent committed the misconduct in both the current probation revocation and original disciplinary matters, he was either involved in the disciplinary process as the result of his prior discipline or was actually on disciplinary probation. Clearly, respondent's prior discipline had very little impact on his behavior. When viewed together with the current misconduct, these factors demonstrate respondent's inability to conform his conduct to ethical norms and indicate that the application of standard 1.7(b) is appropriate. (See also *Barnum* v. *State Bar*, *supra*, 52 Cal.3d at p. 113 [applied std. 1.7(b) even though misconduct in second and third disciplinary priors occurred during the same time period].)

[15c] We also note that the hearing judge recognized that respondent should not be permitted to practice law again without first having to demonstrate his rehabilitation and present fitness to practice law, because she recommended that he be ordered to comply with standard 1.4(c)(ii), which requires such a showing, prior to resuming practice. We agree with this assessment. However, under the circumstances, we believe the greater showing required in a reinstatement proceeding will better protect the public than that required in a standard 1.4(c)(ii) proceeding. (See *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 501.)

RECOMMENDATION

For the foregoing reasons, we recommend the following: In the probation revocation matter (91-P-07913), we recommend that respondent's previously ordered probation be revoked, that the previously ordered stay of his three-year suspension be set aside, and that he be actually suspended from the practice of law for three years. Further, we 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. Further, we recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

In the original disciplinary matters (91-O-02488; 91-O-05101), we recommend that respondent be disbarred from the practice of law in this state. Further, we 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, unless he has already done so pursuant to the Supreme Court order in the above probation revocation matter. Further, we recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code. Our recommendation as to discipline in the original disciplinary matters is independent of our recommendation as to discipline in the above probation violation case. (See rule 571, Trans. Rules Proc. of State Bar.)

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN HENRY HUNTER

A Member of the State Bar

No. 91-P-07034

Filed August 4, 1994; as modified, September 2, 1994

SUMMARY

Respondent violated his disciplinary probation by failing to pay restitution and to file a timely, complete quarterly probation report. In aggravation, respondent had a record of prior discipline consisting of the matter in which the probation was imposed; filed additional defective probation reports; and failed to comply with pretrial procedures in the probation revocation proceeding. In mitigation, respondent suffered emotional difficulties in dealing with family problems. The hearing judge recommended that respondent's probation be revoked and that he be suspended for the entire one-year period of previously stayed suspension and until he completes restitution, provided that if the suspension lasts over two years, respondent would also be required to show rehabilitation and fitness to practice before resuming active status. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent sought review. Rejecting respondent's claims of discriminatory prosecution and procedural error, the review department concluded that the hearing judge's findings were amply supported by the evidence and that respondent had offered no justification to impose less than the hearing judge's recommended discipline. The review department also issued an order to show cause why respondent should not be placed on immediate inactive enrollment due to the revocation of his probation.

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter, Donald R. Steedman

For Respondent: Barbara G. Azimov

HEADNOTES

[1 a, b] 173 **Discipline—Ethics Exam/Ethics School**
Where respondent had been directed in first disciplinary matter to take Multistate Professional Responsibility Examination rather than usually-imposed California Professional Responsibility Examination, and respondent had passed such examination, review department did not recommend in subsequent probation revocation matter that respondent be required to pass another professional responsibility examination.

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

[2 a-c] **1712 Probation Cases—Wilfulness**
Where respondent on disciplinary probation filed a tardy quarterly probation report which failed to comply with requirements for such report, and did not present a complete report for over three months after it was due, respondent's failure to file the report timely was a wilful breach of probation.

[3] **172.19 Discipline—Probation—Other Issues**
1719 Probation Cases—Miscellaneous
Where respondent's probation monitor placed calls to respondent and respondent did attempt to reply to such calls, and hearing judge found that although respondent did not respond promptly, he could not be said to have failed to comply with his duty, respondent was not culpable of violating condition of probation requiring him to meet with monitor to review probation terms.

[4] **171 Discipline—Restitution**
1712 Probation Cases—Wilfulness
1719 Probation Cases—Miscellaneous
Where respondent had stipulated to discipline requiring restitution payments to be made by certain dates, and respondent did not set aside funds to make such restitution as soon as his own stipulation required first payment to be made, and where respondent had no credible excuse for failing to make at least first required payment at a time when respondent had significant income, respondent's failure to make at least partial restitution was a wilful violation of his probation.

[5 a, b] **106.90 Procedure—Pleadings—Other Issues**
162.12 Proof—State Bar's Burden—Preponderance of Evidence
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
1713 Probation Cases—Standard of Proof
1714 Probation Cases—Degree of Discipline
Where hearing judge viewed proceeding as one to revoke probation, not to impose added culpability or discipline, and recommended actual suspension would not exceed imposition of previously stayed suspension if respondent made restitution within such time, applicable standard of proof was preponderance of evidence standard applicable to probation revocation proceedings, even though notice to show cause also alleged violations of respondent's statutory oath and duties and of a court order.

[6] **179 Discipline Conditions—Miscellaneous**
1099 Substantive Issues re Discipline—Miscellaneous
1714 Probation Cases—Degree of Discipline
Disbarment is a remedy generally available for statutory violations in original disciplinary proceedings, but not in probation revocation proceedings.

[7] **119 Procedure—Other Pretrial Matters**
148 Evidence—Witnesses
611 Aggravation—Lack of Candor—Bar—Found
Respondent's failure to comply with proper pretrial procedures and to provide list of witnesses prior to day of trial was properly considered as aggravating circumstance.

[8] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
193 Constitutional Issues
1719 Probation Cases—Miscellaneous

Claim of selective prosecution in probation revocation proceeding was without merit, where such claim was based on asserted failure to give respondent same opportunity as other lawyers to cure defects in probation report, but revocation proceeding was also based on failure to pay restitution due ten months earlier; respondent's subsequent probation reports were also inadequate; and respondent failed to connect cited authorities on doctrine of selective enforcement to facts of proceeding.

[9 a, b] **171 Discipline—Restitution**
1714 Probation Cases—Degree of Discipline

Where respondent's probation violations (failure to file quarterly report and to pay restitution) and balance of aggravating and mitigating circumstances were comparable to those in another reported probation revocation matter, review department adopted hearing judge's essential discipline recommendation, based on discipline in comparable matter, of imposition of entire previously stayed one-year actual suspension, with suspension to continue until payment of restitution, and showing of rehabilitation and fitness to practice to be required if suspension lasted two years or more.

ADDITIONAL ANALYSIS

Culpability
Found
1751 Probation Cases—Probation Revoked

Aggravation
Found
511 Prior Record
561 Uncharged Violations
591 Indifference

Mitigation
Found
760.12 Personal/Financial Problems
Found but Discounted
740.33 Good Character

Discipline
1815.06 Actual Suspension—1 Year
Probation Conditions
1021 Restitution
1820 Probation Conditions
1830 Standard 1.4(c)(ii)

Other
106.20 Procedure—Pleadings—Notice of Charges
1715 Probation Cases—Inactive Enrollment

OPINION

STOVITZ, J.:

This is a disciplinary probation revocation case. In 1991, acting on a stipulated disposition, the Supreme Court placed respondent on probationary suspension. Last year, after the Office of the Chief Trial Counsel (OCTC) sought to revoke respondent's probation, a State Bar Court hearing judge held a hearing, found that respondent had violated his disciplinary probation in two different respects, and recommended that his probation be revoked and that he be suspended actually for one year and until he has made the restitution ordered in his underlying suspension. Respondent seeks our review. He objects to the culpability determination as not supported by the evidence. He claims that there was no wilful violation of probation conditions; that this proceeding resulted from discriminatory enforcement by the State Bar; that OCTC misled him during the probationary period; that the degree of discipline is excessive, and that a 30-day actual suspension or a stayed suspension is adequate. OCTC supports the hearing judge's decision and recommendation of actual suspension.

Independently reviewing the record, we have concluded that the hearing judge's findings are amply supported by the evidence and that respondent has offered no justification to impose less discipline than the hearing judge recommends.

A. THE UNDERLYING SUSPENSION IMPOSING PROBATION.

Respondent was admitted to practice law in California at the end of 1976. Effective June 28, 1991, acting on a stipulated disposition approved by a State Bar Court hearing judge, the Supreme Court suspended respondent for one year, stayed execution of that suspension, placed him on probation for three years, suspended him actually for the first thirty days of probation, and directed him to comply with other conditions of probation.

As the basis for the agreed-upon probationary suspension, the parties had stipulated in two counts that respondent had misappropriated settlement funds owed to medical providers totaling $1,421. In a third count, respondent agreed that he had not held in trust for a doctor $600 he had been authorized to withhold from the client's settlement. Respondent had not signed a medical lien and was waiting for his client's instructions before disbursing the $600. The parties agreed that respondent wilfully violated his oath and duties and violated former rule 6-101(A)(2), Rules of Professional Conduct, as discussed in *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1154, fn. 2. In the stipulation, OCTC expressly stated that there was insufficient proof that respondent acted dishonestly in any of the counts within the meaning of Business and Professions Code section 6106.[1]

Respondent's agreed-upon probation conditions included actual suspension for the first 30 days and the "usual" conditions of probation found in almost every case, including quarterly reports certifying compliance with the State Bar Act and Rules of Professional Conduct. Special conditions included probation monitoring, and the following restitution condition: "It is further Stipulated [*sic*] by the parties, that as a precondition to practicing law following the actual suspension of one month, Respondent pay to Dr. William Ryan or refund to Gary Morris the sum of $600.00 by December 31, 1990 and to Professional Lien Services the sum of [$1,166.50] in two payments with $583.25 paid by December 31, 1990 and the remaining $583.25 paid by July 31, 1991 and that Respondent file . . . evidence . . . of these payments within 30 days of the date of payment."

The above stipulation was signed on November 15, 1990; approved by the hearing judge on November 21, 1990; and adopted as final discipline by a Supreme Court order filed May 29, 1991. Under this chronology, respondent agreed to make most of his restitution about six weeks after he signed the stipulation, well before the Supreme Court would approve the stipulation.

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

On June 27, 1991, the State Bar Court's probation staff[2] sent respondent a two-page letter reminding him of the probationary terms contained in the Supreme Court's order, which became effective the next day. The letter identified the required restitution; pointed out that proof of restitution for the December 30, 1990, payments was past due; and stated that it was "imperative" that respondent immediately provide proof of restitution. This letter also reminded respondent of his duty to provide quarterly probation reports with the first such report due by October 10, 1991. The letter also informed respondent of his probation monitor's name and address and gave him information about enrolling for the professional responsibility examination.[3] **[1a - see fn. 3]**

B. EVIDENCE OF RESPONDENT'S FAILURE TO COMPLY WITH PROBATION DUTIES.

By October 21, 1991, respondent had not provided proof of all restitution, nor had he filed his first quarterly report. On that day, the State Bar Court filed a notice to show cause ("notice") seeking to discipline respondent for alleged probation violations. The notice alleged violation of sections 6068 (k), 6093 (b), and 6103 and warned respondent he could be disbarred or suspended and enrolled inactive. The notice charged respondent with three types of violations: (1) failure to file his probation report due October 10, 1991; (2) failure to make himself available to review his terms with his probation monitor; and (3) failure to make any of the required restitution of $1,766.50. We discuss the evidence concerning each of the alleged violations.

1. Failure to file probation report.

[2a] On October 25, 1991, four days after the notice was filed, respondent submitted what he described as his initial probation report. It did not comply with two requirements. It was not under penalty of perjury, nor did it declare whether or not respondent had complied with the State Bar Act and Rules of Professional Conduct during the covered quarter or whether respondent had complied with specific probation duties.

[2b] On November 4, 1991, a State Bar Court deputy clerk sent respondent a letter advising him of the deficiencies of his tardy report. Although respondent sought in early January 1992 to refile his October 1991 report, he did not present a complete report to the State Bar Court until about January 30, 1992. At the revocation hearing below, respondent stated his position that as soon as he realized that his report was not in compliance with probation duties, he amended it. But as the evidence showed, he did not present a complete report for over three months after it was due.

Respondent also testified below that he was evicted from his apartment in Seal Beach in about February 1991. At times during 1991, he had no permanent address. He had an arrangement with his cousin to receive mail and messages addressed to him, but his cousin did not forward all the mail which he was sent by the State Bar. Respondent testified that he did not timely receive the State Bar Court's letter of November 4, 1991, explaining the deficiencies of his October report. In late January 1992, respondent spoke with a State Bar Court employee and testified he learned for the first time how to cure his October 1991 report.

[2c] Under the circumstances, respondent's failure to file a timely October 1991 report was a wilful breach of probation. The required report was quite simple, and its contents were a part of the stipulated duties he had agreed to about a year before his first report was due. (Cf. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 498.) We therefore adopt the hearing judge's conclusion that respondent violated his probation by failing to file timely his initial report due by October 10, 1991.

2. At the time, disciplinary probation monitoring was a State Bar Court function. It has since been assumed by OCTC.

3. [1a] Respondent was directed to take the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners and was not required to take the usually-imposed California Professional Responsibility Examination. (See *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn. 9.) He has since passed that test. See *post*.

2. Alleged failure to make himself available to probation monitor.

[3] The hearing judge found respondent not culpable of violating his probation on this charge, and on review OCTC does not dispute that finding. We uphold it on review. The evidence showed that the monitor placed calls to respondent and that respondent did attempt to reply to the calls. As the hearing judge determined, although respondent "was not . . . prompt in responding" to the monitor's calls, "it cannot be said that he failed to comply with his duty." We adopt the hearing judge's findings on this point.

3. Failure to make required restitution.

In August 1991, respondent tendered a request to extend his time to make restitution. In that document and in his October 25, 1991, probation report, he stated that he had made restitution of the $600 sum due either Dr. Ryan or Mr. Morris. However, he was unable to make any of the $1,166.50 restitution due to Professional Lien Services (PLS). The State Bar Court clerk's office returned to respondent unfiled his extension request because it did not comply with proper service requirements. The record does not show that he resubmitted his extension request.

As of the hearings below, respondent had still not made restitution of any part of the $1,166.50 owed PLS and made no proof of any attempts at restitution until after the hearings. He testified that shortly after he signed the stipulation for restitution, his take-home pay shrank due to a different deduction method used by his employer and that in February 1991, he lost his job and was unable to find any gainful employment since. He did not have sufficient funds to maintain an apartment. Child support expenses were an added burden to him. He also claimed that he was unable to locate an address for PLS, but his testimony on these points was, in the hearing judge's words, "sketchy" and "inconclusive." The staff member of the probation unit who testified explained that respondent could have opened a trust account in the name of PLS pending a search for its address.

[4] The hearing judge found that respondent did not set aside funds to make restitution to PLS as soon as his own stipulation required the first payment to be made and that his job search was not diligent. We should give great weight to the hearing judge's findings in this regard as they rested on her ability to see and hear the testimony of all witnesses, including respondent. (See Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Layton*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 373.) Moreover, respondent never presented any financial statement, nor did he offer a credible excuse for failing to at least make the first payment to PLS when his own agreement required it at a time during which he was gainfully employed and was taking home about $3,000 per month. Under all circumstances, respondent wilfully violated his probation as he did not have a sufficient excuse for failing to pay timely at least half of the $1,166.50 due PLS. (See *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 537-538.)

[5a] We address briefly the appropriate standard of proof. In *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 76, fn. 8 (involving an attorney different from respondent), we noted that prior to January 1, 1993, the procedural rules provided for one type of proceeding to revoke probation. That revocation proceeding was started by a notice issued upon reasonable grounds to believe that a violation of probation conditions had occurred. The applicable standard of proof at trial was a preponderance of the evidence, and potential discipline was limited to the lifting of the stay as to the entire period of stayed suspension. As we noted, *ante*, the notice filed in this case alleged not only a violation of probation (§ 6093 (b)), but also a violation of respondent's oath and duties (§ 6068 (k)) and a violation of a court order. (§ 6103.) [6] The notice also warned respondent that he could be disbarred in addition to having his probation revoked, which is a remedy generally available for statutory violations in original proceedings, but not in probation revocation proceedings. [5b] The hearing judge saw this proceeding as essentially one to revoke probation and not to impose added culpability or added discipline beyond revocation of probation. She therefore concluded that the applicable standard of proof was

the preponderance-of-evidence standard. We agree based on the limited purpose of this proceeding.[4]

C. EVIDENCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

In aggravation, the hearing judge properly considered respondent's prior discipline. (*In the Matter of Potack, supra,* 1 Cal. State Bar Ct. Rptr. at p. 539.) She also correctly considered respondent's failure to take adequate steps toward restitution as demonstrating indifference to rectifying his harm and thus aggravating. (See *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 417.) She also properly considered evidence offeted by the State Bar that respondent's probation reports due in January and April 1992 were defective in a material respect (i.e., failure to certify compliance with the State Bar Act and Rules of Professional Conduct and with the conditions of his probation). [7] As the hearing judge found, respondent failed to comply with proper pretrial procedures in the hearing of this probation revocation case, and did not even provide his list of witnesses for trial until the day of trial. We adopt the hearing judge's findings in aggravation.

The hearing judge gave mitigating weight to emotional difficulties suffered by respondent in dealing with family problems. Only minimal mitigating weight was accorded respondent's character evidence as the few witnesses were family members or very close friends, some of whom were unfamiliar with the nature of the charges either in the probation revocation case or the underlying disciplinary matter. We agree with the hearing judge's determination that aggravating circumstances outweighed mitigating ones.

D. PROCEDURAL CONTENTIONS.

Respondent urges us to take judicial notice of the hearing judge's decision in *In the Matter of Respondent P,* State Bar Court case number 90-O-10765. Not only was this decision superseded by our own decision in that case (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622), but also there is no relevance of the issues in that case to those before us here.

[8] Respondent's argument of selective prosecution, apparently made for the first time on review, is completely without merit for several reasons. It appears to rest on respondent's view of this case as one where the notice was issued 11 days after his first probation report was due. Respondent contrasts this case to others where notices were issued much later in time, allegedly giving other lawyers an opportunity to cure their defective probation reports. First, although the notice was issued when respondent says it was, as noted *ante*, it was not limited to his failure to file his report. Rather it also alleged his failure to make restitution due *10 months earlier*. When respondent failed to make such restitution, the State Bar was not required to wait an additional time once respondent's first quarterly report was untimely before alleging the latter violation. Second, respondent's claim that if he had been given until January 1992, he could have filed a proper October 1991 report ignores the evidence that as late as April 1992, his probation reports were inadequate when filed. Third, respondent has simply failed to connect the general authorities he cites on the doctrine of selective enforcement to the facts of this case to demonstrate that any such practice occurred.

Also without merit is respondent's claim that he was misled by the State Bar. The notice alleged that respondent could be actually suspended, even disbarred and enrolled inactive. Also meritless is respondent's claim of variance of the charges to the findings concerning his failure to file a proper probation report. Respondent's ability to prepare a defense was not hampered in any way by the questioned wording of the notice.

E. DEGREE OF DISCIPLINE.

The hearing judge found instructive our decision in *In the Matter of Potack, supra,* 1 Cal. State

4. Although the hearing judge recommended that respondent be suspended for one year and until he makes restitution, the period of actual suspension would not exceed the period of stayed suspension so long as respondent provides proof of having made the restitution at any time during the one-year suspension.

Bar Ct. Rptr. 525, which preceded the Supreme Court's opinion in another probation revocation matter involving the same attorney, *Potack* v. *State Bar* (1991) 54 Cal.3d 132. In the aggregate, we and the Supreme Court respectively determined that Potack had violated the terms of his probation by failing to file a quarterly probation report and had failed to comply timely with another probation condition requiring that he make restitution. The Supreme Court revoked probation and imposed a two-year actual suspension.[5]

On review, respondent's counsel cites our decision in *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, to show that his client should be treated more leniently. That decision does not aid respondent. In *Howard*, we increased the hearing judge's recommendation from a 90-day actual suspension to a one-year actual suspension.[6] Recognizing that Howard's disqualification from practice would last a longer time for another reason, we also added a requirement that he show his rehabilitation, fitness, and learning under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.) The Supreme Court followed our recommendation. (*In the Matter of Howard* (S015607), min. order filed Sept 9, 1993.) Although Howard defaulted in the probation revocation proceeding, his substantive probation violations involved his failure to file two required quarterly reports and to deliver certain records to an accountant. **[9a]** We believe that the probation violations and balance of aggravating and mitigating circumstances in *Howard* are comparable to the violations and balance of circumstances in this case. On that basis, we adopt the hearing judge's essential recommendation with the modifications set forth *post*.

F. FORMAL RECOMMENDATION.

[9b] For the foregoing reasons, we recommend that the stay of the previously imposed suspension be set aside, that probation be revoked, and that respondent be suspended from the practice of law for a period of one year and until he has provided proof of restitution to PLS of principal and interest as set forth in the hearing judge's recommendation attached to her amended decision filed August 9, 1993. If respondent's actual suspension lasts for two years or more, we follow the hearing judge's recommendation that respondent be required to make the showing the judge prescribed under standard 1.4(c)(ii).

We also recommend that respondent be required to comply with the provisions of 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.

[1b] Since respondent has passed a professional responsibility examination as part of his 1992 discipline, we do not again recommend that he pass such an examination, but we do recommend that the costs incurred by the State Bar in this matter be awarded pursuant to section 6086.10.

In light of the determination by the hearing judge and the review department in this matter that respondent violated the terms of his probation and the notice given to respondent that he could be inactively enrolled in the event the court recommended actual suspension, the parties are hereby ORDERED to show cause by September 12, 1994, why respondent should not be placed on inactive enrollment effective September 22, 1994, pursuant to Business and Professions Code section 6007 (d).

We concur:

PEARLMAN, P.J.
NORIAN, J.

5. Potack's original discipline had been a three-year stayed suspension and a three-year probation, conditioned on one year of actual suspension.

6. In her brief, respondent's counsel cited the hearing judge's 90-day suspension recommendation, but did not cite our increased recommendation.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN HENRY HUNTER

A Member of the State Bar

No. 91-P-07034

Filed September 2, 1994

SUMMARY

In its opinion in a probation revocation matter, the review department had issued an order placing the respondent on immediate inactive enrollment. On reconsideration, in light of the fact that the respondent was entitled to practice at the time the opinion was filed, the review department vacated the order of inactive enrollment and replaced it with an order to show cause why the respondent should not be placed on inactive enrollment.

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter, Donald R. Steedman

For Respondent: Barbara G. Azimov

HEADNOTES

[1] **130 Procedure—Procedure on Review**
1715 Probation Cases—Inactive Enrollment
Where a respondent in a probation revocation matter is already on inactive enrollment at the time the review department concludes that the respondent has violated disciplinary probation, it is appropriate for the review department to order the respondent's immediate inactive enrollment pursuant to Business and Professions Code section 6007(d). However, where the respondent in a probation revocation matter is entitled to practice law at the time the review department's opinion finding a probation violation is filed, the review department's practice is to issue an order to show cause with a short response time regarding why the respondent should not be enrolled inactive.

ADDITIONAL ANALYSIS

[None.]

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.

MODIFICATION OF OPINION AND ORDER TO SHOW CAUSE

BY THE DEPARTMENT:

We filed our opinion in this case on August 4, 1994, placing respondent on immediate inactive enrollment pursuant to Business and Professions Code section 6007 (d).* Respondent has moved for reconsideration objecting to that procedure. OCTC has opposed respondent's request.

[1] In *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 453, we ordered the immediate involuntary inactive enrollment of the respondent upon concluding that he had violated his probation. In that case, however, the respondent had defaulted in the probation revocation proceeding and had already been placed on inactive enrollment as a consequence of that default. (*Id.* at p. 451.) In this matter, since respondent was entitled to practice law at the time we filed our opinion, we should have and intended to have followed our practice in a similar past case. In that case, we issued an order to show cause with a short response time regarding why respondent should not be enrolled inactive under section 6007 (d). (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 621, fn. 19.)

Accordingly, we hereby VACATE, nunc pro tunc, the last paragraph of our opinion filed August 4, 1994, and substitute instead the following order to show cause:

"In light of the determination by the hearing judge and the review department in this matter that respondent violated the terms of his probation and the notice given to respondent that he could be inactively enrolled in the event the court recommended actual suspension, the parties are hereby ORDERED to show cause by September 12, 1994, why respondent should not be placed on inactive enrollment effective September 22, 1994, pursuant to Business and Professions Code section 6007 (d)."

Pending consideration of the parties' responses to the above order to show cause, respondent's involuntary inactive enrollment is hereby VACATED nunc pro tunc, retroactive to August 4, 1994.

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* Editor's note: See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN STEPHEN RILEY

A Member of the State Bar

Nos. 89-O-10767, 90-O-12597, 90-O-13180

Filed August 4, 1994

SUMMARY

Respondent was found culpable by a hearing judge of some two dozen statute and rule violations in twelve different matters, mostly involving failure to pay medical liens. Finding harm to clients but no other aggravating factors, the hearing judge recommended that respondent receive six months stayed suspension and three years probation on conditions including 75 days actual suspension. (George C. Wetzel, Judge Pro Tempore.)

Respondent requested review, claiming discriminatory prosecution and other prosecutorial misconduct; contesting all of the hearing judge's culpability conclusions, and maintaining that even if some culpability were found, the discipline should consist of a reproval or at most a wholly stayed suspension. The review department rejected respondent's claims of prosecutorial misconduct in their entirety, but made modifications to the hearing judge's culpability conclusions and to his findings regarding mitigation and aggravation. Finding no basis to deviate from the minimum discipline called for by the Standards for Attorney Sanctions for Professional Misconduct, and in light of comparable case law, the review department modified the hearing judge's discipline recommendation to increase the stayed suspension to one year and to include a 90-day actual suspension.

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter, Lawrence J. Dal Cerro

For Respondent: Gert K. Hirschberg

HEADNOTES

[1] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where there was no evidence that respondent acted intentionally in failing to notify statutory medical lienholder of settlement or in failing to honor statutory lien, but rather, respondent's state

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of mind was that he was not actually aware of existence of lien or his duties in regard to it because he took no steps to investigate his client's medical coverage or his obligations under law, respondent's conduct evidenced reckless disregard rather than intentional violation of law.

[2] **130 Procedure—Procedure on Review**
166 Independent Review of Record
Even where State Bar did not contest on review hearing judge's finding that respondent had not violated Rules of Professional Conduct, review department's obligation was to review record independently.

[3] **196 ABA Model Code/Rules**
257.00 Rule 2-100 [former 7-103]
Where it was not clear, given federal case law interpreting similar ABA ethics rule, that county employees contacted by respondent's office came within definition of "party" in rule prohibiting direct contact with opposing party represented by counsel, and where it was possible that such contact came within exception for communications with public officials or otherwise authorized by law, record did not establish by clear and convincing evidence that such contact violated rule.

[4] **204.90 Culpability—General Substantive Issues**
Where respondent was charged with violating both former Rules of Professional Conduct and their current equivalents, but charged misconduct occurred prior to effective date of current rules, current rules were inapplicable.

[5] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation
Where respondent had not paid a medical lien, but there was no evidence that respondent had failed to retain the appropriate sum to pay the lien in his trust account, respondent was not culpable of misappropriating the lien funds.

[6] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where hearing judge did not find that respondent's lack of competence in failing to pay client's medical bill was intentional, reckless, or repeated, and record contained no clear and convincing evidence of anything more than negligence in this regard, respondent was not culpable of intentional, reckless, or repeated failure to perform competently.

[7 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
430.00 Breach of Fiduciary Duty
Where respondent disbursed settlement funds to client without withholding funds to pay medical lien, in reliance on client's unverified representation that client had paid lien, and respondent had no reason to believe that lienholder had any alternative possible source of payment, respondent's error in fulfilling his fiduciary duties both to lienholder and to client, who was later sued by lienholder, was of sufficient magnitude to constitute reckless failure to perform competently.

[8] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Where respondent disbursed settlement funds to client without withholding funds to pay medical lien, in reliance on client's unverified representation that client had paid lien, this conduct constituted failure to take steps to avoid foreseeable prejudice to client in course of termination of respondent's employment.

[9 a, b] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
162.20 Proof—Respondent's Burden
193 Constitutional Issues

Even if selective prosecution were a valid defense in State Bar proceedings, claim that respondent was singled out for prosecution based on success and fame could not succeed in absence of authority that claims of selective prosecution may be premised on asserted discrimination due to notoriety rather than on a constitutionally prohibited basis such as race, sex, or exercise of constitutional rights.

[10 a, b] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
162.20 Proof—Respondent's Burden
192 Due Process/Procedural Rights

It is not clear that selective prosecution may be raised as defense in State Bar disciplinary proceedings, in which respondents do not enjoy full panoply of procedural protection afforded to criminal defendants. If such defense were available, burden of proof to establish selective prosecution would be on respondent.

[11] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
113 Procedure—Discovery
119 Procedure—Other Pretrial Matters
120 Procedure—Conduct of Trial
162.20 Proof—Respondent's Burden

Pursuant to case law, selective prosecution claims should be raised by motion prior to trial, and as a practical matter, such claims have little chance of success if not raised initially by pretrial motion, due to difficulty of proving them without aid of discovery. However, it is not clear that such claims cannot be raised as part of respondent's defense case at trial; accordingly, review department considered such claim despite respondent's failure to raise it by pretrial motion.

[12] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
162.20 Proof—Respondent's Burden

Even if claim of selective prosecution could be founded on alleged discrimination on basis of success and fame, there was insufficient evidence to support such claim, where principal factual basis was that many charges were dismissed or were assertedly without merit. A prosecutor's failure to prove all charges brought in a case has not been held to be sufficient to show invidiously discriminatory prosecution.

[13 a, b] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
106.90 Procedure—Pleadings—Other Issues
162.20 Proof—Respondent's Burden
167 Abuse of Discretion

State Bar Court is reluctant to interfere with reasonable exercise of prosecutorial discretion. When presented with a complaint, State Bar can legitimately charge attorney based on facts as they appear from investigation. Where large number of counts filed against respondent resulted primarily from size and volume of respondent's practice and his chronic problem with handling medical liens, fact that State Bar could not establish factual or legal basis for some counts and charges was not sufficient to establish that charges were brought without reasonable basis or that respondent was victim of prosecutorial misconduct.

[14 a, b] **102.35 Procedure—Improper Prosecutorial Conduct—Exculpatory Evidence**
159 Evidence—Miscellaneous
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 [former 7-105(1)]

Even if State Bar prosecutor had duty to disclose exculpatory evidence, unpublished, non-precedential trial court decision did not constitute such evidence, nor was it controlling precedent which prosecutor had duty to disclose to court.

[15 a, b] **135 Procedure—Rules of Procedure**
199 General Issues—Miscellaneous
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 [former 7-105(1)]

An attorney's wilful failure to cite controlling authority squarely contradicting the attorney's position could be held to violate statute and rule prohibiting attorneys from misleading judges. However, attorneys as advocates are under no duty to reveal decisions which do not constitute controlling precedent. In State Bar Court, ouly decisions of review department, subject to relevant Supreme Court case law, are considered controlling precedent.

[16] **194 Statutes Outside State Bar Act**
204.10 Culpability—Wilfulness Requirement
213.10 State Bar Act—Section 6068(a)

As officers of the court, sworn to uphold the law, attorneys have a duty to honor legislative mandate that government-funded health care expenses be entitled to reimbursement from any and all private funds available. By statute, it is a disciplinable offense to violate this duty unless the violation is the result of a negligent good faith mistake.

[17 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
194 Statutes Outside State Bar Act
213.10 State Bar Act—Section 6068(a)

The Business and Professions Code section requiring attorneys to support federal and California constitution and laws proscribes attorney conduct which violates any federal or California statute. However, such Business and Professions Code section may be used to charge violation of another statute only if that statute is specifically identified in the notice to show cause. Otherwise, the attorney is not given adequate notice of the particular statute allegedly violated.

[18 a-d] **163 Proof of Wilfulness**
164 Proof of Intent
204.10 Culpability—Wilfulness Requirement
213.10 State Bar Act—Section 6068(a)

Where hearing judge found that respondent acted with reckless disregard in failing to honor rights of statutory lienholder, and where in one matter respondent intentionally did not honor known statutory lien based on incorrect legal theory without any legal research, advice, or inquiry, and in two other matters respondent made no effort to determine whether clients' health care providers might have statutory liens, and where respondent took no steps to ascertain the law as to his obligations to statutory lienholder, respondent's failure to honor statutory liens was product of gross negligence rather than of good faith, negligent mistake, and thus constituted violation of statute requiring attorneys to support the law.

[19 a-c] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
430.00 Breach of Fiduciary Duty
Attorney who holds funds subject to legally enforceable lien has duty to lienholder to perform competently in handling those funds; such duty is inherent in attorney's role as fiduciary with respect to entrusted funds. Moreover, because failure to pay liens exposes clients to collection efforts by lienholders, it is for protection of client, not just lienholder, that attorney has duty to ensure that liens are properly paid. Where respondent recklessly disregarded his duty to pay statutory medical liens in personal injury matters, he was culpable of reckless failure to perform legal services competently.

[20 a-c] **194 Statutes Outside State Bar Act**
204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
An attorney retained by a parent to represent the parent's child in a personal injury matter is thereby put on notice that the injured client may be a minor, a fact of critical importance. Statutes requiring court approval of compromise of minors' claims are intended for protection of minors. Respondent's failure to ascertain client's age after being retained by client's parent was grossly negligent as a matter of law and constituted reckless failure to perform legal services competently.

[21] **194 Statutes Outside State Bar Act**
290.00 Rule 4-200 [former 2-107]
Where statutory scheme requires tribunal to approve fees charged by counsel, it is professional misconduct for an attorney to secure or attempt to secure fees in excess of those allowed by tribunal. Respondent's collection of any fee from minor client without court approval, regardless of amount charged, violated prohibition against charging or collecting an illegal fee.

[22] **106.10 Procedure—Pleadings—Sufficiency**
194 Statutes Outside State Bar Act
213.10 State Bar Act—Section 6068(a)
Statute requiring attorneys to uphold law does not provide basis for discipline except where it serves as conduit to charge violation of state or federal statute other than disciplinary provisions of Business and Professions Code. Where no such statutory violation was charged in matter involving failure to honor contractual lien, no violation could be found as a matter of law.

[23 a-c] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
A finding of reckless disregard, for the purpose of the rule prohibiting intentional, reckless or repeated failure to perform competently, cannot be premised on mere negligence. In matter where respondent failed to pay medical lien because it was negligently misplaced, and in matter where there was no evidence that failure to pay lien was result of anything other than simple negligence, respondent's conduct did not constitute a reckless failure to perform. Where counts involving failure to pay liens each involved different fact pattern, and did not involve deliberate indifference to lienholders' rights, record also did not show repeated failure to perform competently with respect to such liens.

[24 a-c] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Rule requiring prompt payment of entrusted funds on demand requires no special state of mind to establish violation; mere fact that payment was not made is sufficient to constitute wilfulness for

purpose of finding wilful violation of rule. Without justification, failure to pay third party lien on demand violates such rule. Where attorney negotiates with lienholder to reduce lien amount, and it becomes clear negotiations will not be productive, attorney violates rule if attorney neither promptly pays lien in full nor takes appropriate steps to resolve dispute promptly.

[25] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where there was no evidence that medical provider had enforceable lien, and one-month delay from provider's demand to payment of medical bill was not unreasonable under circumstances, attorney's delay in paying client's medical bill from settlement proceeds did not violate rule requiring prompt payment of entrusted funds on demand.

[26] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Fact that attorney's failure to pay medical lien resulted from client's deception of attorney did not justify attorney's four-year delay in making payment after lienholder filed suit to enforce lien. Such delay was sufficient to establish violation of rule requiring prompt payment of entrusted funds on demand.

[27 a, b] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**

Whether attorney or client initiates termination of attorney-client relationship, attorney's ethical duties upon such termination remain the same. An attorney of record in pending litigation remains counsel of record, and continues to have duty to take actions essential to avoid foreseeable prejudice to client's interests, until substitution of counsel is filed or court grants leave to withdraw. Rule requiring withdrawing or terminated counsel to protect client from foreseeable prejudice does not require that such prejudice actually occur. Where respondent failed to appear to defend client's deposition, it was foreseeable that client might be prejudiced.

[28 a, b] **164 Proof of Intent**

270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

An attorney's duties to a client do not cease to exist because client is also represented by another attorney. Where respondent wished to be relieved of responsibility for defending client's deposition, but knew that successor counsel was not available to do so, respondent had obligation to take appropriate steps to avoid prejudice to client. Where respondent intentionally absented himself from client's deposition even though he was still officially counsel of record and knew client would be unrepresented in his absence, respondent intentionally failed to perform legal services competently.

[29 a-d] **213.10 State Bar Act—Section 6068(a)**

270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

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

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

290.00 Rule 4-200 [former 2-107]

521 Aggravation—Multiple Acts—Found

801.45 Standards—Deviation From—Not Justified

824.10 Standards—Commingling/Trust Account—3 Months Minimum

1093 Substantive Issues re Discipline—Inadequacy

Where respondent was culpable of one instance each of collection of an illegal fee and intentional failure to perform competently, and of multiple instances each of violating his duty to uphold the law; reckless failure to perform competently; withdrawing from employment without protecting clients from foreseeable prejudice; and failure to pay trust funds on demand, and where most severe

applicable standard proposed three-month minimum actual suspension for non-misappropriation trust fund offenses, and where respondent's mitigating evidence was not sufficient to justify deviating from applicable standard given respondent's record of numerous violations over extended time period, review department increased hearing judge's recommended actual suspension to 90 days, as condition of three-year probation, with one-year stayed suspension as justified by case law.

[30] **582.10 Aggravation—Harm to Client—Found**
720.50 Mitigation—Lack of Harm—Declined to Find
Fact that respondent's clients received funds which should have gone to pay clients' medical bills did not negate aggravating factor of harm to clients, where several clients were sued by medical creditors whom respondent should have paid.

[31] **710.33 Mitigation—No Prior Record—Found but Discounted**
Where respondent had no prior record of discipline in sixteen years from admission to bar until hearing judge's decision, but respondent's misconduct began nine years after his admission to practice and continued for at least four years, review department did not view respondent's clean record as being as long or entitled to as much weight as did hearing judge.

[32] **745.51 Mitigation—Remorse/Restitution—Declined to Find**
Payments of restitution prompted by litigation have no mitigating force, even if made prior to initiation of disciplinary proceedings; their only relevance is to amount of restitution which may be appropriate. Where respondent did not pay medical liens until after being sued by lienholders, such payment was entitled to no mitigating weight whatsoever.

[33] **875.10 Standards—Unconscionable Fee—Declined to Apply**
Standard recommending six-month minimum actual suspension for charging unconscionable fee did not apply in matter in which respondent collected fee that was illegal but not unconscionable.

[34] **621 Aggravation—Lack of Remorse—Found**
801.45 Standards—Deviation From—Not Justified
802.30 Standards—Purposes of Sanctions
802.69 Standards—Appropriate Sanction—Generally
1093 Substantive Issues re Discipline—Inadequacy
Where respondent did not appear from record to be venal or dishonest, but overall nature of respondent's misconduct revealed somewhat indifferent attitude toward ethical obligations, especially those to administration of justice and persons other than current clients, some actual suspension was warranted in order to protect public by augmenting respondent's understanding of his duties.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
290.01 Rule 4-200 [former 2-107]

Not Found

213.15 Section 6068(a)
221.50 Section 6106
257.05 Rule 2-100 [former 7-103]
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.35 Rule 3-510 [former 5-105]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
290.05 Rule 4-200 [former 2-107]
420.54 Misappropriation

Aggravation

Found

584.10 Harm to Public
586.11 Harm to Administration of Justice

Declined to Find

545 Bad Faith, Dishonesty

Mitigation

Found

750.10 Rehabilitation

Standards

802.61 Appropriate Sanction
844.13 Failure to Communicate/Perform
863.90 Standard 2.6—Suspension

Discipline

1013.06 Stayed Suspension—1 Year
1015.03 Actual Suspension—3 Months
1017.09 Probation—3 Years

Probation Conditions

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

Other

173 Discipline—Ethics Exam/Ethics School
175 Discipline—Rule 955
1091 Substantive Issues re Discipline—Proportionality

OPINION

PEARLMAN, P.J.:

Respondent John Stephen Riley was admitted to practice law in California in December 1977, and has no prior record of discipline. This case, consisting of three consolidated matters, involves numerous charges of misconduct, mostly failure to honor medical liens, allegedly committed during the years 1986 through 1991. The hearing judge found respondent culpable of some two dozen statute and rule violations in twelve different matters, but noted that since the misconduct occurred, respondent had taken steps to remedy the problems in his office procedures which gave rise to most of the misconduct. Finding harm to clients but no other aggravating factors, the hearing judge recommended that respondent receive six months stayed suspension and three years probation on conditions including seventy-five days actual suspension.

Respondent requested review, contending that he is a victim of discriminatory prosecution and other prosecutorial misconduct. Respondent also contests all of the hearing judge's culpability conclusions, and maintains that even if some culpability is found, the discipline should consist of a reproval or at most a wholly stayed suspension. The State Bar, represented by the Office of Trials, argues that the hearing judge's findings and conclusions as to culpability are supported by the record, and should be supplemented by two additional culpability findings. It accepts the hearing judge's discipline recommendation as appropriate, but characterizes it as a minimum based on the misconduct found.

We reject respondent's claims of prosecutorial misconduct in their entirety. Based on our independent review of the record and our analysis of the applicable law, we make several modifications to the hearing judge's culpability conclusions and to his findings regarding mitigation and aggravation. Finding no basis to deviate from the minimum discipline called for in this matter by the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V), and in light of comparable case law, we modify the hearing judge's discipline recommendation to increase the stayed suspension to one year and to include a ninety-day actual suspension.

FACTS, CHARGES, FINDINGS, AND CONCLUSIONS

The hearing judge's factual findings are generally not disputed on review, with a few exceptions discussed below under the contested counts. Except as noted and discussed below, we have determined that these findings are supported by clear and convincing evidence in the record and hereby adopt them. Our summary of the facts as to each count is based on these findings, supplemented in some instances by uncontroverted evidence from the record.

A. Case Number 89-O-10767[1]

Count 1: Mooney—Medi-Cal Lien

Respondent was retained by La Don Mooney to represent him as plaintiff in a personal injury case, and filed a complaint in superior court on June 30, 1986. Respondent's firm stated in discovery responses that Mooney had well over $10,000 in medical bills from the accident. A settlement check for $150,000 was issued on February 19, 1988, and deposited into respondent's client trust account. The action was dismissed on March 2. The settlement proceeds were disbursed without paying Mooney's medical bills except for one small lien.

Mooney was a Medi-Cal beneficiary, and Medi-Cal paid over $13,000 for his medical care arising from the accident. There is no evidence in the record that prior to the settlement, respondent provided any notice to the California Department of Health Services ("DHS") regarding the action filed on Mooney's

1. The hearing judge found no culpability on counts 5, 6 and 10 in this matter, and the State Bar has not contested his conclusions on review. We find no basis in the record to disturb the judge's dismissal of counts 5 and 10; count 6 is discussed below. Count 8 of this matter was dismissed by the hearing judge on the State Bar's motion, and no evidence was presented as to this count.

behalf or the settlement. Respondent testified that he did not know whether or not such notice had been given, but admitted that at that time, his office did not have a practice of asking clients whether they had Medi-Cal coverage. Respondent also testified that his office was not aware prior to its disbursement of the settlement proceeds that Medi-Cal claimed a lien in the case. The record also includes a copy of the first notice respondent received from DHS in this matter, indicating that notice was received by DHS from respondent's office on June 2, 1988—well after the settlement was finalized. We find the foregoing to be a sufficient evidentiary basis to support the hearing judge's finding that the required notice to DHS was not given.

Respondent was charged in this count with violating Business and Professions Code sections 6068 (a) and 6106,[2] and former rule 6-101(A)(2) of the Rules of Professional Conduct.[3] The notice to show cause alleged in this count that respondent owed a duty to DHS under sections 14124.76 and 14124.79 of the Welfare and Institutions Code to give DHS notice and allow it an opportunity to perfect and satisfy its lien.

The hearing judge found respondent not culpable of violating section 6106; this finding is not contested by the State Bar on review, and we see no reason in the record to disturb it. The hearing judge found respondent culpable of violating former rule 6-101(A)(2), in that he "recklessly disregarded" DHS's lien rights. Although stating that section 6068 (a) "does not proscribe attorney conduct," the hearing judge concluded that respondent's failure to comply with the lien statutes brought him within the provisions of the statute.[4] Our analysis of the charged section 6068 (a) and rule 6-101(A)(2) violations is set forth in parts B.1 and B.2 of our discussion, *post*.

Count 2: Tittle—County Hospital Lien

Respondent was retained sometime prior to December 14, 1988,[5] to represent Michael Tittle in a personal injury matter. On January 30, 1989, HHL Financial Service, Inc., a collection agency, sent a letter to respondent notifying him that its client, Harbor-UCLA Medical Center, a county hospital, claimed a lien pursuant to section 23004.1 of the Government Code for services provided by Harbor-UCLA Medical Center in the amount of $10,045. Additional notices to the same effect were sent to respondent on March 9 and April 3, 1989. The case was settled for $15,000 in early May 1989. Respondent disbursed the settlement proceeds without paying Harbor-UCLA Medical Center's lien.

Respondent was charged in this count with violating sections 6068 (a) and 6106, former rule 6-101(A)(2), and current rule 3-110(A). The notice to show cause in this count referred to "a statutory county lien," but did not cite any statute which respondent was alleged to have violated other than the charged sections of the Business and Professions Code.

The hearing judge found respondent not culpable of violating section 6106; as with count 1, this finding is not contested by the State Bar on review, and we see no reason in the record to disturb it. The hearing judge found respondent culpable of violating both former rule 6-101(A)(2) and current rule 3-110(A), based on an express finding that respondent had acted with "reckless disregard" in failing to honor the lien. The judge reached the same conclusion as in count 1 regarding section 6068 (a). Our analysis of these conclusions is set forth in parts B.1 and B.2 of our discussion, *post*.

2. All further references to sections, unless otherwise noted, are to the Business and Professions Code.

3. Unless otherwise noted, all references in this opinion to former rules are to the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989, and all references to current rules are to the Rules of Professional Conduct which became effective May 27, 1989, as they read prior to the amendments which became effective September 14, 1992.

4. This form of conclusion regarding section 6068 (a) charges was reiterated with respect to counts 2, 3, 4, 9, and 11 in this matter.

5. The notice to show cause charged, and the hearing judge found, that respondent was representing Tittle in March 1989. However, the record includes a demand letter sent by respondent on Tittle's behalf dated December 14, 1988. Evidently, respondent's representation of Tittle commenced sometime in 1988 and continued through May 1989.

Count 3: Mack—Medicare Lien

Peter G. Mack retained respondent on April 25, 1987, to represent him in a personal injury matter. Respondent subsequently filed a superior court complaint on behalf of Mack, and signed a statement of damages listing medical and related expenses of $5,763.77 to date. The case was settled in October 1988 for $12,000. Respondent disbursed $7,143.57 to his client, withholding no funds to pay medical bills.

Respondent testified that he had no recollection whether he and Mack ever discussed Mack's medical bills or Medicare. Mack testified, and the hearing judge found, that Mack told respondent that he had medical care coverage through Medicare, and that respondent advised Mack that Medicare would cover his medical bills for his injuries from the accident and Mack would not need to reimburse Medicare. Mack testified that he accepted a low settlement in part because respondent assured him that he would not have to pay any medical bills. There is no evidence in the record as to whether or not respondent made any effort to verify his views as to Mack's lack of obligation to Medicare before advising his client or disbursing the settlement funds.

Some time after the settlement was concluded, Medicare contacted Mack and asserted that he was obligated to reimburse it for the medical bills arising from the accident. On January 11, 1990, Mack wrote to respondent complaining about respondent's failure to pay his medical bills. Eventually, Mack was able to persuade Medicare that he had not been at fault in failing to ensure that Medicare was reimbursed, and that reimbursement would cause him substantial hardship, and Medicare waived its claim for reimbursement.

Respondent was charged in this count with violating sections 6068 (a) and 6106, as well as former rules 6-101(A)(2) and 8-101(B)(3). The notice to show cause alleged that respondent knew or should have known that Medicare would have a lien against the settlement, and that he failed to honor Medicare's statutory lien.[6] However, it did not cite any statute other than the charged Business and Professions Code sections.

The hearing judge concluded that respondent was not culpable of violating section 6106 or former rule 8-101(B)(3); the State Bar does not contest these conclusions on review, and we find them to be supported by the record. The hearing judge found that in failing to honor the statutory lien, respondent "failed with reckless disregard to perform legal services competently" and thereby violated former rule 6-101(A)(2). As to section 6068 (a), the hearing judge's conclusion was the same as in counts 1 and 2. Our analysis of the section 6068 (a) and former rule 6-101(A)(2) charges is set forth in parts B.1 and B.2 of our discussion, *post*.

Count 4: Griffith—Medi-Cal Lien

Respondent's firm was retained in October 1988 to represent Kelly Griffith in a personal injury action. The firm filed a complaint for Griffith in superior court on December 27, 1988. A statement of damages prepared by respondent's firm listed Griffith's medical expenses as $90,843.70. The case settled in February 1989 for $16,108. After deductions for legal fees and costs advanced, the remaining funds were distributed to Griffith. No funds were withheld or paid out on account of medical bills.

Griffith's medical bills were covered by Medi-Cal. There is no evidence in the record that respondent knew this fact at any time prior to the disbursement of the settlement funds. Respondent gave no notice to DHS at any time regarding the filing of suit on Griffith's behalf or the settlement of that suit. Respondent first received notice of the existence of a Medi-Cal lien on June 2, 1989, well after the settlement funds were disbursed.

6. The notice to show cause referred to a statutory "Medi-Cal" lien rather than Medicare. This was corrected orally by the examiner at trial, without any objection by respondent's counsel or claim that his client did not receive proper notice of the charge.

In this count, respondent was charged with violating sections 6068 (a) and 6106, former rule 6-101(A)(2) and current rule 3-110(A), and former rule 8-101(B)(3) and current rule 4-100(B)(3). The notice to show cause quoted a portion of Medi-Cal's notice to respondent about its lien which included a reference to "'Sections [sic] 14124.70 of the Welfare and Institutions Code.'"[7] The hearing judge found respondent not culpable of violating section 6106, former rule 8-101(B)(3) and current rule 4-100(B)(3); we see no basis in the record to disturb those conclusions.

[1] The hearing judge found that by failing to honor Medi-Cal's statutory lien respondent "intentionally failed to perform legal services competently." There is no evidence in the record to support the finding that respondent acted intentionally in failing to notify DHS of the suit or in failing to honor its statutory lien in handling the settlement funds. Respondent's state of mind with respect to this count appears to have been essentially the same as with respect to count 1; that is, he was not actually aware of the existence of the Medi-Cal statutory lien or of his duties in regard to it, because he took no steps to ascertain whether his client had Medi-Cal coverage or to investigate his obligations under the law. Accordingly, we modify this finding to reflect that respondent's conduct evidenced reckless disregard, as found in counts 1 and 2, rather than intentional violation of the law.

The hearing judge concluded that respondent violated former rule 6-101(A)(2) and current rule 3-110(A). The judge's conclusion as to section 6068 (a) was the same as that in counts 1 through 3. As with counts 1 through 3, our analysis of these culpability conclusions is set forth in parts B.1 and B.2 of our discussion, *post.*

Count 6: Contact with Represented Parties

In April 1990, respondent's firm was representing a client in a lawsuit in which the County of Tulare was a defendant. Respondent had been advised by counsel for the County of Tulare not to contact any county employees directly in connection with the suit, but rather to direct any inquiries to its counsel. However, a member of respondent's staff sent letters and questionnaires to two employees of the county who had been named in the county's interrogatory responses as persons with relevant knowledge. When counsel for the county reported this to respondent, respondent agreed to check into the matter. There is no evidence that any direct contacts with county employees occurred after that, and the hearing judge found that respondent had taken prompt action to prevent any such communications.

In connection with these events, respondent was charged with violating current rules 2-100(A) and 3-110(A). [2] The hearing judge found no violation of either rule, and the State Bar has not contested this finding on review. However, our obligation is to review the record independently. (*In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 14.) Upon such review, we concur with the hearing judge's conclusion as to rule 3-110(A), since there is no basis for a finding that respondent's conduct in this matter evidenced intentional, reckless, or repeated incompetence.

We also concur in the hearing judge's dismissal of the current rule 2-100(A) charge. The judge concluded that respondent's conduct was not "wilful" because it apparently ceased as soon as the county's counsel brought it to respondent's attention. We find no violation on a somewhat different basis.

[3] It is not clear from the record whether the county employees whom respondent's office contacted came within the definition of "party" in current rule 2-100(B). (See *Frey* v. *Department of Health & Human Services* (E.D.N.Y. 1985) 106 F.R.D. 32, 37 [applying ABA Code of Professional Responsibility, DR 7-104; holding that "party" with whom contact is prohibited should be interpreted narrowly in the case of public employees].) Even if they did, it

7. The actual Medi-Cal letter cited sections 14124.70 et seq. of the Welfare and Institutions Code; the "et seq." was omitted when the letter was quoted in the notice to show cause.

is possible that the contact with them fell within one of the exceptions to current rule 2-100(A). Current rule 2-100(C)(1) permits communications with a public officer, board, committee, or body, and current rule 2-100(C)(3) permits communications "otherwise authorized by law." (See *Vega* v. *Bloomsburgh* (D. Mass. 1977) 427 F.Supp. 593 [interpreting ABA Code of Professional Responsibility, DR 7-104; holding that First Amendment concerns support permitting direct contact between plaintiff's counsel and state employees who might be witnesses in suit against defendant state agency].) Accordingly, and especially in the absence of any request by the State Bar that we review this issue, we concur with the hearing judge that the record does not establish by clear and convincing evidence that there was any violation of current rule 2-100(A) in this matter.

Count 7: Peterson/Smith—Representation of Minor Client

Respondent's firm was retained by Patricia Smith on August 16, 1988, to represent her minor son, Sandy Peterson, in a personal injury matter. The record does not disclose whether a lawsuit was actually filed. The matter settled for $15,000 in October 1988. Respondent retained an attorney's fee of 33 and 1/3 percent, plus a small additional sum, apparently for costs, and remitted the $9,960.18 balance to Peterson.

Respondent admitted in this disciplinary proceeding that Peterson was a minor at the time of the representation, but there was no testimony as to whether or not respondent was aware of this fact in 1988, and the hearing judge made no findings on the issue. The only evidence in the record bearing on this question is a letter to a State Bar investigator from an attorney in respondent's firm, written in 1989. The letter states that "Apparently no notation was made at any point along the way that this was a minor's claim even though he was 16 at all relevant times . . . ." The letter goes on to state that respondent's firm was refunding to Peterson, with interest added, the difference between the 33 and 1/3 percent attorney fee he had been charged and the 25 percent fee which would be charged in cases involving minors. Based on the foregoing evidence, and drawing therefrom the most favorable inferences to respondent, we find that respondent was not aware in 1988, when Peterson's claim was settled, that Peterson was a minor.

[4] Respondent was charged in this count with violating five former Rules of Professional Conduct and each of their current equivalents. The hearing judge correctly concluded that the current rules were inapplicable since the charged misconduct occurred prior to their effective date. The hearing judge found respondent culpable of violating former rule 6-101(A)(2), and not culpable of violating former rules 2-107(A), 2-111(A)(2), 2-111(A)(3), and 5-105. On review, respondent challenges the finding of culpability as to former rule 6-101(A)(2), and the State Bar challenges the finding of nonculpability as to former rule 2-107(A). We address these issues in part B.3 of our discussion, *post*. As to the other charges, we adopt the hearing judge's conclusions of nonculpability.

Count 9: Johnson—Medi-Cal Lien; Uninsured Motorist Claim

Respondent was retained by Donna Johnson to represent her in a personal injury action involving an uninsured motorist. He filed a superior court complaint in July 1987. Respondent advised Johnson that because her case was an uninsured motorist matter, her medical care providers would not be entitled to be reimbursed from the proceeds of her lawsuit. Respondent later learned that this advice was incorrect, but he believed it to be correct at the time he gave it.

In November 1987, DHS sent respondent's firm a notice informing the firm that Johnson was a Medi-Cal beneficiary, claiming a lien on any proceeds from her case, and requesting that it be notified if suit was filed. Notwithstanding this notice, DHS was not notified about the pending lawsuit, and the case was thereafter settled without notice to DHS or payment of its lien.

DHS sent further notices to respondent regarding its lien in February, August, and November 1988. The last of these notices indicated that DHS had been notified on November 10, 1988, that the case had been settled and the funds disbursed without payment of DHS's lien. On December 12, 1988,

respondent wrote to DHS setting forth his view that DHS was not entitled to reimbursement because the funds received by his client were from first-party rather than third-party insurance. DHS responded on December 22, indicating a contrary view of the law and citing supporting statutes. On January 4, 1989, an attorney in respondent's office replied, stating that "It is not our duty to contact [DHS] at all, except to inform you that a judgment, award, or settlement is impending"; that "This office understands [DHS's] reimbursement rights"; and that "we disbursed this settlement before [DHS] was able to perfect its lien." The letter indicated that DHS should pursue the beneficiary—i.e., respondent's client, Johnson—to collect its lien.

Respondent was charged in this count with violating sections 6068 (a) and 6106, and former rule 6-101(A)(2). The notice to show cause cited the relevant sections of the Welfare and Institutions Code regarding DHS's notice and lien rights. The hearing judge concluded as to the former rule 6-101(A)(2) charge that respondent "wilfully failed to honor [DHS's] lien, and wilfully ignored and disregarded [DHS's] statutory lien rights." We interpret this as a finding that respondent acted with reckless disregard of his obligations with respect to DHS's lien rights, and adopt it.

The hearing judge found respondent not culpable of violating section 6106; we adopt that conclusion. The judge concluded that respondent violated former rule 6-101(A)(2); his conclusion as to section 6068 (a) was the same as that in counts 1 through 4. As with counts 1 through 4, our analysis of these culpability conclusions is set forth in parts B.1 and B.2 of our discussion, *post*.

Count 11: Sulley—Contractual Lien

Respondent was retained by Gerry Sulley in November 1987 to represent him regarding a personal injury. In May 1988, respondent signed an agreement to honor a medical lien for $961.60 in favor of the County of San Bernardino ("the County"), which had previously been executed by the client, Sulley. In December 1988, the matter settled, and the proceeds remaining after payment of attorney's fees, costs, and other medical bills were disbursed to the client without payment of the County's lien.

The hearing judge found, and neither party disputes, that the reason the County's lien was not paid was that the lien agreement was negligently misplaced in respondent's file. Other medical bills in the case, including one larger than the County's, were paid. The County subsequently sued both Sulley and respondent in small claims court, and obtained a judgment against Sulley for the amount of the lien plus court costs.

Respondent was charged in this count with violating sections 6068 (a) and 6106 and former rule 6-101(A)(2). No statutes other than the charged sections of the Business and Professions Code were cited in the notice to show cause. The hearing judge found no culpability as to section 6106, and we adopt that conclusion. The judge further concluded that respondent failed to perform legal services competently "with reckless disregard" and thereby violated former rule 6-101(A)(2). As to the section 6068 (a) charge, the hearing judge's conclusion was the same as in counts 1 through 4 and 9. Our analysis of the section 6068 (a) and rule 6-101(A)(2) charges on this count is set forth in part B.4.a of our discussion, *post*.

B. Case Number 90-O-12597: Jackson—Contractual Lien[8]

Sometime between mid-August and mid-October 1988, respondent was retained by Steve Jackson to represent him regarding personal injuries he had suffered in an accident. In January 1989, respondent executed an express contractual lien in favor of Marshal Hale Sport Medicine Center ("Marshal Hale") for the cost of Jackson's treatment. The case was settled for $32,500, and in January 1990, the client signed a release and respondent deposited the

8. The notice to show cause in this matter pleaded only one count.

settlement proceeds in his trust account. Respondent failed to pay Marshal Hale's lien when the settlement funds were distributed. In March 1990, Marshal Hale wrote to respondent requesting payment for Jackson's treatment in the amount of $3,575. Respondent later paid the lien after being sued by Marshal Hale. There is no evidence in the record regarding the circumstances or reasons surrounding respondent's failure to honor this lien.

Respondent was charged in this matter with violating section 6106, current rules 3-110(A) and 4-100(B)(4), and former rules 6-101(A)(2) and 8-101(B)(4).[9] The hearing judge found no evidence to support the section 6106 charge, and we adopt this conclusion. The hearing judge found respondent culpable of all of the charged rule violations; our analysis of these charges is set forth in part B.4.b of the discussion, *post*.

C. Case Number 90-O-13180[10]

Count 2: Malaspino—Contractual Lien

Forrest Malaspino retained respondent sometime prior to January 1989 to represent him in a claim for personal injuries. Respondent's office manager, with his permission, signed a lien in favor of California Back & Neck Pain Institute ("Pain Institute") for the cost of treatment provided to Malaspino.

The case settled in May 1990 for $6,500. Upon being notified of the settlement, Pain Institute demanded full payment of its $3,120 lien. On Malaspino's instructions, respondent and his staff attempted to persuade Pain Institute to accept a smaller sum. To that end, in July 1990, respondent's office manager tendered a check to Pain Institute in the amount of $1,979.47, requesting that it be accepted as payment in full. Pain Institute refused to compromise its lien claim, and, on the advice of respondent's office staff, returned the check. In November 1990, Pain Institute repeated its demand for full payment. As of the time of the hearing in this matter (March 1993), the lien still had not been paid.

[5] Respondent contends that the funds to pay Pain Institute's $3,120 lien were maintained in respondent's trust account. The notice to show cause charged, and the hearing judge found, that the trust account balance dipped below the requisite sum in September 1990, and that respondent accordingly misappropriated the funds. At oral argument before us, and in a supplemental post-argument brief, counsel for the State Bar conceded that there is no evidence in the record that respondent failed to retain the appropriate sum in his trust account. Accordingly, we decline to adopt the hearing judge's finding of misappropriation.

Respondent was charged in this count with violating section 6106 and current rules 3-700(A)(2) and 4-100(B)(4). The hearing judge found no evidence to support the rule 3-700(A)(2) charge, and we adopt this conclusion. As the State Bar has acknowledged, there is no factual basis in the record to find culpability of misappropriation or of a violation of section 6106. Our analysis of the rule 4-100(B)(4) charge is found in section B.4.c of the discussion, *post*.

Count 3: King—Substitution of Attorneys

Respondent was retained by Brian King in February 1989 to represent him with regard to personal injuries he sustained in an accident. Sometime in 1990, King spoke with someone in respondent's office regarding terminating their attorney-client relationship,[11] and King indicated that he would take

9. None of the counts in the first matter (case number 89-O-10767) charged a violation of former rule 8-101(B)(4) (now current rule 4-100(B)(4)) based on similar misconduct. The State Bar did not seek to amend the notice to show cause in that matter to supply such charges.

10. Counts 1 and 6 of this matter were dismissed by the hearing judge on the State Bar's motion, and no evidence was presented on these counts.

11. Respondent contends that the termination of respondent's representation was King's idea. King so testified in response to a leading question from respondent's counsel, but in response to the judge's questions, indicated that it was respondent's office which stated that respondent no longer wished to represent King. The hearing judge resolved this factual issue by finding that King and respondent agreed that King would retain other counsel, and we defer to this finding. In any event, the issue is not material.

over his case. On July 13, 1990, respondent wrote to the opposing counsel in King's case, in response to a deposition notice, advising him that respondent no longer represented King, and would not appear on King's behalf at the deposition. Another attorney in respondent's office wrote a second letter to the same effect on July 23.

King's deposition was scheduled for August 2, 1990. Approximately two weeks before the deposition, an attorney named Dalby agreed to become King's new attorney. However, no substitution of attorney had been executed or filed by August 2, and respondent had not obtained leave of court to withdraw from King's case. Dalby notified respondent by fax on August 1, the day before King's deposition, that Dalby had not yet been substituted into the case and would not be able to attend the deposition. The fax pointed out that respondent was still King's counsel and had an obligation to represent his interests. On Dalby's advice, King appeared for his deposition but declined to respond to questions since he was unrepresented.

King did not recall whether or not respondent's office had sent him a substitution of counsel form prior to August 2, 1990. The record contains a letter from respondent's office to King indicating that a substitution form was sent either on July 30, 1990, or on August 20, or possibly on both dates. King did not recall the date when he first saw the letter, and did not recall signing any substitution of counsel form prior to November 1990. In any event, it is undisputed that no substitution of counsel was executed until November 1990, and that the substitution was not filed with the court until December 4, 1990. Legal proceedings were required to compel King's deposition.

Respondent was charged in this count with violating current rules 3-110(A) and 3-700(A)(2). The hearing judge found that respondent intentionally failed to perform competently in the matter, and thus violated current rule 3-110(A). However, he found no violation of current rule 3-700(A)(2), because there was no evidence that King was prejudiced. On review, respondent disputes his culpability as to current rule 3-110(A), and the State Bar disputes the hearing judge's conclusion as to current rule 3-700(A)(2). Our analysis of these issues is set forth in section B.5 of the discussion, *post*.

Count 4: Campbell—Medical Bill

Sometime before or during January 1991, Trevlen Campbell retained respondent to represent him in a personal injury matter. Northwest Creditors, Inc. ("Northwest"), a collection agency, had been hired to collect a bill in the amount of $961.71 for medical services rendered to Campbell. There is no evidence in the record as to whether or not Northwest or its client had a formal legal lien on the recovery, but the record does support a finding that respondent's office was aware of the bill and had undertaken to pay it out of the settlement proceeds. The case settled for $37,500. Respondent disbursed Campbell's share to him on January 31, 1991, and retained funds to pay various bills, including Northwest's.

On April 23, 1991, the collection manager at Northwest wrote to respondent requesting payment of Campbell's medical bill. The hearing judge found that Northwest made "numerous efforts" to receive payment. We do not adopt this finding, because the record does not contain evidence of any collection efforts other than the April 23 letter, and the letter itself does not refer to any previous collection efforts. On May 24, 1991, respondent issued a trust account check for the amount due to Northwest.

Respondent contends that a check had been issued to Northwest earlier, but that the check was evidently lost. Respondent presented no testimony or documents supporting this contention. In responding to requests for admissions served in the course of discovery and introduced in evidence at trial, respondent stated that he did not have sufficient knowledge to admit or deny a requested admission that his office had not sent Northwest a check in February 1991. Respondent also admitted that he had not paid Campbell's bill promptly. Accordingly, there is no evidentiary basis for respondent's contention that his office attempted to pay Northwest prior to May 24, 1991.

Respondent was charged in this count with violating section 6106 and current rules 3-110(A), 3-

700(A)(2), and 4-100(B)(4). The hearing judge concluded that the record did not establish violations of section 6106 or of current rule 3-700(A)(2). The State Bar does not dispute these conclusions, and we adopt them.

[6] The hearing judge found that respondent violated current rule 3-110(A) in that the failure to pay Campbell's medical bill promptly constituted a failure to act competently. However, the hearing judge did not find that respondent's lack of competence in this regard was intentional, reckless, or repeated as required by current rule 3-110(A), and the record contains no clear and convincing evidence to that effect. We do not see clear and convincing evidence of anything more than negligence in this regard. Accordingly, we reverse the hearing judge's conclusion of culpability on this charge. (See *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 711.) We also reverse the culpability conclusion as to rule 4-100(B)(4). (See section B.4.d of discussion, *post*.)

Count 5: Tomas—Contractual Lien

In March 1985, while representing Ljubo Tomas in a personal injury matter, respondent signed an express medical lien for $5,035 in favor of Dr. Philip Jules. In July 1986, Tomas's case settled for $15,000. Respondent admits that Dr. Jules's lien was not honored. At the hearing, he explained how this occurred. Respondent's uncontroverted testimony was that Tomas came to his office in the late afternoon to pick up his share of the settlement funds, and insisted that he had already paid Dr. Jules's bill. Based on his client's representation that the bill had been paid, respondent did not withhold the funds to pay it. In his testimony at the hearing, respondent acknowledged that it had been "stupidity" to rely on his client's word that the bill had been paid, and declared that he would not do so again. Dr. Jules sued both respondent and Tomas in 1987. In 1991, Dr. Jules obtained a judgment against respondent, which he paid.

Respondent was charged in this count with violating former rules 2-111(A)(2), 6-101(A)(2), and 8-101(B)(4). The hearing judge found culpability on all of the charges. We concur in these conclusions. **[7a, 8]** Respondent admits that he erred in relying on his client's unverified representation that Dr. Jules's bill had been paid. Respondent's error in fulfilling his fiduciary duties both to Dr. Jules and to his client, who was later sued as a result of respondent's misconduct, is of sufficient magnitude to constitute a reckless failure to perform competently for the purpose of former rule 6-101(A)(2),[12] **[7b - see fn. 12]** as well as a failure to take steps to avoid foreseeable prejudice to his client in the course of terminating his employment, thus violating former rule 2-111(A)(2). Our analysis of the former rule 8-101(B)(4) charge is found in section B.4.e of the discussion, *post*.

DISCUSSION

A. Allegations of Prosecutorial Misconduct

1. Discriminatory Prosecution

[9a] Respondent contends that he was singled out for prosecution by the State Bar on an invidiously discriminatory basis, to wit, his success and fame. **[10a]** It is by no means self-evident that selective prosecution may be raised as a defense in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 645, citing *Goldman* v. *State Bar* (1977) 20

12. In *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 634, we held that the respondent's misconduct in allowing his client to take responsibility for clearing up a medical lien failed to rise to the level of recklessness for the purpose of former rule 6-101(A)(2) in part because it was "invited by his client." In that matter, however, the respondent himself had already notified the lienholder of an alternate possible source of recovery, and mistakenly believed in good faith that the lienholder would seek and obtain reimbursement from that source without the need for further intervention by the respondent or his client. (*Id.* at p. 633.) **[7b]** In the present matter, there is no evidence that respondent had any reason to believe Dr. Jules had an alternative possible source of third-party payment. It was therefore reckless, not merely negligent, for respondent to accept the unverified word of his client that Dr. Jules had been paid.

Cal.3d 130, 140.)[13] **[11 - see fn. 13] [9b]** But even if selective prosecution were a valid defense in State Bar proceedings, respondent's claim could not succeed. Respondent cites no authority, nor are we aware of any, holding that a claim of selective prosecution may be premised on asserted discrimination due to notoriety rather than on a constitutionally prohibited basis such as race (see *People* v. *Harris* (1960) 182 Cal.App.2d Supp. 837), sex (see *People* v. *Municipal Court (Street)* (1979) 89 Cal.App.3d 739, 745), or the exercise of constitutional rights. (See, e.g., *People* v. *Serna* (1977) 71 Cal.App.3d 229, 233-235 [First Amendment rights]; *Murgia* v. *Municipal Court, supra*, 15 Cal.3d at pp. 301-303 [freedom of association in form of union membership].)

[12] Assuming arguendo that a valid selective prosecution claim could be founded on the contention that the respondent had been singled out on the basis of success and fame, respondent in this matter presented insufficient evidence to support his contention. Respondent presented no evidence on this point other than the opinion testimony of his counsel. The principal factual basis for respondent's claim is that many of the charges brought against him were dropped or dismissed, or are contended by him to be without merit. Respondent cites no authority, nor have we found any, holding that a prosecutor's failure to prove all of the charges brought in a case is sufficient to show invidiously discriminatory prosecution. (See also discussion of other asserted prosecutorial misconduct, *post.*)

Respondent also points to the publication of an assertedly derogatory article about respondent in the magazine California Lawyer. We take judicial notice, however, that at the time the article was published (September 1992), California Lawyer was not published by the State Bar but by the Daily Journal Corporation, and the State Bar was responsible only for the contents of the "State Bar Report" section of the magazine.[14] The article of which respondent complains appeared in the portion of California Lawyer for which the Daily Journal, not the State Bar, was responsible. (See Checcio, *Television's Motorcycle Lawyers*, Cal. Law. (Sept. 1992), p. 26.) Accordingly, we do not find the publication or contents of the article to have any relevance to the State Bar's reasons for bringing these disciplinary proceedings.

[10b] Were this a criminal prosecution, or one governed by those rules, respondent would have the burden of proof to establish selective prosecution. (See 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 384, pp. 443-444.) We conclude that respondent has failed to establish his claim of selective prosecution.

2. *Other Misconduct*

Respondent argues that the number of counts and charges brought in this proceeding, especially when compared to the number of charges on which the State Bar was actually able to prove culpability, demonstrates that the State Bar overcharged respondent, and brought charges which it should have known were meritless. We disagree. **[13a]** Like all courts, we are reluctant to interfere with the reasonable exercise of prosecutorial discretion. (See, e.g., *Dix* v. *Superior Court* (1991) 53 Cal.3d 442, 451

13. [11] As respondent acknowledges, pursuant to the leading California case on the question, *Murgia* v. *Municipal Court* (1975) 15 Cal.3d 286, selective prosecution claims *should* be raised by motion prior to trial. Indeed, given the difficulty of proving such a claim without the aid of discovery, as a practical matter such a claim has little chance of success if not raised initially by pretrial motion. (See 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, §§ 383-384, pp. 443-444.) However, it is not entirely clear that the issue *cannot* be raised as part of the respondent's defense case at trial, as occurred in this matter. (See *ibid.*) Accordingly, we consider respondent's contention despite his failure to raise it by pretrial motion.

14. See State Bar Administrative Manual (revised June 1991), division 5, chapter 4, article 10, "NOTE" (at p. 5:4-18), stating that effective January 1, 1988, "The State Bar of California is responsible only for the contents of the State Bar Report portion of California Lawyer." (See also Cal. Law. (Sept. 1992), p. 6 [masthead note stating that California Lawyer is "owned by the Daily Journal Corporation" and that California Lawyer "is solely responsible for the contents of all sections of the magazine except the State Bar Report, which is prepared by the State Bar"].)

["The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. (Citation.)"]; *Mitchell* v. *Superior Court* (1989) 49 Cal.3d 1230, 1250-1252; *Consumers Union of U.S., Inc.* v. *Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963.) When presented with a complaint from a dissatisfied client or the holder of an unpaid medical lien,[15] the State Bar can legitimately charge the attorney based on the facts as they appear from its investigation.

[13b] In this case, the large number of counts filed against respondent appears to have resulted primarily from factors outside the State Bar's control, to wit, the size and volume of respondent's law practice, as well as a chronic problem with his handling of medical liens at the time. For reasons not always apparent from the record, the State Bar was unable to establish a factual or legal basis for some of the resulting counts and charges. This fact is insufficient, without more, to establish that the charges were brought without a reasonable basis at the time they were filed, or that respondent was the victim of prosecutorial misconduct of any kind.

[14a] Respondent also contends that it was prosecutorial misconduct for the State Bar's counsel not to have informed him about a decision by a hearing judge in an unrelated matter which held that attorneys had no statutory duty to ensure that Medi-Cal liens were satisfied.[16] Respondent cites ABA Model Rule of Professional Conduct 3.8(d), relating to the duty of a prosecutor in a criminal case to disclose exculpatory evidence or information. Even if the rule applied,[17] we are aware of no precedent—and respondent cites none—holding that unpublished, non-precedential trial court decisions constitute "exculpatory evidence" within the meaning of this prosecutorial duty. Indeed, respondent has not cited authority holding that legal precedent of any kind has been held to constitute "evidence" for this purpose.

[15a] We may assume that attorneys have an ethical duty to reveal *to the court* before which they are appearing any *controlling* precedent which squarely contradicts their position.[18] **[15b - see fn. 18]** However, as advocates, they are under no such duty with respect to decisions which do not constitute controlling precedent. (See *Shaeffer* v. *State Bar*, *supra*, 26 Cal.2d at pp. 747-748.) In our court, only the opinions of this review department—subject, of course, to any relevant Supreme Court case law—are considered controlling precedent in the hearing department. The hearing judges are independent adjudicators and are entitled to reach varying conclusions based on their respective views of the applicable law. Consistency in legal analysis and discipline recommendations at the hearing department level is an important goal, but decisions of one

15. As we noted in *In the Matter of Respondent P*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 634, fn. 7, in November 1993—long after the charges were filed in this matter—the Board of Governors of the State Bar approved the Chief Trial Counsel's decision, in the exercise of prosecutorial discretion, to decline to continue to investigate complaints based solely on nonpayment of medical liens. This change in policy shows, if anything, that at the time the charges were filed in this matter, prosecution of medical lien cases was not unusual. Moreover, as noted in *In the Matter of Respondent P*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 634, fn. 7, the new policy will not necessarily apply to liens which are held by public entities, as was the case with many of the liens involved in this matter.

16. This decision was subsequently reversed by us in *In the Matter of Respondent P*, *supra*, 2 Cal. State Bar Ct. Rptr. 622.

17. Business and Professions Code section 6085 has very recently been amended to require that State Bar prosecutors provide disciplinary respondents with exculpatory evidence. (Assem. Bill No. 2928 (1993-1994 Reg. Sess.), § 1, approved by Governor, July 9, 1994.) However, the statute contained no such requirement at the time this matter was investigated and tried.

18. **[15b]** Section 6068 (d) states that attorneys must never seek to mislead judges "by an artifice or false statement of . . . law." Current rule 5-200(B) is essentially to the same effect, as was former rule 7-105(1). *DiSabatino* v. *State Bar* (1980) 27 Cal.3d 159, 162-163, holds that concealment of a material fact is just as misleading as an explicit false statement. A wilful failure to cite controlling authority thus could be held to be a disciplinable offense. (But see *Shaeffer* v. *State Bar* (1945) 26 Cal.2d 739, 747-748 [no discipline for attorney's failure to cite recent case which had overruled case relied on, where attorney (apparently erroneously) considered recent case to be dictum as to point in question, and had no intent to deceive court].)

hearing judge do not bind another. Accordingly, while it was not inappropriate[19] for respondent's counsel to bring the hearing department decision in question to the attention of the hearing judge in this matter, **[14b]** that decision did not constitute controlling precedent, and counsel for the State Bar had no duty to disclose it to the court, much less to respondent's counsel.

B. Culpability Issues

1. Statutory Medical Liens—Section 6068 (a)

At trial and in his initial brief on review, respondent took the position that attorneys are not obligated to notify DHS regarding pending lawsuits or settlements, and that failure to notify DHS or pay a DHS lien is not a disciplinable offense. In a supplemental brief filed after the issuance of our opinion in *In the Matter of Respondent P, supra,* 2 Cal. State Bar Ct. Rptr. 622, respondent's counsel has conceded that these arguments were rejected by *Respondent P.* However, he requests us to overrule that opinion. We decline to do so.

[16] The statutes guaranteeing DHS's lien rights, as well as the lien rights of government-funded health care facilities such as county hospitals, were enacted for an obvious and persuasive policy reason, i.e., that the public coffers should be the resource of last resort in paying for medical care for the injured, and thus that Medi-Cal and public hospitals should be entitled to reimbursement from any and all private funds which are available. (See *Wright* v. *Dept. of Benefit Payments* (1979) 90 Cal.App.3d 446, 451 [statutory scheme creating DHS's lien rights "permits the public treasury to be reimbursed from [the injured Medi-Cal beneficiary's] recovery from the party who caused the injuries for which Medi-Cal paid for the treatment"].) As officers of the court, sworn to uphold the law, members of the bar have a duty to honor this legislative mandate. The effect of section 6068 (a) is to make it a disciplinable offense to violate this duty unless the violation is the result of a negligent good faith mistake. (*In the Matter of Respondent P, supra,* 2 Cal. State Bar Ct. Rptr. at p. 631.)[20] **[17a - see fn. 20]**

However, both the facts and the specific charges involved in this matter are different from those at issue in *Respondent P.* Accordingly, further analysis is required in order to apply the basic holding of that case in determining respondent's culpability here.

[17b] First, with respect to the two counts which charged violation of statutory liens other than Medi-Cal liens,[21] the notice to show cause did not give respondent adequate notice of the particular statute which he was alleged to have violated. Section 6068 (a) may be used to charge violation of another statute only if that statute is specifically identified in the notice. (*In the Matter of Lilley, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 486-487; see *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562.) Accordingly, no section 6068 (a) violations may be found in either of these counts.

With respect to the remaining section 6068 (a) charges arising out of statutory liens,[22] the notice to show cause cited the relevant provisions of the Welfare and Institutions Code, and thus gave due notice of the charges. **[18a]** As to all of these counts, the hearing judge found that respondent acted with reckless disregard in failing to honor DHS's lien rights.

19. Under the current Transitional Rules of Procedure, unlike the California Rules of Court (see Cal. Rules of Court, rule 977), there is no rule precluding counsel from citing unpublished State Bar Court decisions. Proposed rule 310 of the draft revised Rules of Procedure for State Bar Court Proceedings currently under consideration by the Board of Governors would provide that "State Bar Court opinions or decisions not designated for publication are not citable as precedent."

20. **[17a]** The hearing judge's analysis of section 6068 (a) in this regard was not a correct formulation of the legal theory for culpability under this section. By requiring that an attorney "support the Constitution and laws of the United States and of this state," section 6068 (a) *does* proscribe attorney conduct which violates any federal or California statute. (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.)

21. Case number 89-O-10767, counts 2 (Tittle; county hospital lien) and 3 (Mack; Medicare lien).

22. Case number 89-O-10767, counts 1 (Mooney), 4 (Griffith), and 9 (Johnson).

We also find clear and convincing evidence that respondent's conduct was not the product of a good faith negligent mistake, which would preclude a finding of culpability. (*In the Matter of Respondent P, supra,* 2 Cal. State Bar Ct. Rptr. at p. 631.)

[18b] In the Johnson matter, respondent had been notified of Medi-Cal's lien prior to settlement, but consciously chose not to honor it on the theory that Medi-Cal did not have reimbursement rights as to uninsured motorist coverage. Respondent admitted at trial in this disciplinary matter that this theory was incorrect. He presented no evidence that it was based on any legal research, advice, or inquiry. Unlike the attorney in *Respondent P,* respondent here made no effort whatsoever to communicate with DHS about its claimed lien, and had no basis to believe that DHS had received or would receive reimbursement from a source other than the settlement which respondent obtained for Johnson. Accordingly, unlike in *Respondent P,* respondent here acted at best with gross negligence, rather than on the basis of a good faith negligent belief. This state of mind is a sufficient basis upon which to find culpability of violating section 6068 (a). (*In the Matter of Morse* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 24, 31-32.)

[18c] In the Mooney and Griffith matters, respondent contends that he should not be held accountable for honoring DHS's notice and lien rights when he did not know until after settlement that his clients were Medi-Cal recipients. However, he did not present any evidence that he made any effort whatsoever to determine how his clients' medical bills had been paid. On the contrary, respondent admitted in his testimony in this matter that at the time he represented Mooney and Griffith, his office did not have a practice of interviewing clients regarding the source of payment for their medical care. In the absence of any evidence that such an inquiry was made, respondent's admitted ignorance of his clients' Medi-Cal coverage is also gross negligence rather than a good faith error, particularly because by the time he settled the Mooney and Griffith cases in February 1988 and February 1989 respectively, respondent's firm had received DHS's notice of lien in the Johnson matter, which was sent in November 1987. Thus, at least by this time, respondent should have known that his position that he had no obligations to DHS was, at the very least, in dispute. Yet respondent presented no evidence that he researched the issue, sought advice from other counsel as to his obligations, or took any other steps to ascertain the law. (Cf. *In the Matter of Morse, supra,* 3 Cal. State Bar Ct. Rptr. at p. 32.)

[18d] Moreover, shortly before the settlement of the Griffith matter, one of respondent's associates wrote a letter to DHS regarding the Johnson matter in which he *acknowledged* that respondent's office had a duty to notify DHS if a judgment, award, or settlement was pending. Thus, we find that respondent's position that he had no obligations to DHS was not the result of a good faith, negligent mistake, and we therefore conclude as to the Mooney and Griffith matters that respondent was culpable of violating section 6068 (a) as charged.

2. Statutory Medical Liens—Former Rule 6-101(A)(2) and Current Rule 3-110(A)

[19a] In all five of the matters involving statutory medical liens (Mooney, Tittle, Mack, Griffith, and Johnson), respondent was charged with violations of current rule 3-110(A) and/or former rule 6-101(A)(2), which make it a disciplinable offense for an attorney to intentionally, recklessly, or repeatedly fail to perform services competently. Based on the hearing judge's findings (as modified by us in the Griffith matter), we conclude that in all of these matters, respondent's failure to pay the liens in question was the product of reckless disregard for his duty to do so.

Respondent contends that he should not be found culpable of reckless failure to perform competently in these matters because his duty of competence ran to his clients, not to the holders of the medical liens. We disagree, for two reasons.

[19b] First, we disagree with respondent's view that an attorney who holds funds subject to a legally enforceable lien does not owe any duty to the lienholder to perform competently in the handling of those funds. On the contrary, such a duty is inherent in the attorney's role as a fiduciary with respect to the entrusted funds. (See, e.g., *In the Matter of Respon-*

dent P, supra, 2 Cal. State Bar Ct. Rptr. at p. 630; *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 200.) Accordingly, we find respondent culpable of reckless failure to perform legal services competently in all five of the matters in question. (Cf. *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 415 [prompt payment of medical liens is an aspect of competent performance].)[23]

[19c] In any event, as exemplified by the facts of the Mack matter (as well as the Tomas matter, which involved a private medical provider), failure to pay medical liens can have an adverse impact on the client, because it exposes the client to collection efforts by the lienholder. Accordingly, it is also for the protection of the client, not just the lienholder, that an attorney has a duty to ensure that medical liens are properly paid upon settlement of a personal injury matter.

3. Representation of Minor Client

[20a] On the Peterson/Smith count (case number 89-O-10767, count 7), the hearing judge found that respondent's failure to seek court review and approval when compromising the tort claim of his minor client was "a gross failure to competently perform legal services," and concluded that respondent thereby violated former rule 6-101(A)(2). We interpret the judge's finding to mean that respondent's conduct in this matter evidenced reckless disregard for his obligation to perform competently, and we concur both in that finding and in the ensuing legal conclusion. An attorney retained by a parent to represent the parent's child in a personal inquiry matter is thereby put on inquiry notice that the injured client may be a minor. Because of the critical importance of this fact, the attorney in such a case is grossly negligent as a matter of law if he or she does not ascertain the client's age.

[20b] Respondent contends that the requirement of court approval of the settlement of minors' tort claims is for the benefit of the defendant, and that respondent therefore cannot be found culpable of incompetent representation based on the failure to adhere to that requirement. We disagree. The reason that minors are legally incapable of entering into contracts is that they are deemed to be unable to protect their own interests adequately. Thus, the statutory scheme requiring court approval of the compromise of minors' claims (Probate Code, §§ 3500, 3600 et seq.)[24] is obviously intended for the protection of the minor.

This is amply demonstrated by the fact that court approval is required for the payment of medical expenses, costs, and attorney's fees out of the settlement proceeds due to the minor. (*Id.*, § 3601, subd. (a).) Indeed, in a case decided under a substantively equivalent predecessor statute, the Court of Appeal held that in approving the compromise of a minor's tort claim, the court is required to determine reasonable counsel fees for the minor's counsel regardless of any agreement to the contrary, and remanded the case for further proceedings due to the concern that "the proceedings after settlement may have victimized" the minor plaintiffs "for whose protection the guardianship ad litem existed." (*Hernandez* v. *Fujioka* (1974) 40 Cal.App.3d 294, 302-304.)

Court approval does have the additional effect of protecting defendants and their insurers by assuring them that the settlement agreement is valid and that any judgment entered thereon is final. But that assurance is an incidental effect of the statutory scheme, and it arises precisely because the court's

23. In *Respondent P, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 633-634, we declined to find a former rule 6-101(A)(2) violation based on failure to pay a statutory medical lien. However, in that matter, only simple negligence and not gross negligence or recklessness was established. Moreover, the respondent had been charged with violation of former rule 8-101(B)(4), which "addresses the same alleged misconduct far more aptly." (*Id.* at p. 634.) As already noted (see fn. 9, *ante*), none of the statutory medical lien counts in this proceeding charged violations of former rule 8-101(B)(4) or its current equivalent, rule 4-100(B)(4).

24. The relevant events occurred in 1988. The Probate Code was repealed and recodified in its entirety effective in 1991. The revision affected neither the section numbers nor the substance of the cited provisions, except for minor revisions not relevant here.

review and approval are deemed to have protected the interests of the minor, who is otherwise legally incapable of consenting to the settlement.

Moreover, there are other reasons why an attorney needs to know whether his or her client is a minor. This information is relevant not only to the duty to obtain court approval of any settlement, but also to the need to have a guardian ad litem appointed in order to file suit, and also to the type and extent of damages that are likely to be at issue in the case. **[20c]** Thus, respondent's admitted failure to ascertain his client's age, especially when he was retained by the client's parent, demonstrates a reckless failure to perform legal services competently in violation of former rule 6-101(A)(2).

[21] With regard to respondent's failure to obtain the statutorily required court approval of his fee, we agree with the State Bar that respondent should have been found culpable of violating former rule 2-107(A). Where a statutory scheme requires a tribunal to approve the fees charged by counsel in a matter, "it constitutes professional misconduct for an attorney to secure or attempt to secure fees in excess of those allowed by the [tribunal]." (*Coviello* v. *State Bar* (1953) 41 Cal.2d 273, 276-277 [finding violations of State Bar Act based on attorney's violation of statutes requiring approval of fees in workers' compensation matters].) Respondent's collection of any fee from a minor client without court approval, regardless of the amount charged, violated former rule 2-107(A)'s prohibition against charging or collecting an illegal fee.

4. Non-Statutory Medical Liens

a. Sulley. As to the Sulley count (case number 89-O-10767, count 11), involving failure to honor a contractual lien in favor of the County of San Bernardino, we find no culpability under section 6068 (a). **[22]** As we have already discussed, that statute does not provide a basis for discipline except where it serves as a conduit to charge a violation of a state or federal statute other than the disciplinary provisions of the Business and Professions Code. (*In the Matter of Lilley, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 486-487; *In the Matter of Respondent P, supra,* 2 Cal. State Bar Ct. Rptr. at p. 631.) No such statutory violation having been charged in this count, no section 6068 (a) violation can be found as a matter of law.

[23a] The former rule 6-101(A)(2) violation on this count is also problematic. The hearing judge explicitly found that the reason for the nonpayment of the County's lien was that it was negligently misfiled. This finding is supported by the evidence, and appears to be squarely at odds with the judge's ensuing conclusion that respondent's failure to pay the lien constituted a failure to perform competently "with reckless disregard." A finding of reckless disregard, for the purpose of a former rule 6-101(A)(2) violation, cannot be premised on mere negligence. (*In the Matter of Respondent P, supra,* 2 Cal. State Bar Ct. Rptr. at p. 633; see also *In the Matter of Hanson, supra,* 2 Cal. State Bar Ct. Rptr. at p. 711 [isolated, negligent error did not constitute intentional, reckless or repeated failure to perform competently under current rule 3-110(A)].)

[23b] Moreover, unlike the situation with statutory liens, there is no evidence in the record that respondent had a practice of systematically disregarding express contractual liens. Although there are five counts in this case involving failure to pay private medical providers, each of them involves a different fact pattern, and none of them evidences the type of deliberate indifference which respondent demonstrated with respect to the rights of statutory lienholders. Thus, no former rule 6-101(A)(2) violation may be found as to this count based on repeated failure to perform competently. Accordingly, we conclude that the record does not show clearly and convincingly that respondent committed any of the charged violations on this count.

b. Jackson. [23c] The Jackson matter (case number 90-O-12597) involved an unexplained failure to pay an express contractual lien to a personal injury client's medical provider. There was no evidence regarding the circumstances surrounding the failure to pay the lien, and the hearing judge made no findings in this regard. Accordingly, we must draw the inference most favorable to respondent (*Lee* v. *State Bar* (1970) 2 Cal.3d 927, 939; *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 136) and assume that it was the result of

simple negligence. Accordingly, as with the *Sulley* matter (part B.4.a, *ante*), we cannot adopt the hearing judge's conclusion that respondent violated former rule 6-101(A)(2) or current rule 3-110(A) in this matter.

[24a] However, current rule 4-100(B)(4)[25] requires no special state of mind to establish a violation; the "wilfulness" required for all rule violations is enough, and the mere fact that payment was not made is sufficient to constitute wilfulness for this purpose. (*King* v. *State Bar* (1990) 52 Cal.3d 307, 313-314; *In the Matter of Respondent P*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 633.) Moreover, it was established well before respondent committed the misconduct in this matter that, without justification, failure to pay a third party lien on demand constitutes a violation of former rule 8-101(B)(4), and thus of its present equivalent. (See, e.g., *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979.) We therefore adopt the hearing judge's conclusion that respondent wilfully violated current rule 4-100(B)(4) in this matter.

c. Malaspino. [24b] In this matter (case number 90-O-13180, count 2), respondent attempted to negotiate with a medical care provider to reduce the balance of the provider's lien, and failed to pay promptly when the negotiations proved unsuccessful. We adopt the hearing judge's conclusion that respondent's failure to pay the lien violated current rule 4-100(B)(4). As noted *ante*, the unjustified failure to pay third party liens on demand constitutes a violation of this rule. Even if we were to accept respondent's contentions regarding the lienholder's unreasonable conduct in attempting to collect its lien, this would not render respondent's conduct any less culpable.

Given the facts of this matter, we do not need to reach the issue of what members of the State Bar may ethically do, without violating current rule 4-100(B)(4), when their clients wish to seek reductions in lien claims.[26] **[24c]** We hold only that current rule 4-100(B)(4) is violated where, after it has become clear that negotiations with the lienholder will not be productive, the attorney neither promptly pays the lien in full, nor takes appropriate steps to resolve the dispute promptly.

d. Campbell. In this matter (case number 90-O-13180, count 4) the evidence in the record shows that respondent retained funds from a client's settlement proceeds to pay a medical bill; that about three months after the client's share of the funds had been disbursed to the client, the medical creditor sent a letter to respondent demanding payment; and that payment was made about a month after the demand letter was sent.

[25] Current rule 4-100(B)(4) requires that funds be promptly paid upon demand. Since there is no evidence in this record that there was an enforceable lien as to this particular bill, nor is there evidence of any demand for payment being made until about a month before the bill was paid, we do not find clear and convincing evidence of a violation of current rule 4-100(B)(4) in this count. Under the circumstances, the one-month interval from demand to payment was not unreasonable. (See *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522.)

e. Tomas. As already noted in connection with the Jackson count, *ante*, it was established well before respondent committed the misconduct in this matter (case number 90-O-13180, count 5) that the unjustified failure to pay a third party lien on demand constituted a violation of former rule 8-101(B)(4). (See, e.g., *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979.) **[26]** Respondent argues that his conduct

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25. Former rule 8-101(B)(4) does not apply, because respondent's obligation to pay the lien did not arise until he received the settlement funds, and this occurred after former rule 8-101(B)(4) had been superseded by current rule 4-100(B)(4). Accordingly, we do not adopt the hearing judge's conclusion that respondent violated the former rule. However, the two charges were duplicative, and our rejection of this conclusion does not affect our view as to the appropriate discipline.

26. We note, however, without either approving or disapproving its contents, that the State Bar's Standing Committee on Professional Responsibility and Conduct has issued a formal ethics opinion addressing this question. (See Cal. Compendium on Prof. Responsibility, pt. II A, pp. 292-294, State Bar Formal Opn. No. 1988-101.)

should be excused because his payment of the funds to his client instead of to Dr. Jules was the result of his client's deception. We need not reach the merits of this argument because it in no way justifies respondent's delay in making payment from 1987, when Dr. Jules sued him to enforce the lien, until 1991, when he finally paid the judgment. This delay alone is sufficient to establish a violation of former rule 8-101(B)(4).

5. Substitution of Counsel

In the King matter (case number 90-O-13180, count 3), respondent argues that he should not have been found culpable of intentional failure to perform legal services competently in violation of current rule 3-110(A), because King had discharged him prior to the scheduled date of King's deposition. However, it is undisputed that no substitution of counsel had been executed and filed as of the date of the deposition.

[27a] Regardless of whether it is the attorney or the client who initiates the termination of their relationship, the attorney's ethical duties upon such termination remain the same. (*Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006; see *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 447-448 & fn. 13; *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 365.) An attorney of record in pending litigation remains counsel of record, and thus continues to have a duty to take such actions as are essential to avoid foreseeable prejudice to the client's interests, unless and until a substitution of counsel is filed or the court grants leave to withdraw. (See generally 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, §§ 85-86, pp. 104-106; see also *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179 [finding violation of former rule 6-101(A)(2) based on failure to notify client in closed probate matter regarding inheritance tax assessment].) **[28a]** An attorney's duties to a client do not entirely cease to exist simply because the client is also represented by another attorney. (*In the Matter of Whitehead, supra*, 1 Cal. State Bar Ct. Rptr. at p. 369 [finding violation of section 6068 (a) based on breach of common-law duty to communicate with client, where respondent failed to answer letters from another attorney whom respondent's clients had contacted]; *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716, 725 [attorney who transferred client's file to successor counsel had obligation to prevent foreseeable prejudice to client by notifying client of such transfer].)

[28b] Since respondent wished to be relieved of the responsibility for defending his client's deposition, and knew that successor counsel was not available to take his place, it was respondent's obligation to take appropriate steps to avoid prejudice to the client, such as obtaining a postponement of the deposition until the transfer of the case to successor counsel could be perfected. (Cf. *In re Hickey* (1990) 50 Cal.3d 571, 580-581 [even if attorney reasonably believed client understood he was withdrawing, attorney still had obligation to both client and court to assume responsibility for effectuating consensual withdrawal and presenting it to court].) The record shows clearly and convincingly that respondent intentionally absented himself from his client's deposition even though he was still officially counsel of record and knew his client would be unrepresented in his absence.[27] Accordingly, we adopt the hearing judge's conclusion that respondent intentionally failed to perform legal services competently in this matter.

[27b] We agree with the State Bar that respondent also should have been found culpable of violating current rule 3-700(A)(2) in this matter. The rule requires that withdrawing (or terminated) counsel take steps to avoid any *foreseeable* prejudice to the client. It does not require that such prejudice actually occur. It is unquestionably foreseeable that a client may be prejudiced if his or her attorney of record

27. Respondent vigorously attacked King's credibility. However, the essential facts in this matter are established by uncontroverted documentary evidence, and despite some understandable confusion in King's testimony as to matters of legal terminology and specific dates, we find no reason to disturb the portions of the hearing judge's factual findings which are based in part on that testimony.

does not appear to defend the client's deposition. In fact, such prejudice occurred in this case. As a result of respondent's failure to take appropriate steps to protect King's interests, King was subjected to legal proceedings to compel his deposition.

6. Summary of Culpability Findings

[29a] In sum, we have concluded that respondent is culpable of the following misconduct: violation of his duty to uphold the law in three counts (section 6068 (a); Mooney, Griffith, and Johnson); collection of an illegal fee in one count (former rule 2-107(A); Peterson); reckless failure to perform competently in seven counts, and intentional failure to do so in one count (current rule 3-110(A) and/or former rule 6-101(A)(2); Mooney, Tittle, Mack, Griffith, Peterson, Johnson, King (intentional), and Tomas); withdrawing from employment without taking steps to avoid foreseeable client prejudice in two counts (current rule 3-700(A)(2) or former rule 2-111(A)(2); King and Tomas); and failure to pay trust funds on demand in three counts (current rule 4-100(B)(4) or former rule 8-101(B)(4); Jackson, Malaspino, and Tomas).

C. Aggravation and Mitigation

Neither party presented evidence of aggravation or mitigation during the discipline phase of the hearing in this case. However, evidence relating to aggravation and mitigation was presented during the culpability hearing, and was considered by the hearing judge on the question of appropriate discipline.

Aggravation

The hearing judge declined to find in aggravation that respondent's misconduct with respect to medical liens constituted multiple acts or involved bad faith. We agree that this record does not contain clear and convincing evidence of bad faith on respondent's part. However, a finding of multiple acts is warranted based on the sheer number of violations found in this case. (Std. 1.2(b)(ii), Stds. for Atty. Sanctions for Prof. Misconduct ("stds."), Trans. Rules Proc. of State Bar, div. V.)

The hearing judge's findings of harm to clients, the public, and the administration of justice are well supported by this record. (Std. 1.2(b)(iv).) [30] Respondent argues that in fact his clients benefited from his misconduct because they received settlement funds which should have gone to pay their medical bills. Even if true, this does not negate the fact that several of the clients, including Mooney, Griffith, Johnson, and Tomas, were sued by medical creditors whom respondent should have paid. Indeed, respondent's office actually *suggested* to DHS in at least one matter (Johnson) that it pursue respondent's former client to recoup the funds which respondent should have paid under DHS's statutory lien. King was also harmed, as already noted, by respondent's failure to attend his deposition. Both the public and the administration of justice were harmed when DHS was forced to file suit against respondent to recover public funds which should have been repaid out of respondent's clients' settlements.

Mitigation

[31] The hearing judge cited as a mitigating factor that respondent had been a member of the bar for sixteen years as of the time of the hearing judge's decision and had no prior record of discipline. We agree that respondent's lack of a prior record is mitigating. (Std. 1.2(e)(i).) However, his misconduct began in 1986 (Tomas matter), only about nine years after his admission to practice, and continued at least through 1990 (Jackson, Malaspino, and King matters). Accordingly, we do not view respondent's prior clean record as being of as long duration, or as being entitled to as much weight, as did the hearing judge.

Much of the misconduct charged in this case occurred as long as five to seven years prior to the hearing. Respondent presented some evidence that in the interim, his office procedures had improved with respect to the handling of medical liens. There is also no evidence in this record of any new acts of misconduct occurring after 1990. These facts are entitled to some consideration in mitigation pursuant to standard 1.2(e)(viii).

[32] We agree with the hearing judge that respondent's eventual payment of most of the liens is entitled to no mitigating weight whatsoever, and unlike the hearing judge, we do not find any other

basis for mitigation under standard 1.2(e)(vii). Respondent did not pay any of the liens until after being sued by the lienholders, and in at least one case (Tomas) respondent did not pay until after a judgment had been entered against him. Payments prompted by litigation have no mitigating force, even if made prior to the initiation of disciplinary proceedings. (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 222.) Their only relevance is to the amount of restitution, if any, which may be appropriate as a condition of discipline or as a prerequisite to reinstatement. (*In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 496.) Moreover, respondent's testimony failed to establish any significant recognition or acknowledgment of the seriousness of his misconduct.

D. Appropriate Discipline

In assessing the appropriate discipline to be imposed based on respoudent's misconduct, we begin with standard 1.6(a), which states that if several violations warranting different sanctions are found, the most severe of the applicable sanctions shall be imposed. **[29b]** The most severe sanction applicable in this matter is standard 2.2(b), which proposes a minimum three-month actual suspension for trust fund offenses not involving misappropriation.[28] **[33 - see fn. 28]** Other applicable standards are consistent with this guideline. They include standard 2.4(b), which proposes reproval or suspension, depending on the extent of misconduct and degree of client harm, for failure to perform services which does not demonstrate a pattern of such misconduct, and standard 2.6, which indicates disbarment (clearly not warranted here) or suspension for respondent's violation of section 6068 (a), depending again on the gravity of the misconduct and extent of harm.

The hearing judge recognized the applicability of standard 2.2(b), but concluded that a deviation from the standard was justified based on evidence indicating that respondent's misconduct was unlikely to be repeated. On review, the State Bar characterizes the recommendation as being low in relation to the standards, but within the range indicated by analogous case law. Accordingly, the State Bar has not requested increased discipline.

In a supplemental post-argument brief, the State Bar argues that the most closely analogous case is *In the Matter of Kaplan, supra*, 2 Cal. State Bar Ct. Rptr. 509, in which the respondent received a two-year stayed suspension, two years probation, and a three-month actual suspension for numerous instances of minor misconduct caused primarily by his failure to supervise his office staff properly.

[34] Respondent's counsel's post-argument brief contends that respondent should receive no actual suspension, but cites no case law which would support that result. Respondent does not appear on this record to be venal or dishonest. However, the overall nature of his misconduct reveals a somewhat indifferent attitude toward his ethical obligations, especially obligations to the administration of justice and to persons other than current clients. Some actual suspension is plainly warranted in order to protect the public by augmenting respondent's understanding of the importance of his duties in this regard.

We agree with the State Bar that *In the Matter of Kaplan, supra*, is reasonably comparable to this matter. If anything, this case could support greater discipline than recommended in that case. In *Kaplan*, much of the misconduct was attributable to deliberate malfeasance by the respondent's office manager, which the respondent promptly corrected once he detected it. In this matter, respondent's failure to pay statutory liens was not the product of unauthorized acts by an inadequately supervised office staff, but rather of respondent's own lack of concern for his obligations with respect to such liens. Moreover, respondent's mitigating evidence is somewhat less extensive than that in *Kaplan*, and he caused more harm to his clients.

We also find some guidance in our opinion in *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47. In that case, the respondent's

28. **[33]** Standard 2.7, proposing a six-month minimum actual suspension, does not apply by its own terms, since respondent's violation of former rule 2-107 in this matter involved the collection of an illegal fee, but not an unconscionable one.

misconduct in improperly applying a large sum of client trust funds to his own fees involved grossly negligent misappropriation, and therefore was more serious than any of the individual acts of which respondent has been found culpable in this matter. However, the present matter involves many more acts of misconduct than were involved in *Ward*, and a far less substantial showing in mitigation. The respondent in *Ward* received a three-year stayed suspension, three years probation, and, as in *Kaplan*, a ninety-day actual suspension.

[29c] Upon our independent analysis of the appropriate degree of discipline in the instant proceeding, we recommend increasing the hearing judge's recommended stayed suspension to one year. Such a result is justified under the case law, notwithstanding that the State Bar has not requested such an increase. Moreover, we do not find that respondent's mitigating evidence is a sufficient basis to justify deviating from the applicable standards. Here, as in *Kaplan*, we conclude 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." (2 Cal. State Bar Ct. Rptr. at p. 525.)

RECOMMENDATION

[29d] We adopt the hearing judge's recommendation of three years probation. We modify the stayed suspension to increase it to one year, and we modify the actual suspension required as a condition of probation to increase it to ninety days. Otherwise, we adopt the hearing judge's recommended conditions of probation, as modified on reconsideration, including submission of a law office management/organization plan for approval by a probation monitor, completion of a law office management course, and attendance at the State Bar's Ethics School. We concur in the recommendation that respondent be ordered to take and pass the California Professional Responsibility Examination[29] within one year of the effective date of the Supreme Court's order in this matter.

In accordance with our recommendation of 90 days actual suspension, we further recommend that respondent be ordered to comply with 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.

We concur:

NORIAN, J.
STOVITZ, J.

29. The hearing judge was correct in amending his decision on reconsideration to recommend that respondent be ordered to take the California Professional Responsibility Examination administered by the Committee of Bar Examiners of the State Bar of California, rather than the national Professional Responsibility Examination. (See *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, & fns. 8, 9.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RONALD WAYNE SAMPSON

A Member of the State Bar

No. 90-O-17703

Filed August 16, 1994; as corrected, August 29, 1994; reconsideration denied, September 20, 1994; writ issued, September 14, 1995; writ discharged, August 14, 1996.

SUMMARY

Respondent abdicated his responsibility to supervise his personal injury practice and recklessly disregarded his trust account obligations for almost a year, thereby committing acts of moral turpitude. He failed to retain settlement funds in trust, but did not engage in intentional misappropriation. He also repeatedly failed to perform legal services competently in one matter and failed to notify a client promptly of the receipt of settlement funds in another matter. In aggravation, he committed multiple acts of misconduct and harmed a medical provider. In mitigation, he had no prior record of discipline. The hearing judge recommended five years stayed suspension, five years probation, and actual suspension for two years and until respondent made restitution and proved rehabilitation, fitness to practice, and learning and ability in the law. (George C. Wetzel, Judge Pro Tempore.)

Respondent requested review. The review department concluded that respondent was culpable of serious misconduct, but modified some of the hearing judge's conclusions as to culpability and declined to adopt some of his findings in aggravation. Based on prior comparable cases, the review department reduced the discipline recommendation to three years stayed suspension, three years probation, and actual suspension for eighteen months and until completion of restitution.

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter, Allen Blumenthal

For Respondent: Arthur L. Margolis

HEADNOTES

[1 a-c] 221.00 State Bar Act—Section 6106
420.00 Misappropriation

Where respondent had good faith but unreasonable belief that he had permission from clients' medical provider to use medical lien funds indefinitely, record did not establish that respondent

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.

injury cases and reckless disregard of trust account obligations, respondent's mishandling of trust funds amounted to violation of statute providing that acts of moral turpitude are grounds for discipline.

[2 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
802.69 Standards—Appropriate Sanction—Generally

Where respondent's failure to supervise his personal injury practice and fulfill trust fund responsibilities was so remiss as to be reckless, and his mismanagement of his trust account included repeated failure to provide competent legal services by promptly paying medical liens, respondent violated rule regarding reckless or repeated failure to perform competently. However, where misconduct forming basis for such violation also underlay charge of moral turpitude supporting identical or greater discipline, review department gave violation of competence rule no additional weight in determining discipline.

[3 a, b] **204.10 Culpability—Wilfulness Requirement**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Rule requiring prompt payment of client funds on request also applies to obligation to pay third parties, including holders of medical liens, out of funds held in trust. Failure to pay a medical lien can violate such rule even if attorney acts in good faith. Even where respondent believed he had permission from medical lienholder to use settlement funds, such belief was not a defense to violation of rule.

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

Attorneys must put all funds received for benefit of clients in a trust account. In event of dispute over amount owed to medical lienholder, attorney cannot withdraw funds from trust account and put them in general account. Where respondent retained funds to pay lien, but withdrew them from trust account, respondent violated trust account rule.

[5] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Where medical lienholder demanded payment of liens; respondent disputed amount owed; negotiations ensued; lienholder did not object to respondent's waiting to make payment until dispute was resolved; and respondent promptly paid agreed amount upon resolution of dispute, respondent did not violate rule requiring prompt payment of client funds on request.

[6] **280.00 Rule 4-100(A) [former 8-101(A)]**
430.00 Breach of Fiduciary Duty

Even if attorney has no fiduciary obligation to client's medical provider due to absence of enforceable lien or judgment, attorney still has duty to client to keep all client funds in trust. Where respondent withdrew client funds from trust account which he later used to pay client's medical provider, respondent violated rule requiring client funds to be held in trust even though provider had no lien.

[7] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
430.00 Breach of Fiduciary Duty

Rule requiring prompt payment of client funds on demand requires attorney to pay client's medical provider only if attorney has fiduciary obligation to provider. Where respondent had no such

fiduciary obligation due to lack of enforceable lien or judgment, and record did not show that provider requested payment or that respondent did not promptly comply with such request, violation of rule was not established.

[8 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where respondent failed to file required at-issue memorandum at time when former Rules of Professional Conduct were in effect, but such failure was not intentional or reckless, and respondent failed to perform several other required acts in same litigation after revised Rules of Professional Conduct became effective, review department held that respondent repeatedly failed to perform competently in violation of revised rule precluding intentional, reckless, or repeated failure to perform legal services competently, and did not reach question whether initial failure to file at-issue memorandum constituted duplicative violation of earlier version of same rule.

[9 a, b] **165 Adequacy of Hearing Decision**
535.90 Aggravation—Pattern—Declined to Find
In considering whether respondent's misconduct constituted a pattern, hearing judge should not have considered charges which had been dismissed or of which respondent was not culpable.

[10] **543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
It was not appropriate to use same conduct which constituted violation of statute regarding acts of moral turpitude as basis for finding of bad faith in aggravation of same charge.

[11] **563.90 Aggravation—Uncharged Violations—Found but Discounted**
Where respondent committed uncharged violations of trust fund rules, but conclusions as to respondent's culpability directly addressed respondent's mishandling of trust funds, uncharged violations did not count as separate aggravating circumstance.

[12] **582.50 Aggravation—Harm to Client—Declined to Find**
Where respondent's client refused to cooperate in responding to interrogatories and would not have prevailed on merits of case, respondent's repeated failure to perform competently in handling client's case did not cause client significant harm.

[13] **586.50 Aggravation—Harm to Administration of Justice—Declined to Find**
Facts that respondent's misconduct required unnecessary sanction motions and hearings in one matter, and that respondent filed a cross-complaint against an unpaid medical lienholder in another matter, did not by themselves clearly and convincingly establish significant harm to the administration of justice.

[14 a, b] **795 Mitigation—Other—Declined to Find**
Where respondent and his paralegal testified that respondent had reduced his case load and was more involved in operation of practice, but respondent had not shown that his office was problem-free or properly organized, and did not testify that he had designed and implemented an office organization plan, and where respondent's misconduct lasted at least three and a half years and included repeated misuse of settlement funds and numerous ethical violations, respondent's misconduct was not aberrational.

[15 a-d] 221.00 State Bar Act—Section 6106
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.00 Rule 4-100(A) [former 8-101(A)]
280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
824.10 Standards—Commingling/Trust Account—3 Months Minimum
833.90 Standards—Moral Turpitude—Suspension
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension

Where respondent's mishandling of trust funds was not intentional, but respondent abdicated responsibility to supervise personal injury cases and recklessly disregarded trust account obligations, thereby committing acts of moral turpitude; where respondent also repeatedly failed to provide legal services competently and did not notify a client of receipt of a settlement; and where record did not show that problems resulting from respondent's disregard of his trust account obligations had ended or that respondent had established sound office management plan, appropriate discipline included three years probation with trust account audit and law office management requirements, three years stayed suspension, and actual suspension for eighteen months and until restitution was completed.

ADDITIONAL ANALYSIS

Culpability

Found

221.12 Section 6106—Gross Negligence
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

213.95 Section 6068(i)
214.35 Section 6068(m)
220.25 Section 6103.5
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.05 Rule 3-500 (no former rule)
275.35 Rule 3-510 (former 5-105)
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.05 Rule 4-100(A) [former 8-101(A)]
280.25 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
323.05 Rule 5-210 [former 2-111(A)(4), (5)]
420.51 Misappropriation—Lack of Intent

Aggravation

Found

521 Multiple Acts
584.10 Harm to Public

Declined to Find

584.50 Harm to Public

Mitigation

Found

710.10 No Prior Record
740.51 Good Character

Standards

802.30 Purposes of Sanctions
802.61 Appropriate Sanction
822.53 Misappropriation—Declined to Apply

Discipline

1013.09 Stayed Suspension—3 Years
1015.07 Actual Suspension—18 Months
1017.09 Probation—3 Years

Probation Conditions

1021 Restitution
1024 Ethics Exam/School
1025 Office Management
1026 Trust Account Auditing

Other

162.11 Proof—State Bar's Burden—Clear and Convincing
162.20 Proof—Respondent's Burden
166 Independent Review of Record
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness

OPINION

STOVITZ, J.:

At the request of respondent, Ronald Wayne Sampson, we review the decision of the hearing judge pro tempore, who recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for two years and until respondent completes restitution and proves rehabilitation, present fitness to practice law, and present learning and ability in the general law. We conclude that although respondent is culpable of serious misconduct, based on the discipline imposed in prior comparable cases, this recommendation should be reduced to eighteen months and until completion of restitution.

By abdicating his responsibility to supervise his personal injury cases and recklessly disregarding his trust account obligations for almost a year, respondent committed acts of moral turpitude. He also wilfully violated the rule of professional conduct on trust accounts by failing to retain in trust more than $34,000 in settlement funds although he did not engage in intentional misappropriation. Further, he repeatedly failed to provide competent legal services and did not promptly notify a client of the receipt of a $2,500 settlement. In aggravation, he committed multiple acts of wrongdoing and significantly harmed a medical provider. In mitigation, he was admitted to practice law in California in 1975 and has no prior disciplinary record. On this record, we believe in light of precedent that the appropriate discipline is a three-year stayed suspension and a three-year probation, conditioned on actual suspension for eighteen months and until completion of restitution.

I. PROCEDURAL POSTURE

The Office of the Chief Trial Counsel (OCTC) filed an initial notice to show cause in April 1992 and an amended notice to show cause in May 1993. The amended notice consisted of ten counts and charged respondent with numerous statutory and rule violations.

The parties entered into two sets of stipulations. The first set recites facts about counts 1 through 9. The second set contains the facts and a stipulated conclusion of culpability about count 10.

Hearings occurred in June and August 1993, and the hearing judge filed a decision in September 1993. Claiming that the hearing judge's factual findings, legal conclusions, and disciplinary recommendation were largely insupportable, respondent sought review. Oral argument before the review department occurred in April 1994.[1]

II. DISCUSSION

First, we set out the settled principles governing our review and the burdens of proof in a disciplinary proceeding. Next, we examine the allegations against respondent and adopt findings of fact and conclusions of law. Finally, we address the aggravating and mitigating circumstances and the appropriate discipline.

A. Principles Governing Review

We must independently review the record and may adopt findings, conclusions, and a disciplinary recommendation at variance with the hearing decision. In addition, we are authorized to act on an issue whether or not the parties have raised it. Credibility determinations by the hearing judge must be given great weight. (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716, 724-725; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 346.)

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1. The proceeding was originally submitted at the end of oral argument on April 27, 1994. On May 5, 1994, respondent filed an application to submit a supplemental statement about the record. In a response, filed on May 10, 1994, the deputy trial counsel asserted that OCTC did not oppose the filing of this supplemental statement, but that the statement merely reiterated views expressed in respondent's brief on review. Although these documents made no new legal arguments, they highlighted aspects of the record for us to examine. Given OCTC's lack of opposition, we considered respondent's statement and the deputy trial counsel's response. Because we filed and considered these documents, we deem the original submission to have been vacated and the proceeding to have been resubmitted as of May 10, 1994.

B. Burdens of Proof

In a disciplinary proceeding, the deputy trial counsel must establish culpability and aggravating circumstances by clear and convincing evidence, whereas the attorney accused of misconduct must establish mitigating circumstances by clear and convincing evidence. (See *In the Matter of Morse* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 24, 30; Trans. Rules Proc. of State Bar, div. V, Standards for Atty. Sanctions for Prof. Misconduct (standards), stds. 1.2(b), (e).)

C. Counts 1, 2, 3, 4, and 8

1. Findings of fact

Respondent disputes many of the hearing judge's factual findings. As the deputy trial counsel concedes, the hearing decision contained factual inaccuracies. Clear and convincing evidence, however, supports the findings set out below.

Counts 1, 2, 3, 4, and 8 concern unpaid medical liens owed to Dr. Jose Byrne, a chiropractor, to cover Byrne's treatment of 14 of respondent's clients. In late 1990, these clients retained respondent to represent them in personal injury cases. His employees signed 14 medical liens for him in favor of Byrne to pay for the treatment of these clients. The cases settled between January and May 1991, and respondent deposited the settlement checks in his client trust account.

As the cases settled, respondent did not pay Byrne's medical bills. Instead, he used for his own purposes the portions of the settlement funds allocated for the payment of Byrne's liens.

In April 1991, Byrne sent respondent a letter complaining about the delay in paying these liens. Byrne then retained attorney Richard Geringer. In May 1991, Geringer sent respondent a letter demanding $29,453 for the payment of Byrne's liens.

Thereafter, respondent talked with Geringer by telephone. Respondent asserted that he and Byrne had a working relationship and an arrangement for payment of the medical liens.

In June 1991, respondent met with Geringer. Respondent told Geringer that the total amount of Byrne's liens was less than $29,453 and that he was unable to pay the liens. The issue of whether respondent and Byrne had an arrangement allowing respondent to delay payment did not arise during the meeting.

On July 10, 1991, the balance in respondent's trust account fell to $1,206.46. This balance was less than the amount needed to pay any of the outstanding medical liens owed to Byrne.

Geringer filed suit for payment of the liens. In March 1992, respondent stipulated to a judgment against him of $25,163, which included $22,163 for medical liens plus $3,000 for attorney's fees.

At the disciplinary hearing, respondent claimed that he and Byrne had an arrangement whereby respondent referred patients to Byrne and was permitted to delay the payment of medical liens for an indefinite time so that he could use the funds to build his personal injury practice. According to respondent, this arrangement was set up in late 1989 by Louis Alberto Alvarez, an insurance broker who rented office space from Byrne and knew respondent.

Alvarez testified that he spoke to Byrne and respondent about such an arrangement. Alvarez asserted that he discussed no specific details with them other than respondent's delay of payments and that he expected them to talk with each other.

Respondent testified that he did not talk to Byrne about the arrangement until late 1990. He asserted that it took him a long time to get around to talking with Byrne because he was preoccupied with certain real estate litigation and that he delayed paying Byrne's medical liens because of a good faith belief that he and Byrne had an agreement allowing him to do so. He acknowledged, however, that he had no documentation reflecting such an agreement.

Byrne testified that in late 1989 he agreed to handle referrals from respondent, but that he did not authorize respondent to delay the payment of medical liens or to use medical lien funds to build a personal injury practice.

With regard to the existence of an agreement allowing respondent to use settlement funds belonging to Byrne for the building of a personal injury practice, the hearing judge determined that Byrne's testimony was highly credible and that respondent's testimony was not credible. We accept these determinations.

Although respondent was building a personal injury practice, he focused his attention on his existing real estate practice. As he conceded during the hearing, he did not pay proper attention to his personal injury cases and delegated far too many duties to his staff.

Respondent's paralegal, Kim Burgess-Orlov, apparently handled these duties very well. Yet when Burgess-Orlov was out of the office from October 1990 to January 1991, respondent depended on another employee, who lacked Burgess-Orlov's abilities. Burgess-Orlov testified that when she returned to the office in January 1991, she found that it was in a shambles, that nothing had been done to manage respondent's personal injury cases, that matters were not calendared, that depositions and court dates had been missed, and that cases had been dismissed for failure to attend. Burgess-Orlov further testified that she received little help from respondent in dealing with this situation, which required approximately nine months to remedy. As of the date of her testimony in August 1993, she admitted that some lingering problems from the past were still being addressed. We accept Burgess-Orlov's uncontroverted testimony as true.

Respondent testified that the chaos engulfing his personal injury practice led to the shortfall in his trust account on July 10, 1991. He also testified that he neglected to make timely deposits and sometimes carried checks in his briefcase for a couple of weeks. We accept this uncontroverted testimony as true.

2. Conclusions of law

Counts 1, 2, 3, 4, and 8 of the amended notice to show cause alleged that respondent violated section 6106 of the Business and Professions Code and rules 3-110(A), 4-100(A), and 4-100(B)(4) of the Rules of Professional Conduct.[2] Count 8 also alleged that respondent violated section 6068 (m) and rule 4-100(B)(1).

a. Section 6106. [1a] The most serious charge against respondent is that he violated section 6106, which provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension. Although the hearing judge concluded that section 6106 does not proscribe attorney conduct, section 6106 is a section which can be violated. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 611, fn. 8; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 349-350, and cases cited therein.) The hearing judge concluded that respondent's actions came within the scope of section 6106, but did not explain why. We conclude that respondent wilfully violated section 6106 by recklessly disregarding his trust account obligations.

At oral argument, respondent's counsel contended that respondent did not steal trust funds. This contention rested on respondent's alleged good faith belief that he had unlimited permission from Byrne to use settlement funds belonging to Byrne for an indefinite time.

[1b] Yet respondent had done nothing to specify the terms of an agreement which would have allowed him to delay the payment of settlement funds to Byrne. As the hearing judge concluded, if respondent had such a belief, it was unreasonable. Alvarez's testimony bolsters respondent's contention that he had such a belief, as does respondent's uncontroverted testimony about an initial telephone conversation with Geringer in which he mentioned a payment arrangement with Byrne. Despite the credibility determination against respondent as to the existence of an agreement with Byrne, the hearing judge did not include in the discussion of culpability a conclusion either that respondent intentionally misappropriated

2. All further references to sections denote sections of the Business and Professions Code. Unless otherwise indicated, all further references to rules are to the Rules of Professional Conduct effective May 27, 1989.

funds. At oral argument, the deputy trial counsel argued not that respondent had stolen trust funds, but that his conduct had come very close to intentional misappropriation. Resolving all reasonable doubts in respondent's favor (see *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 183; *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240), we conclude that the record does not contain clear and convincing evidence that respondent misappropriated such funds.

[1c] Taking trust funds because of a good faith, unreasonable belief that one has permission to use such funds does not necessarily violate section 6106. (*Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 321, 332; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 10-11.) But these cases are not applicable here. At oral argument, respondent's counsel described respondent's handling of his trust account as "extremely sloppy" and "all wrong." Gross negligence or recklessness in discharging one's duties as an attorney involves moral turpitude and thereby violates section 6106. (See *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 475; *Simmons* v. *State Bar* (1970) 2 Cal.3d 719, 729; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.) When asked whether respondent had been grossly negligent in discharging his trust account obligations, respondent's counsel stated first that such a view was probably correct and later that he was not contesting the issue of gross negligence. We conclude that respondent abdicated his duty to supervise his personal injury cases and recklessly disregarded his trust account obligations. Thus, in counts 1, 2, 3, 4, and 8, respondent's mishandling of trust funds amounted to moral turpitude in wilful violation of section 6106.

b. Rule 3-110(A). Rule 3-110(A) prohibits the intentional, reckless, or repeated failure to perform legal services competently. In counts 1, 2, 3, 4, and 8, the hearing judge concluded that the record lacked clear and convincing evidence establishing that respondent had wilfully violated rule 3-110(A). We disagree.

[2a] Respondent's failure to supervise his personal injury practice and to fulfill trust fund responsibilities was so remiss as to be reckless. Also, his mismanagement of his trust account included his repeated failure to provide competent legal services by promptly reimbursing Byrne as the cases of his 14 clients settled. Thus, we conclude in counts 1, 2, 3, 4, and 8 that respondent wilfully violated rule 3-110(A).

[2b] Duplicative allegations of misconduct, however, serve little, if any, purpose. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 634.) The misconduct forming the basis for the rule 3-110(A) charges is the same misconduct underlying the section 6106 charges, which support identical or greater discipline. (See stds. 2.3, 2.4(b).) Accordingly, we give no additional weight to the rule 3-110(A) violations in determining the appropriate discipline.

c. Rule 4-100(A). In relevant part, rule 4-100(A) requires an attorney to maintain all funds received for the benefit of clients in a trust account. Between January and May 1991, respondent deposited in his trust account the settlement funds for the 14 personal injury clients in counts 1, 2, 3, 4, and 8. He then withdrew these funds for his own use. On July 10, 1991, the balance in respondent's trust account was less than the amount needed to cover any of such clients' outstanding medical liens owed to Byrne. Thus, the hearing judge concluded in counts 1, 2, 3, 4, and 8, that respondent had wilfully violated rule 4-100(A) by failing to retain in trust the funds needed to pay these liens. We agree.

Respondent's mishandling of trust funds, including his failure to keep in his trust account the settlement funds necessary to pay the medical liens, largely underlies his culpability of violating section 6106. Because the rule 4-100(A) charges deal with the misconduct addressed by the section 6106 charges, which support identical or greater discipline (see stds. 2.2(b), 2.3), we give no additional weight to the rule 4-100(A) violations in determining the appropriate discipline.

d. Rule 4-100(B)(4). **[3a]** Rule 4-100(B)(4) provides that upon a request by a client, an attorney shall promptly pay any funds which the client is entitled to receive. Rule 4-100(B)(4) applies also to an attorney's obligation to pay third parties out of

funds held in trust, including the obligation to pay holders of medical liens. (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979; *In the Matter of Respondent P*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 633.) The failure to pay an outstanding medical lien can violate rule 4-100(B)(4) even if the attorney acts in good faith. (*In the Matter of Respondent P*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 633.)

[3b] In counts 1, 2, 3, 4, and 8, the hearing judge concluded that respondent had wilfully violated rule 4-100(B)(4) by failing to pay the medical liens owed to Byrne. We agree. Upon request by Byrne, respondent should have paid the liens. Even if respondent believed that he had unlimited permission from Byrne to use the settlement funds, such a belief was not a defense to the rule 4-100(B)(4) charge.

Respondent's mishandling of trust funds, including his failure to pay the medical liens, is the basis for his culpability of violating section 6106. Like the rule 4-100(A) charges, the rule 4-100(B)(4) charges cover misconduct addressed by the section 6106 charges, which support identical or greater discipline. (See stds. 2.2(b), 2.3.) Thus, we give no additional weight to the rule 4-100(B)(4) violations in determining the appropriate discipline.

e. Section 6068 (m) and rule 4-100(B)(1). Under section 6068 (m), an attorney has the duty to respond promptly to reasonable status inquiries from clients and to keep clients reasonably informed of significant developments in their matters. Under rule 4-100(B)(1), an attorney must promptly notify a client of the receipt of the client's funds. In count 8, the hearing judge concluded that respondent had not violated section 6068 (m) or rule 4-100(B)(1) because OCTC had introduced no evidence to support the section 6068 (m) and rule 4-100(B)(1) charges. We agree.

D. Count 5

1. Findings of fact

In early 1989, respondent undertook the representation of his daughter in a personal injury case. In July 1989, respondent and his daughter executed a medical lien agreement in favor of Dr. Ilan Tamir. The agreement required that respondent withhold settlement funds to honor Tamir's lien for medical services and that respondent provide Tamir with information about the status of the case. Between September 1990 and May 1991, Tamir wrote respondent three letters to inquire about the status of the case. Respondent did not reply to these letters. In October 1991, respondent issued a check payable to Tamir in satisfaction of the medical lien.

2. Dismissal at trial

Count 5 of the amended notice to show cause charged respondent with violating section 6068 (i) and rule 3-110(A). At the hearing, the deputy trial counsel stipulated that OCTC had produced insufficient evidence to sustain culpability on either charge against respondent. The hearing judge then dismissed count 5. Upon independent review (see *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 14 [independent review required even for stipulated conclusions]), we agree that the record does not contain clear and convincing evidence of a violation of section 6068 (i) or rule 3-110(A).

E. Count 6

1. Findings of fact

In December 1990, respondent undertook the representation of three plaintiffs in a personal injury case, and an employee of respondent signed a medical lien for respondent with Joshua Medical Group to cover the costs of medical services to these three clients. In February 1991, respondent settled the case for $11,980 and deposited the settlement funds in his client trust account.

Although the parties stipulated that respondent retained $3,994 for the payment of his clients' medical bills, this amount was not retained in his client trust account. On July 10, 1991, the balance in respondent's trust account fell to $1,206.46.

Respondent negotiated the amount of the medical lien until May 1992, when Joshua Medical Group and respondent agreed that the amount owed was $3,994. Respondent then paid this amount from his general account.

2. Conclusions of law

Count 6 of the amended notice to show cause alleged that respondent violated section 6106 and rules 3-110(A), 4-100(A), and 4-100(B)(4).

a. Section 6106. As in earlier counts, the hearing judge concluded that while section 6106 does not proscribe attorney conduct, respondent's conduct came within the scope of section 6106. For the reasons discussed *ante*, we conclude that respondent wilfully violated section 6106 by recklessly disregarding his trust account obligations in late 1990 and during much of 1991.

b. Rule 3-110(A). According to the hearing judge, the record lacked clear and convincing evidence that respondent had intentionally, recklessly, or repeatedly failed to perform legal services competently in violation of rule 3-110(A). We disagree.

By recklessly mishandling trust funds, respondent wilfully violated rule 3-110(A). Nevertheless, because the rule 3-110(A) charge concerns misconduct addressed by the section 6106 charge, which supports identical or greater discipline (see stds. 2.3, 2.4(b)), we give no additional weight to the rule 3-110(A) violation in determining the appropriate discipline.

c. Rule 4-100(A). The hearing judge concluded that respondent had wilfully violated rule 4-100(A) by failing to retain in trust the funds needed to pay the liens owed to the Joshua Medical Group. We agree.

[4] Rule 4-100(A) requires an attorney to put all funds received for the benefit of clients in a trust account. In the event of a dispute over the amount owed to a medical lienholder, the attorney cannot withdraw the funds from the trust account and put them in the attorney's general account. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 28; *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 286.) In February 1991, respondent deposited in his trust account the settlement funds for his three clients in count 6. In July 1991, however, the balance in respondent's trust account dropped to $1,206.46, far less than the amount ultimately needed to cover the outstanding medical liens which these three clients owed to the Joshua Medical Group. Even though respondent and OCTC stipulated that respondent retained $3,994 for payment of these liens, he should have retained in his trust account the amount in dispute between his clients and the Joshua Medical Group until the resolution of the dispute. By withdrawing the funds from his trust account, he wilfully violated rule 4-100(A).

Respondent's mishandling of trust funds, including his failure to keep in his account the amount in dispute with the Joshua Medical Group, underlies his culpability of violating section 6106. Because the rule 4-100(A) charge addresses misconduct covered by the section 6106 charge, which supports identical or greater discipline (see stds. 2.2(b), 2.3), we give no additional weight to the rule 4-100(A) violation in determining the appropriate discipline.

d. Rule 4-100(B)(4). [5] According to the hearing judge, the record lacks clear and convincing evidence that respondent had violated rule 4-100(B)(4) by failing to pay the medical liens owed to the Joshua Medical Group. We agree. The record establishes only that the Joshua Medical Group demanded payment of the liens, that respondent disputed the amount owed, that negotiations lasted until May 1992, and that respondent promptly paid the agreed amount upon the resolution of the dispute in May 1992. There is no evidence in the record that the Joshua Medical Group objected to respondent's waiting to make payment until the dispute was resolved.

F. Count 7

1. Findings of fact

In August 1990, Karen Brown employed respondent to represent her in a personal injury case. Respondent settled the case in June 1991 for $10,000 and deposited the settlement funds into his client trust account. On July 10, 1991, the balance in respondent's trust account fell to $1,206.46.

In August 1991, respondent disbursed $4,000 of the settlement funds to Brown. In October 1991, respondent disbursed $4,000 to a medical provider for medical expenses incurred by Brown.

2. *Conclusions of law*

Count 7 of the amended notice to show cause alleged that respondent violated section 6106 and rules 3-110(A), 4-100(A), and 4-100(B)(4). Also, count 7 alleged that respondent violated section 6068 (m) and rules 3-500 and 4-100(B)(1).

a. Section 6106. As in earlier counts, the hearing judge concluded that section 6106 does not proscribe attorney conduct, but that respondent's conduct came within the scope of section 6106. Because respondent recklessly disregarded his trust account obligations during late 1990 and much of 1991, we conclude for the reasons discussed *ante*, that he was culpable of moral turpitude in wilful violation of section 6106.

b. Rule 3-110(A). According to the hearing judge, the record lacked clear and convincing evidence that respondent had intentionally, recklessly, or repeatedly failure to perform legal services competently in violation of rule 3-110(A). We disagree.

As discussed in earlier counts, respondent wilfully violated rule 3-110(A) by recklessly mishandling trust funds. Yet because the rule 3-110(A) charge deals with misconduct addressed by the section 6106 charge, which supports identical or greater discipline (see stds. 2.3, 2.4(b)), we give no additional weight to the rule 3-110(A) violation in determining the appropriate discipline.

c. Rule 4-100(A). The hearing judge concluded that respondent had wilfully violated rule 4-100(A) because he failed to retain in trust the medical expense monies. We agree with this conclusion, for the following reasons.

[6] Rule 4-100(A) provides that an attorney must maintain all funds received for the benefit of clients in a trust account. Even if the attorney has no fiduciary obligation to the client's medical provider, due to the absence of any enforceable lien or judgment (cf. *In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 242-243 [client's general creditor cannot reach monies held for client by client's attorney, absent enforceable lien or judgment]), the attorney still has a duty *to the client* to keep all client funds in trust. (See *In the Matter of Dyson*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 286.) Nothing in the record of the current proceeding establishes that respondent had a fiduciary obligation to the medical provider. No evidence shows that respondent or an employee of respondent signed a medical lien in favor of the provider or that a statutory lien applied. Nonetheless, respondent is culpable of violating rule 4-100(A) for failing to retain in trust the money which he eventually paid to Brown's medical provider (apparently with Brown's consent or at her direction).

Respondent is likewise culpable for another reason: he also failed to retain in trust the portion of the funds which he later paid to Brown. The decrease in respondent's trust account on July 10, 1991, to a level below the amount owed to Brown establishes such failure. Thus, he wilfully violated rule 4-100(A) in this regard as well.

For the reasons discussed in similar counts *ante*, respondent's mishandling of trust funds, including his failure to keep in his trust account the amount owed to Brown, underlies his culpability of violating section 6106. Because the rule 4-100(A) charge addresses misconduct covered by the section 6106 charge, which supports identical or greater discipline (see stds. 2.2(b), 2.3), we give no additional weight to the rule 4-100(A) violation in determining the appropriate discipline.

d. Rule 4-100(B)(4). The hearing judge concluded that respondent had wilfully violated rule 4-100(B)(4) by failing to pay the medical provider promptly. We disagree.

[7] Rule 4-100(B)(4) requires that an attorney promptly pay a medical provider upon request only if the attorney has a fiduciary obligation to the provider. (See *Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 979; *In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 242-243; *In the Matter of Respondent P*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 632-633.) The record in the current proceeding fails to establish that respondent had a fiduciary obligation to the provider, that the provider requested payment, or that respondent did not promptly comply with such a request. Thus, respondent's conduct toward the medical provider does not establish a violation of rule 4-100(B)(4).

Nor does respondent's conduct toward Brown establish a violation of rule 4-100(B)(4). The record shows neither that Brown requested payment of the funds owed to her nor that respondent failed promptly to make such payment.

e. Section 6068 (m) and rules 3-500 and 4-100(B)(1). Section 6068 (m) and rule 3-500 require an attorney to respond promptly to reasonable requests for information from clients and to keep clients reasonably informed of significant developments in their matters. Rule 4-100(B)(1) requires an attorney to notify a client promptly of the receipt of the client's funds. In count 7, the hearing judge concluded that the record lacked clear and convincing evidence of a violation of section 6068 (m), rule 3-500, or rule 4-100(B)(1). We agree.

G. Count 9

1. Findings of fact

In September 1988, respondent undertook the representation of his business partner, Phillip Wegener, and himself as plaintiffs in a civil action. Wegener paid respondent $950 in advanced fees.

In May 1989, the court in the action issued an order to show cause why sanctions should not be imposed against respondent for his failure to file an at-issue memorandum.

Respondent also failed to respond to interrogatories from the defendant. This failure prompted the opposing counsel in October 1989 to file a motion to compel answers to interrogatories.

In January 1990, respondent failed to appear at an arbitration hearing. The arbitrator made a decision in favor of the defendant and awarded the defendant $12,500.

In February 1990, respondent failed to appear at a status conference regarding the arbitration award. The judgment against respondent and Wegener was reinstated. Eventually, a writ of execution seeking to collect the $12,500 from Wegener was filed.

In June 1990, respondent returned $500 to Wegener in unearned advanced fees.

2. Conclusions of law

Count 9 of the amended notice to show cause alleged that respondent violated current rule 3-110(A) and former rule 6-101(A)(2).[3] Also, count 7 alleged that respondent violated section 6068 (m), current rule 3-700(D)(2), and former rule 2-111(A)(3).

a. Rule 3-110(A) and former rule 6-101(A)(2). Current rule 3-110(A) and former rule 6-101(A)(2) prohibit the intentional, reckless, or repeated failure to perform legal services competently. The hearing judge concluded that respondent violated both rules by repeatedly failing to perform legal services competently.

[8a] The last operative date for former rule 6-101(A)(2) was May 26, 1989; the starting operative date for its successor, rule 3-110(A), was May 27, 1989. The record shows that respondent failed to file the required at-issue memorandum by the deadline of February 20, 1989, but does not establish that such failure was reckless or intentional or that respondent otherwise failed to perform legal services competently in count 9 before May 27, 1989.

[8b] The record establishes, however, that respondent repeatedly failed to perform legal services competently after May 27, 1989. He did not respond to interrogatories, attend the arbitration hearing, or attend the status conference about the arbitration award. Thus, we conclude that he wilfully violated rule 3-110(A), and do not reach the question whether his initial failure to file the at-issue memorandum also constituted a duplicative violation of former rule 6-101(A)(2).

b. Section 6068 (m), rule 3-700(D)(2), and former rule 2-111(A)(3). Under section 6068 (m),

3. Unless otherwise indicated, all further references to former rules are to the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

an attorney must respond promptly to reasonable status inquiries from clients and keep clients reasonably informed of significant developments in their matters. Under rule 3-700(D)(2) and former rule 2-111(A)(3), an attorney whose employment has terminated must promptly refund any part of a fee paid in advance which has not been earned. In count 9, the hearing judge concluded that the record lacked clear and convincing evidence of a violation of section 6068 (m), rule 3-700(D)(2), or former rule 2-111(A)(3). We agree.

H. Count 10

1. Findings of fact

In February 1991, Lillian Collins retained respondent to represent her in a personal injury case. In October 1991, the insurance company issued a $2,500 check to Collins in settlement of her claim. Respondent did not notify Collins of the receipt of her funds until January 1992.

2. *Conclusions of law*

Count 10 of the amended notice to show cause alleged that respondent violated sections 6068 (m), 6103.5 (a), and 6106 and rules 3-110(A), 3-500, 3-510(A), 4-100(A), 4-100(B)(1), 4-100(B)(4), and 5-210(C). Respondent stipulated that he wilfully violated rule 4-100(B)(1). The hearing judge accepted this stipulation and granted the deputy trial counsel's motion to dismiss all other allegations of misconduct against respondent in count 10. We conclude that by failing to notify Collins promptly of his receipt of the $2,500 settlement check, respondent wilfully violated rule 4-100(B)(1) and that the record contains no evidence supporting the other charges against respondent in count 10.

I. Aggravating Circumstances

1. Standard 1.2(b)(ii)

[9a] Standard 1.2(b)(ii) provides that either multiple acts of wrongdoing or a pattern of misconduct constitutes an aggravating circumstance. The hearing judge concluded that both factors are present in the current proceeding. In support of this conclusion, the hearing judge asserted that respondent had failed to pay medical providers in counts 1, 2, 3, 4, 6, 7, and 8. Further, the hearing judge stated that respondent did not timely advise the medical provider in count 5 about the status of the client's matter and that some evidence indicated a failure by respondent to make timely payment to the client in count 10.

[9b] Respondent correctly objects to the comments of the hearing judge about counts 5, 6, 7, and 10. The hearing judge properly dismissed the charges against respondent in count 5. In count 6, the hearing judge properly concluded that the amount owed to the Joshua Medical Group was in dispute until May 1992, when respondent promptly paid the agreed amount to the Joshua Medical Group. The record contains no evidence of misconduct by respondent towards the medical provider in count 7 and lacks clear and convincing evidence that respondent failed to make timely payment to the client in count 10.

Nevertheless, in counts 1 through 4 and 6 through 10, respondent was culpable of various ethical violations. We thus conclude that the record shows multiple acts of misconduct by respondent. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647.) Yet respondent's wrongdoing was not so systematic and prolonged as to constitute a pattern of misconduct.[4] (*Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074, 1079-1080; *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 78-79; cf. *In the Matter of Collins*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 16.)

2. Standard 1.2(b)(iii)

[10] Standard 1.2(b)(iii) provides that it is an aggravating circumstance if an attorney's misconduct was surrounded or followed by bad faith or dishonesty. The hearing judge concluded that bad faith or dishonesty surrounded or followed respondent's misconduct solely because he diverted

4. As discussed *ante*, however, respondent's wrongdoing occurred over several years. His failure to perform legal services competently for Wegener began in 1989, and it was not until January 1992 that he notified Collins about the receipt of her settlement funds in October 1991.

funds belonging to Byrne and others for his own personal use. It appears that the hearing judge used the same conduct constituting the section 6106 violation as a finding in aggravation of the same charge. This is inappropriate. (See *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11.)

[11] Standard 1.2(b)(iii) also provides that it is an aggravating circumstance if an attorney's misconduct was surrounded or followed by other ethical violations. The hearing judge concluded that standard 1.2(b)(iii) applies in the current proceeding because almost all of respondent's misconduct involved violations of rules dealing with trust funds. Although respondent committed violations of such rules, they do not count as a separate aggravating circumstance because the culpability conclusions directly address respondent's mishandling of trust funds. (See *In the Matter of Respondent K, supra*, 2 Cal. State Bar Ct. Rptr. at p. 357; *In the Matter of Mapps, supra*, 1 Cal. State Bar Ct. Rptr. at p. 11.)

3. Standard 1.2(b)(iv)

Standard 1.2(b)(iv) provides that significant harm to a client, the public, or the administration of justice constitutes an aggravating circumstance. The hearing judge concluded that respondent significantly harmed Byrne, who had to retain legal counsel and who did not receive prompt payment upon request of $22,163 in medical liens. We agree.

The hearing judge also concluded that respondent significantly harmed the medical providers in counts 5 and 6. We disagree. The record establishes no misconduct by respondent toward these providers.

[12] The hearing judge concluded that respondent significantly harmed Wegener in count 9 on the grounds that Wegener had a judgment entered against him as a result of respondent's incompetent handling of the case in which respondent represented them both. We disagree. According to respondent's uncontroverted testimony, Wegener refused to cooperate in responding to interrogatories and would not have prevailed on the merits of the case. The record thus lacks clear and convincing evidence that respondent caused Wegener significant harm, even though respondent repeatedly failed to perform legal services competently.

[13] The hearing judge concluded that respondent significantly harmed the administration of justice on the grounds that respondent's misconduct in count 9 required unnecessary sanction motions and hearings and that respondent filed a cross-complaint against Byrne. We disagree. By themselves, such facts do not clearly and convincingly establish significant harm.

J. Mitigating Circumstances

1. Standard 1.2(e)(i)

Under standard 1.2(e)(i), the lack of a prior disciplinary record can constitute a mitigating circumstance. The hearing judge concluded that respondent's lack of a disciplinary record is a mitigating circumstance. We agree because more than 13 years of discipline-free practice elapsed between his admission to the bar in December 1975 and the start of his misconduct in May 1989. (See *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 596; *In the Matter of Burckhardt, supra*, 1 Cal. State Bar Ct. Rptr. at p. 350.)

2. Standard 1.2(e)(vi)

Standard 1.2(e)(vi) provides that an extraordinary demonstration of good character attested to by a wide range of references who are aware of the full extent of an attorney's misconduct constitutes a mitigating circumstance. Respondent presented two character witnesses: paralegal Kim Burgess-Orlov and attorney Leon Pizante. Although both testified to respondent's high moral character, two witnesses do not constitute a wide range of references. Thus, standard 1.2(e)(vi) does not apply.

3. No aberration

The hearing judge concluded that respondent's misconduct was aberrational on the grounds that his misconduct had generally occurred in 1990 and 1991, that he had been involved in an extensive trial, that his case load had increased tremendously, and that health and personal problems had caused his

reliable paralegal, Burgess-Orlov, to be out of the office. However, the hearing judge gave very little, if any, weight to his finding that respondent's misconduct was aberrational, on the grounds that his major trial had lasted only six weeks, that he had been aware of the chaotic condition of his office, and that he had not taken proper steps to deal with the problem.

Respondent argues that his misconduct was aberrational. He cites his long period of discipline-free practice before his misconduct and claims that problems no longer exist in his office because he is no longer engulfed by litigation, has reduced his practice, and takes a more direct role in the operation of his office, which he claims is now properly organized.

[14a] We accept the unrebutted testimony by Burgess-Orlov and respondent that he has reduced his case load and is more involved in the operation of his practice. Yet respondent has not shown by clear and convincing evidence that no problems affect his office or that his office is now properly organized. Burgess-Orlov testified that some lingering problems were still being addressed in August 1993. When asked whether his office is currently organized, respondent asserted not that he had designed and implemented an office organization plan, but that Burgess-Orlov was in the office and that he had no big trials. When asked how he currently handles his trust account, he stated that he is now more involved in his personal injury work, has fewer cases, and is not handling a big trial.

[14b] Respondent's wrongdoing was not aberrational. His misconduct in count 9 began by May 1989, and his misconduct in count 10 lasted until January 1992. Further, he repeatedly misused settlement funds for his own purposes. The number of his ethical violations and the extended time during which they occurred prevent his misconduct from being considered aberrational. (See *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.)

K. Discipline

The hearing judge recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for two years and until respondent fully satisfies the judgment against him in favor of Byrne and proves rehabilitation, present fitness to practice, and present learning and ability in the general law at a hearing under standard 1.4(c)(ii). Yet in discussing culpability, the hearing judge was silent as to whether he found that respondent's mishandling of trust funds was intentional or resulted from a lesser level of wrongdoing. **[15a]** We have concluded from our review of the record that the mishandling was not intentional and therefore have taken such finding into account in assessing the appropriate degree of discipline. (See *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 38 [more severe discipline warranted by intentional misappropriation]; *In the Matter of Hagen, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 172-173.) Also, the hearing judge overstated the aggravating circumstances.

The parties disagree sharply over the appropriate discipline. Respondent argues that if his misconduct warrants any actual suspension, such suspension should last fewer than 90 days. Although OCTC had originally sought disbarment, the deputy trial counsel contended on review that the hearing judge's lengthy suspension recommendation was proper.

In determining the appropriate discipline, we look initially to the standards for guidance. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Under standard 1.3, the primary purposes of discipline are 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. Under standard 1.6(a), the most severe of different applicable sanctions applies. Standard 2.2(a) calls for the disbarment of an attorney culpable of wilfully misappropriating trust funds unless either the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, and standard 2.2(b) requires at least a three-month actual suspension for violation of the rules governing trust funds regardless of mitigating circumstances. Culpability of an act of moral turpitude warrants actual suspension or disbarment under standard 2.3, and culpability of wilfully failing

to perform legal services warrants reproval or suspension under standard 2.4(b) if no pattern of misconduct is demonstrated.

The recommended discipline must rest upon a balanced consideration of all relevant factors. (*Grim v. State Bar* (1991) 53 Cal.3d 21, 35; *In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 676.) Also, it must be consistent with the discipline imposed in similar proceedings. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Twitty, supra,* 2 Cal. State Bar Ct. Rptr. at p. 676.)

Cases relevant to the current proceeding include *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404; *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, and *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708. In *In the Matter of Bouyer, supra,* Bouyer almost totally abdicated the handling of personal injury cases to his nonattorney staff. His gross negligence, which amounted to moral turpitude, lasted about a year, and resulted in misconduct in several matters. He provided incompetent legal services, maintained inadequate trust account balances, inadvertently took trust funds to which he was not entitled, kept inadequate records, and provided delayed accountings. In aggravation, he committed multiple acts of misconduct, harmed clients, engaged in concealment, showed lack of candor to clients, and failed to inform clients promptly upon the receipt of settlement funds. In mitigation, he voluntarily made restitution to almost all the clients involved as soon as he discovered the problem, well before the State Bar's involvement, although he still owed restitution to one client and to medical providers. Also, he implemented a new office management system to prevent future problems. Stressing that Bouyer did not intentionally misappropriate funds, we recommended a two-year stayed suspension and two-year probation, conditioned on actual suspension for six months and until the completion of restitution.

[15b] Respondent's misconduct is more serious than Bouyer's. By abdicating the responsibility to supervise his personal injury cases and recklessly disregarding his trust account obligations, respondent committed acts of moral turpitude. In counts 1, 2, 3, 4, and 8, he did not retain settlement funds in his trust account and did not promptly pay Byrne $22,163 for medical liens covering 14 clients. He also failed to retain in his trust account settlement funds amounting to $3,994 in count 6 and $8,000 in count 7. Further, he repeatedly failed to provide competent legal services in count 9 and did not promptly notify the client in count 10 of the receipt of a $2,500 settlement.

In *In the Matter of Jones, supra,* 2 Cal. State Bar Ct. Rptr. 411, Jones agreed with a nonattorney to set up a law corporation and to split fees with the nonattorney. For more than two years, the nonattorney acted without proper supervision by Jones. The nonattorney handled all aspects of a plaintiff personal injury practice, solicited clients illegally, collected over $600,000 in attorney's fees in Jones's name without any attorney's performance of services, and misused nearly $60,000 withheld from client settlements for payment to medical providers. Jones did not take realistic steps to end the nonattorney's illegal solicitations, even after he learned that they were occurring. Eventually, Jones turned the nonattorney in to the police, reported himself to the State Bar, and fully cooperated in the criminal prosecution of the nonattorney and in his own disciplinary proceeding. In aggravation, Jones committed multiple acts of misconduct and caused considerable harm to medical lienholders. In mitigation, Jones cooperated with the police, State Bar, and potential victims; established good character and community activities; and paid $57,000 of his own funds to lienholders to remedy the nonattorney's misconduct. We recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for two years and until proof of rehabilitation, present fitness to practice, and present learning and ability in the general law at a hearing under standard 1.4(c)(ii).

Respondent's misconduct was less serious than Jones's. Like Jones, respondent failed to supervise his personal injury practice and to handle trust funds properly. Unlike Jones, respondent did not split fees with a nonattorney, countenance illegal solicitation of clients, or establish a practice which would inherently operate in an unethical manner. Also,

respondent's misconduct lasted about half as long as Jones's and resulted in the mishandling of much smaller amounts of trust funds.

In *In the Matter of Robins*, *supra*, 1 Cal. State Bar Ct. Rptr. 708, Robins stipulated to culpability on six counts of grossly negligent misappropriation totalling more than $20,000 in medical liens which his office failed to pay timely. The misappropriation involved the medical bills of eight clients over a period of six years. Also, Robins stipulated to culpability of recklessly or repeatedly failing to perform legal services competently and of failing to return a file to a client. In aggravation, Robins engaged in a pattern of misconduct, was grossly negligent in accounting for client funds, and significantly harmed one client, who was sued by a collection agency for failure to pay a medical lien. In mitigation, Robins had no prior record of discipline, had extreme physical disabilities at the time of some of the misconduct, was candid and cooperative with the State Bar, performed extensive pro bono legal services, worked diligently to improve the management of his law office after the problems in office management were brought to light, had changed his values through a spiritual reawakening, and evinced sincere remorse for his wrongdoing. We recommended a two-year stayed suspension and three-year probation, conditioned on actual suspension for one year.

Respondent's misconduct is similar to Robins's. Like Robins, respondent disregarded trust account responsibilities, but did not intentionally misappropriate trust funds. Like Robins, respondent was also culpable of repeated failure to perform legal services competently and another rule violation. The current proceeding, however, presents less aggravation and far less mitigation than *In the Matter of Robins*, *supra*.

[15c] We agree with the hearing judge that a significant period of probation is appropriate with requirements for obtaining quarterly trust account audits, developing a law office management plan, completing a course on law office management, and attending the State Bar Ethics School. The record does not establish that the problems resulting from respondent's disregard of his trust account obligations have completely ended or that respondent has established a sound office management plan. Although respondent's office has run more smoothly since Burgess-Orlov's return in 1991, neither respondent nor Burgess-Orlov offered specific information about how the office is currently organized to avoid a recurrence of misconduct or what would happen if Burgess-Orlov were again unavailable to help respondent. That is why an acceptable law office management plan is essential as a condition of probation.

[15d] We also conclude that a substantial period of stayed suspension and a significant period of actual suspension are appropriate to protect the public, maintain high professional standards, and preserve confidence in the legal profession. Given that respondent's acts of moral turpitude and other ethical violations were serious but not intentional, as well as other factors in aggravation and mitigation, we recommend that discipline include a stayed suspension for three years and an actual suspension for eighteen months and until completion of restitution to Byrne.

III. RECOMMENDATION

For the foregoing reasons, we recommend a three-year stayed suspension and three-year probation, conditioned on actual suspension for eighteen months and until respondent fully pays the $25,163 judgment against him in favor of Byrne and files an executed satisfaction of this judgment with the probation unit. We also recommend that respondent comply with probation conditions 4 through 12 and 14 of the hearing judge's recommendation, including the requirements for obtaining quarterly trust account audits, developing a law office management plan, completing a course on law office management, and attending the State Bar Ethics School. We recommend as additional probation conditions that if respondent's actual suspension lasts for two years, such actual suspension shall continue until he proves rehabilitation, present fitness to practice law, and present learning and ability in the general law at a hearing pursuant to standard 1.4(c)(ii) and that at the expiration of the period of probation if respondent has complied with the terms of probation, the Supreme Court order suspending respondent from the practice of law for three years shall be satisfied, and

the suspension shall be terminated. Finally, we recommend that respondent be ordered to pass the California Professional Responsibility Examination and furnish proof of such passage to the probation unit during the period of his actual suspension (see *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891, fn. 8), to comply with the requirements of rule 955 of the California Rules of Court, and to pay costs to the State Bar pursuant to section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM G. BRODERICK

A Member of the State Bar

Nos. 91-P-07909, 91-O-05057

Filed September 22, 1994

SUMMARY

Respondent violated the restitution and reporting requirements of his disciplinary probation, misused his client trust account as a personal account, lost a client's settlement check, failed to reply to the client's inquiries, and did not respond to a State Bar investigation. In aggravation, respondent had a prior record of discipline, committed multiple acts of wrongdoing, violated the therapy requirement of his probation, and significantly harmed the client. In mitigation, respondent made good faith efforts to pay some restitution and obtain therapy and was candid and cooperative with the State Bar after formal disciplinary proceedings were initiated. The hearing judge recommended three years stayed suspension, four years probation, and actual suspension for one year and until respondent provided a letter from a licensed mental health professional stating that he was mentally and emotionally able to serve as an attorney. (Hon. Alan K. Goldhammer, Hearing Judge.)

The State Bar requested review. The review department generally adopted the hearing judge's culpability conclusions, but made modifications to the findings regarding aggravation and mitigation. The review department made separate discipline recommendations in the two proceedings, and modified the hearing judge's recommended conditions of probation. In the probation revocation proceeding, the review department recommended three years stayed suspension and four years probation, conditioned on a one-year actual suspension. In the original disciplinary proceeding, it recommended the same discipline, with the two periods of actual suspension to run concurrently, but provided that respondent's actual suspension would last until respondent proved rehabilitation, fitness to practice, and learning and ability in the law pursuant to standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro, Bruce H. Robinson

For Respondent: J. Keith Bohren, William G. Broderick 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
139 Procedure—Miscellaneous
179 Discipline Conditions—Miscellaneous
194 Statutes Outside State Bar Act
1099 Substantive Issues re Discipline—Miscellaneous
1711 Probation Cases—Special Procedural Issues
1719 Probation Cases—Miscellaneous

The Supreme Court order in a probation revocation matter can become effective earlier than the Supreme Court order in an original discipline matter. (Cal. Rules of Court, rule 952(a), (b).) Accordingly, where a probation revocation matter and an original discipline matter were consolidated, the review department made a separate disciplinary recommendation for each matter.

[2 a, b] **214.10 State Bar Act—Section 6068(k)**
220.00 State Bar Act—Section 6103, clause 1
1719 Probation Cases—Miscellaneous

Statutes providing (1) that violating disciplinary probation conditions constitutes cause for probation revocation and possibly discipline; (2) that attorneys have duty to comply with disciplinary probation conditions, and (3) that wilful disobedience of court orders constitutes cause for disbarment or suspension are all statutes that can be violated. The determination that an attorney violated the statute making probation violations cause for revocation of probation means that the attorney failed to comply with a probation condition.

[3] **162.12 Proof—State Bar's Burden—Preponderance of Evidence**
715.10 Mitigation—Good Faith—Found
1712 Probation Cases—Wilfulness
1713 Probation Cases—Standard of Proof
1719 Probation Cases—Miscellaneous

Wilfully failing to comply fully with a disciplinary probation condition constitutes a violation of the statute providing that violating disciplinary probation conditions constitutes cause for probation revocation and possibly discipline. Wilfulness in this context requires merely that the person charged acted or omitted to act purposely, that is, knew what he was doing or not doing and intended either to commit the act or abstain from committing it. The violation must be proved by a preponderance of the evidence. Substantial compliance is insufficient to avoid culpability on this charge, and any good faith on the part of the attorney is relevant to mitigation rather than culpability.

[4] **171 Discipline—Restitution**
172.19 Discipline—Probation—Other Issues
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
1719 Probation Cases—Miscellaneous

Where respondent on disciplinary probation made no required restitution payments to former clients, but made some payments to State Bar in belief that probation monitor or other authority had so instructed, and where respondent had insufficient reason for such belief, respondent was grossly negligent in failing to make such payments to clients, and thereby violated probation.

[5 a, b] **171 Discipline—Restitution**
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
1712 Probation Cases—Wilfulness
Where respondent's failure to make restitution payments required by disciplinary probation was due to lack of income, but respondent did not attempt to have restitution requirement modified, and did not demonstrate that he made sufficient good faith efforts to acquire resources to pay restitution, respondent was culpable of gross negligence which violated conditions of probation.

[6] **106.30 Procedure—Pleadings—Duplicative Charges**
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
1719 Probation Cases—Miscellaneous
Where attorney violated statute providing that violating disciplinary probation conditions constitutes cause for probation revocation and possibly discipline, and where misconduct underlying such charge was same as misconduct underlying charges of violating statutes providing that attorneys have duty to comply with disciplinary probation conditions and that wilful disobedience of court orders constitutes cause for disbarment or suspension, latter two charges were given no additional weight in determining appropriate discipline.

[7 a, b] **179 Discipline Conditions—Miscellaneous**
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
1712 Probation Cases—Wilfulness
Where respondent believed that after notice to show cause in disciplinary probation revocation proceeding had been filed, his probation was terminated and he no longer needed to comply with probation reporting requirement, but respondent took no steps to ascertain whether this belief was correct, respondent was grossly negligent in failing to file required probation report, and thereby violated probation.

[8 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
172.50 Discipline—Psychological Treatment
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
1711 Probation Cases—Special Procedural Issues
Where respondent was charged with violating disciplinary probation conditions by failing to submit evidence of having obtained assistance from a licensed psychologist or psychiatrist, respondent could be found culpable only of failing to comply with requirement that he submit such evidence, and not of failing to comply with requirement that he obtain such assistance.

[9 a-c] **172.50 Discipline—Psychological Treatment**
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
561 Aggravation—Uncharged Violations—Found
715.10 Mitigation—Good Faith—Found
1719 Probation Cases—Miscellaneous
Substantial compliance with a disciplinary probation requirement is not a defense to violation of the requirement. Where respondent's probation conditions required that he obtain therapy from licensed practitioner, and where respondent made efforts to obtain therapy but did not seek to have probation conditions modified to include therapy provided by unlicensed practitioner, respondent's

uncharged probation violation of failing to comply with therapy requirement was aggravating circumstance in probation revocation proceeding. However, respondent's efforts to comply constituted significant mitigating circumstance.

[10] **725.36 Mitigation—Disability/Illness—Found but Discounted**
Extreme emotional difficulties directly responsible for attorney's misconduct constitute mitigating circumstance if clear and convincing evidence proves that attorney no longer suffers from such difficulties. Where respondent's chronic depression was a major cause of his misconduct, but respondent had not clearly and convincingly established recovery, such depression failed to constitute mitigating circumstance.

[11 a, b] **179 Discipline Conditions—Miscellaneous**
1099 Substantive Issues re Discipline—Miscellaneous
1714 Probation Cases—Degree of Discipline
Where respondent requested "credit for time served" based on his having voluntarily limited his law practice to avoid misconduct, but cited no authority supporting such request, and where much of respondent's misconduct occurred after date he testified he terminated his practice, review department declined to give such credit.

[12 a-c] **172.19 Discipline—Probation—Other Issues**
1714 Probation Cases—Degree of Discipline
Protection of public and rehabilitation of attorney are chief aims of disciplinary probation. Violation of probation condition significantly related to attorney's prior misconduct merits greatest discipline, especially if such violation raises serious concern for public protection or shows attorney's failure to undertake rehabilitation. Where respondent was culpable of multiple probation violations reflecting adversely on his rehabilitation efforts, but showed substantial mitigating circumstances, appropriate discipline was three years stayed suspension and four years probation, conditioned on one year of actual suspension.

[13] **173 Discipline—Ethics Exam/Ethics School**
Where respondent had been ordered in prior disciplinary matter to take and pass professional responsibility examination, and remained suspended for failure to do so at time review department decided subsequent disciplinary matters, review department did not recommend imposing additional professional responsibility examination requirement in subsequent matters.

[14] **171 Discipline—Restitution**
172.19 Discipline—Probation—Other Issues
179 Discipline Conditions—Miscellaneous
Requirements for quarterly probation reports and monthly restitution payments as conditions of disciplinary probation were important steps toward rehabilitation, and were appropriate from effective date of Supreme Court discipline order, rather than being delayed until after respondent resumed active law practice.

[15] **171 Discipline—Restitution**
Where disciplinary probation conditions specified minimum amount for monthly restitution payment, and amount was such that restitution would not be completed within period of probation if only minimum payments were made, fact that probation conditions specified minimum monthly amount did not relieve respondent from paying full required amount of restitution within term of probation.

[16] **172.50 Discipline—Psychological Treatment**
Where hearing judge had confidence in respondent's unlicensed therapist and the therapeutic relationship which respondent had established with such therapist, it was appropriate to allow respondent to satisfy therapy requirement of probation conditions by continuing to see that specific therapist; otherwise, therapist would have to be duly licensed psychiatrist or clinical psychologist.

[17 a-d] **1715 Probation Cases—Inactive Enrollment**
In probation revocation proceeding, where State Bar requested lengthy actual suspension for protection of public, and where all statutory requirements for involuntary inactive enrollment upon recommendation of actual suspension were met, and where in absence of inactive enrollment respondent could have resumed active practice of law without limitation or oversight by paying fees and passing professional responsibility examination, State Bar should have requested inactive enrollment in hearing department, as part of its responsibility for public protection.

[18] **204.90 Culpability—General Substantive Issues**
280.30 Rule 4-100(B)(2) [former 8-101(B)(2)]
Where record clearly and convincingly established that respondent had not kept client's settlement check in safe place, but did not specify whether respondent lost check before or after effective date of revised Rules of Professional Conduct, respondent violated either former or current version of rule requiring attorneys to keep client property in place of safekeeping.

[19] **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)]
275.00 Rule 3-500 [no former rule]
280.30 Rule 4-100(B)(2) [former 8-101(B)(2)]
Where respondent was grossly negligent in failing to respond to requests for information from client and successor counsel, and where respondent failed to maintain client's settlement check in safe place, respondent repeatedly failed to perform competently. However, where charge of repeated failure to perform competently addressed same misconduct as charges of failure to communicate with client and failure to keep client property in safe place, failure to perform competently was given no additional weight in determining appropriate discipline.

[20] **162.11 Proof—State Bar's Burden—Clear and Convincing**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where record contained no evidence about circumstances of loss of client's settlement check, respondent could not be found culpable of reckless failure to perform competently based on such loss.

[21 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
582.10 Aggravation—Harm to Client—Found
Where failure to file complaint for client within statute of limitations was not mentioned in notice to show cause, such failure could not form basis for culpability, but where such failure, although not shown by clear and convincing evidence to be intentional or reckless, constituted part of series of repeated failures to perform competently which significantly harmed client, such failure constituted aggravating circumstance.

[22] **511 Aggravation—Prior Record—Found**
710.55 Mitigation—No Prior Record—Declined to Find
Only if attorney's prior and present misconduct occurred during same time period and within narrow time frame can many years of discipline-free practice before prior misconduct be deemed mitigating circumstance. Where respondent's prior and present misconduct occurred neither during same period nor within narrow time frame, and where misconduct in subsequent matter continued while prior matter was pending before State Bar court, respondent's discipline-free practice before prior misconduct was not mitigating in subsequent proceeding.

[23] **120 Procedure—Conduct of Trial**
148 Evidence—Witnesses
735.10 Mitigation—Candor—Bar—Found
Respondent's cooperation with State Bar in agreeing to allow complaining former client to testify by telephone at disciplinary hearing constituted mitigating circumstance.

[24 a-c] **213.90 State Bar Act—Section 6068(i)**
214.30 State Bar Act—Section 6068(m)
275.00 Rule 3-500 [no former rule]
280.00 Rule 4-100(A) [former 8-101(A)]
280.30 Rule 4-100(B)(2) [former 8-101(B)(2)]
725.36 Mitigation—Disability/Illness—Found but Discounted
Where respondent misused client trust account as personal account, failed to respond to client's reasonable status inquiries, did not keep client's settlement check in safe place, and did not respond to State Bar investigation, and where at time of disciplinary hearing respondent still suffered from chronic depression which was major cause of misconduct, and had been ineligible to practice law for two years, appropriate discipline was three years stayed suspension, four years probation, and actual suspension for one year and until respondent proved rehabilitation, fitness to practice competently, including mental fitness, and present learning and ability in the law.

[25] **179 Discipline Conditions—Miscellaneous**
755.10 Mitigation—Prejudicial Delay—Found
1099 Substantive Issues re Discipline—Miscellaneous
Where extended time had passed since hearing judge's decision in consolidated probation revocation and original discipline matters, during which time respondent had been ineligible to practice law, review department recommended that actual suspension in original discipline matter be fully concurrent with, and retroactive to effective date of, respondent's actual suspension in probation revocation matter.

[26] **130 Procedure—Procedure on Review**
1715 Probation Cases—Inactive Enrollment
Where respondent in probation revocation matter was already precluded from practicing law for other reasons, review department ordered respondent's inactive enrollment effective immediately, without first issuing order to show cause.

ADDITIONAL ANALYSIS

Culpability

Found

213.91 Section 6068(i)
214.11 Section 6068(k)
214.31 Section 6068(m)
220.01 Section 6103, clause 1
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.01 Rule 3-500 [no former rule]
280.01 Rule 4-100(A) [former 8-101(A)]
280.31 Rule 4-100(B)(2) [former 8-101(B)(2)]
1751 Probation Cases—Probation Revoked

Aggravation

Found

521 Multiple Acts

Standards

802.30 Purposes of Sanctions
802.61 Appropriate Sanction
802.69 Appropriate Sanction
824.10 Commingling/Trust Account Violations
844.13 Failure to Communicate/Perform

Discipline

1013.09 Stayed Suspension—3 Years
1015.06 Actual Suspension—1 Year
1017.10 Probation—4 Years
1813.09 Stayed Suspension—3 Years
1815.06 Actual Suspension—1 Year
1817.10 Additional Probation—4 Years

Probation Conditions

1021 Restitution
1022.10 Probation Monitor Appointed
1023.40 Testing/Treatment—Psychological
1024 Ethics Exam/School
1025 Office Management
1030 Standard 1.4(c)(ii)
1820 Probation Conditions

Other

102.90 Procedure—Improper Prosecutorial Conduct—Other
162.20 Proof—Respondent's Burden
166 Independent Review of Record
204.10 Wilfulness Requirement
1091 Substantive Issues re Discipline—Proportionality

OPINION

PEARLMAN, P.J.:

At the request of the Office of the Chief Trial Counsel (OCTC), we review a decision regarding respondent, William G. Broderick. For misconduct in both a probation proceeding and an original disciplinary proceeding, the hearing judge recommended in April 1993 three years stayed suspension and four years probation, conditioned on actual disciplinary suspension[1] for one year and until respondent provides a psychiatrist's or licensed psychologist's letter stating that respondent is mentally and emotionally able to serve as an attorney. Further, the hearing judge recommended that if respondent's actual suspension lasts for more than two years, he must continue to remain actually suspended until he complies with standard 1.4(c)(ii).

We separately consider the two proceedings. In the probation proceeding, respondent violated the restitution and reporting requirements of his probation. In aggravation, he had a record of prior discipline and committed multiple acts of wrongdoing, as well as an uncharged violation of the therapy requirement of his probation. In mitigation, he made good faith attempts to pay some restitution and obtain therapy and was candid and cooperative with OCTC after the filing of his answer to the amended notice to show cause. He also established extenuating personal circumstances. The discipline recommended by the hearing judge for both proceedings is similar to our recommended discipline for the probation proceeding: three years stayed suspension and four years probation, conditioned on a one-year actual suspension. Also, we conclude that an order of immediate involuntary inactive enrollment is appropriate.

In the original disciplinary proceeding, respondent misused his client trust account as a personal account, lost a settlement check, and was grossly negligent in failing to reply to reasonable status inquiries from a client and her new attorney and to two letters from a State Bar investigator. In aggravation, respondent had two prior records of discipline, committed multiple acts of wrongdoing, significantly harmed a client, and failed to perform competently. In mitigation, he was candid and cooperative with OCTC after the filing of his answer to the notice to show cause. Here again, our recommended discipline is similar to that of the hearing judge: three years stayed suspension and four years probation, conditioned on actual suspension for one year and until respondent proves his rehabilitation, present fitness to practice law, and present learning and ability in the general law. We recommend that the period of actual suspension in the original disciplinary proceeding run concurrently with the period of actual suspension in the probation proceeding.

I. PROCEDURAL HISTORY

In case number 91-P-07909, the probation proceeding, the initial notice to show cause was filed in November 1991 and an amended notice in March 1992.[2] In case number 91-O-05057, the original disciplinary proceeding, OCTC filed a notice to show cause in May 1992. The cases were consolidated for trial. At the end of April 1993, the hearing judge filed a decision.

The deputy trial counsel requested review. A new deputy trial counsel was substituted to represent OCTC, and respondent substituted himself as his own attorney. After two continuances at respondent's request, oral argument was held. Following supplemental briefing, the consolidated proceeding was taken under submission on May 31, 1994.

II. DISCUSSION

A. Independent Review of the Record

We must independently review the record. We may adopt findings, conclusions, and a decision or

1. Respondent has not practiced law since 1991 and has been suspended under administrative suspension orders for more than two years (from August 1992 for failure to pay State Bar annual membership fees, and from October 1992 for failure to pass the Professional Responsibility Examination).

2. These notices were filed under former provisions of the Transitional Rules of Procedure of the State Bar of California. New provisions governing probation proceedings became effective January 1, 1993. (See Trans. Rules Proc. of State Bar, rules 605-614.5.)

recommendation at variance with the hearing decision and may take action on an issue whether or not the parties raise the issue. The hearing judge's determinations of testimonial credibility must be given great weight. (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 124.)

B. Separation of Case Number 91-P-07909 from Case Number 91-O-05057

[1] The hearing judge combined the discussions of aggravating and mitigating circumstances, analysis of appropriate discipline, and disciplinary recommendation for cases number 91-P-07909 and number 91-O-05057. Because the Supreme Court order in case number 91-P-07909 can become effective earlier than the Supreme Court order in case number 91-O-05707 (see *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 68-69; Cal. Rules of Court, rule 952(a), (b)), we include a separate discussion and disciplinary recommendation for each case.

C. Case Number 91-P-07909

1. Findings of fact

Respondent was admitted to the State Bar of California on June 26, 1970.

Pursuant to a Supreme Court order which was effective September 12, 1991, respondent was disciplined for misconduct in State Bar Court case number 88-O-14228. (S021309, min. order filed August 13, 1991.) Between late 1987 and the middle of 1989, he committed misconduct in two matters. In one matter, he intentionally misrepresented the status of a case to a client and repeatedly failed to perform legal services competently. In the other matter, he repeatedly failed to perform legal services competently, did not respond promptly to reasonable status inquiries from the client, and did not keep the client reasonably informed of significant developments in the case. Substantial mitigating circumstances and some aggravating circumstances were present. The discipline was two years stayed suspension and two years probation.[3] Among other conditions, respondent's probation required the following: (1) that he be actually suspended for a retroactive period of 45 days from June 1 to July 15, 1991; (2) that he file quarterly probation reports; (3) that he pay restitution to Clyde and Stella Joyner of $4,466.50 plus interest in monthly installments of at least $100 from June 1, 1991, onwards, that he make such payments to the Joyners or to any agent designated in writing by them, and that he submit proof of all payments; and (4) that he obtain or continue assistance from a duly licensed psychologist or psychiatrist and furnish evidence of such assistance with each quarterly report.

Respondent filed no quarterly reports, made no restitution payments to the Joyners, and furnished no evidence of having obtained assistance from a duly licensed psychologist or psychiatrist.[4]

On two or three occasions before October 1991, respondent tried to comply with the restitution requirement of his probation by making monthly payments of $100 to the State Bar. He mistakenly believed that he had been instructed to make these payments to the State Bar by his probation monitor or

3. A stipulation between the parties formed the basis for the hearing judge's recommended discipline, which the Supreme Court imposed.

4. In his brief on review, respondent's former counsel asserted that "what is really driving" case number 91-P-07909 is racial animus. Respondent's former counsel contended that the deputy trial counsel representing OCTC in case number 91-P-07909 until September 1993, "[v]ery early . . . took the position that respondent had 'ripped off some poor old black people and now he was going to pay.'" Claiming that the deputy trial counsel made this comment to him, respondent's former counsel stated: "Respondant [*sic*] believes the racial comment was inappropriate at best and completely off base. Mr. Broderick and [respondent's former counsel] are white. [The deputy trial counsel] and the Joiners [*sic*] are black."

The record shows neither that the deputy trial counsel made such a comment nor that racial bias underlies case number 91-P-07909. Respondent does not claim, and the record does not suggest, that the hearing judge's decision reflects racial bias. In any event, respondent has not accused the review department of any racial bias, and we have reached our determination by independent review of the record. (Cf. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 687-688 [broad claim of racial bias rejected].)

by someone else in a position of authority. Apparently, the State Bar credited these payments to his obligations for State Bar dues and the costs of his prior disciplinary proceeding.

In January 1991, respondent began individual counseling with Dr. Ercil Barker, a Biblical clinical counselor, to whom he paid $10 per session, the lowest fee on a sliding scale. Respondent testified that he took antidepressant medication prescribed by a doctor for a short time, but stopped taking the medication because he could not afford to pay for it or for further visits to the doctor. For approximately eight months, from December 1991 to July 1992,[5] respondent devoted himself exclusively to caring for his mother, who could not be left alone and who eventually died. At the time of the disciplinary hearing in March 1993, respondent had a temporary job as a laborer and was earning $11 per hour.

Although Barker was not a duly licensed psychologist or psychiatrist, respondent continued to obtain individual counseling from Barker after the start of his probation. For eight months, while he was caring for his mother, he did not see Barker at all. He later participated in a group therapy program led by Barker. At the time of the disciplinary hearing in March 1993, he had returned to individual counseling with Barker, who testified that respondent was improving.

In October 1991, respondent met with his probation monitor, David Pastor, and told Pastor that he did not know how he was going to pay restitution because he had no source of income. In reviewing the conditions of respondent's probation, Pastor informed respondent that he was not complying with the therapy requirement because Barker was not a duly licensed psychologist or psychiatrist. Pastor saw respondent again briefly in January 1992, but did not meet with him thereafter.

After his October 1991 meeting with Pastor, respondent saw psychologist Tom Grimm three or four times. Respondent testified that he stopped meeting with Grimm because he could not afford to pay Grimm's fees.

Respondent had the impression from the October 1991 meeting with Pastor that he would be "done on probation" or "terminated on probation" unless he obtained treatment from a duly licensed psychologist or psychiatrist. From his experience with criminal law, he mistakenly expected that he would quickly be "called back before the sentencing authority and resentenced." Pastor, however, had not told respondent that his probation would be revoked or that he would no longer have to comply with the probation requirements.

2. Conclusions of culpability

The amended notice to show cause in case number 91-P-07909 alleged that by failing to comply with the restitution, reporting, and therapy evidence requirements of his probation, respondent was culpable of violating sections 6093 (b), 6068 (k), and 6103 of the Business and Professions Code.[6] **[2a - see fn. 6]** The hearing judge concluded that respondent violated section 6068 (k) and can be sanctioned pursuant to sections 6093 (b) and 6103.

[2b] The three sections listed in the amended notice can all be violated. The determination that an attorney violated section 6093 (b) means that the attorney failed to comply with a probation condition in violation of section 6093 (b). (Cf. *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350 [finding of violation of section 6106 is shorthand for the conclusion that an attorney committed an act of moral turpitude, dishonesty, or corruption in violation of section 6106].) Also, sections 6068 (k) and 6103 can be violated. (See *In the*

5. Although respondent testified in March 1993 that his mother needed constant care for eight months, from "December '92 to July '93," he was apparently mistaken about the years. The time period which is consistent with the rest of his testimony and with other evidence in the record is from December 1991 through July 1992.

6. All further references to sections are to provisions of the Business and Professions Code. **[2a]** Section 6093 (b) provides that violating "a condition of probation constitutes cause for revocation of any probation then pending, and may constitute cause for discipline." Section 6068 (k) provides that an attorney has the duty to "comply with all conditions attached to any disciplinary probation." Section 6103 provides that an attorney's wilful disobedience of a court order constitutes a cause for disbarment or suspension.

Matter of Hunter, supra, 3 Cal. State Bar Ct. Rptr. at p. 76; *In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 451-452.)

[3] An attorney who wilfully fails to comply fully with a probation condition violates section 6093 (b). (See *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536-537.) Wilfulness in this context requires merely "'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* (1966) 64 Cal.2d 787, 792.) Substantial compliance with a probation condition is insufficient to avoid culpability under section 6093 (b). (See *In the Matter of Potack, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 536-537.) Any good faith on the part of the attorney is relevant to mitigation rather than culpability under section 6093 (b). (See *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 253.) The deputy trial counsel must prove culpability by a preponderance of the evidence. (§ 6093 (c).) As discussed *post*, respondent's violations of probation conditions resulted from gross negligence and are established by clear and convincing evidence.

a. Restitution requirement. The amended notice to show cause alleged that respondent failed to pay restitution and to furnish proof of restitution from June 1991 through February 1992. Respondent stipulated that he made no payments to the Joyners and supplied no proof of such payments during the relevant time period. He testified, however, that he had made two or three $100 payments to the State Bar in 1991 in an attempt to comply with the restitution requirement and that he later had no source of income.

The hearing judge concluded that respondent was grossly careless in failing to make the two or three $100 payments to the Joyners and wilfully violated the restitution requirement of his probation with regard to these payments. Yet the hearing judge found respondent's testimony as to his inability to make more than the two or three payments to be credible and corroborated by Barker's testimony that respondent paid the lowest fee on a sliding scale. The hearing judge concluded that respondent's failure to pay restitution was not wilful except with regards to the two or three $100 payments.[7]

[4] Respondent was inattentive to his restitution obligation. He had insufficient reason to believe that his probation monitor or someone else in a position of authority had instructed him to make the initial two or three restitution payments to the State Bar. Neither the Supreme Court order imposing the restitution requirement nor the disciplinary decision underlying it provided a basis for respondent's making these payments to the State Bar. Because of his grossly negligent failure to make these payments to the Joyners, he violated sections 6093 (b), 6068 (k), and 6103.

[5a] Respondent also displayed indifference to his restitution obligation during the remainder of the period from June 1991 through February 1992 specified in the amended notice to show cause. Because of his limited income, he could have sought to have this requirement modified. (See Cal. Rules of Court, rule 951(c) [authority of the State Bar Court, for good cause, to approve stipulations modifying probation conditions and to make corrections and minor modifications of such conditions].) He made no attempt, however, to obtain any such modification. Through his gross negligence, he violated sections 6093 (b), 6068 (k), and 6103.[8] **[5b - see fn. 8]**

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7. In reaching this conclusion, the hearing judge relied on the failure of respondent's probation monitor to tell respondent to pay whatever he could. In OCTC's brief on review, the deputy trial counsel argued that such reliance was misplaced. We agree with the deputy trial counsel.

8. [5b] Respondent could have avoided culpability of violating the restitution requirement if he had proved not only that he was unable to pay restitution, but also that he made sufficient good faith efforts to acquire the resources to pay during the relevant period. (See *In the Matter of Potack, supra,* 1 Cal. State Bar Ct. Rptr. at p. 537.) The record, however, contains no evidence about efforts by respondent to acquire the resources to pay restitution during the relevant period.

[6] Duplicative allegations of misconduct serve little, if any, purpose. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.) Because the misconduct underlying the section 6093 (b) charge is the same misconduct underlying the section 6068 (k) charge and the section 6103 charge, we give no additional weight to the violations of sections 6068 (k) and 6103 in determining the appropriate discipline.

b. Reporting requirement. **[7a]** The amended notice to show cause alleged that respondent failed to file the quarterly probation report due January 10, 1992.[9] It is undisputed that respondent filed no reports. Respondent pointed out, however, that the initial notice to show cause in case number 91-P-07909 was filed on November 22, 1991. Respondent testified that based on his experience with criminal law, he believed that his probation was terminated and that he no longer had to comply with the reporting requirement. The hearing judge concluded that respondent's failure to comply with the reporting requirement showed gross disregard of the Supreme Court order imposing the probation.

[7b] Respondent was heedless of his reporting obligation. He took no steps to ascertain whether his probation was terminated and whether he no longer had to file quarterly reports. He did not contact his probation monitor or the State Bar or do any research about his obligation to file the report. Neither the Supreme Court order nor the disciplinary decision underlying it supplied a basis for respondent to suppose that his probation was terminated by the filing of a notice to show cause in a probation revocation proceeding. Because of his grossly negligent failure to file the report due January 10, 1992, he violated sections 6093 (b), 6068 (k), and 6103.

As discussed *ante*, we give the duplicative section 6068 (k) and section 6103 charges no additional weight in determining the appropriate discipline for the violation of section 6093 (b) resulting from respondent's failure to comply with the reporting requirement.

c. Therapy evidence requirement. **[8a]** The amended notice to show cause asserted that under the conditions of probation, respondent had an obligation to obtain or continue assistance from a duly licensed psychologist or psychiatrist and to furnish evidence of compliance in his quarterly probation reports unless the duly licensed psychologist or psychiatrist determined that such assistance was no longer needed. The amended notice then alleged that respondent had failed to comply with the probation conditions insofar as he had not submitted evidence of having obtained assistance from a duly licensed psychologist or psychiatrist for the quarterly period ending December 31, 1991, and had not filed a motion for relief on the grounds that he no longer needed such assistance. The hearing judge concluded that respondent had violated the probation requirement to submit evidence of having obtained assistance from a duly licensed psychologist or psychiatrist. **[9a]** In addition, the hearing judge concluded that respondent had made a good faith effort to comply with the therapy requirement, that he had substantially complied, and that he thus had not wilfully violated the therapy requirement.

[8b] As with the other probation conditions he violated, respondent was inattentive to his obligation to submit evidence of compliance with the therapy requirement. By failing to submit the quarterly probation report due January 10, 1992, respondent necessarily failed to submit the information required in the report, including evidence of having obtained the required assistance from a duly licensed psychologist or psychiatrist. Because of his grossly negligent failure to submit evidence of compliance with the therapy requirement, respondent violated sections 6093 (b), 6068 (k), and 6103.

[8c] An attorney can be found culpable only of misconduct charged in the notice to show cause, although uncharged misconduct can be considered an aggravating circumstance. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 33-34.) Because OCTC did not charge respondent with violating the requirement to obtain therapy, we cannot conclude that respondent is culpable of such a violation.

9. Because respondent's probation became effective on September 12, 1991, which was less than 30 days before the quarterly due date of October 10, 1991, his first quarterly probation report was due January 10, 1992.

[9b] Nevertheless, respondent mishandled the requirement to obtain therapy from a duly licensed psychologist or psychiatrist. If he could not comply with this requirement, he should have tried to have it modified to include his therapy from Barker. (See Cal. Rules of Court, rule 951(c).) At oral argument, respondent conceded that he should have attempted to obtain such modification. Because of his grossly negligent failure to make such an attempt, he violated the requirement. This violation is an aggravating circumstance.

[9c] Substantial compliance with a probation requirement is not a defense to violation of the requirement. (See *In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 536-537.) Nevertheless, respondent's efforts to obtain some therapy constitute a significant mitigating circumstance.

3. Aggravating circumstances

The hearing judge's combined discussion of aggravation for cases number 91-P-07909 and number 91-O-05057 identified two aggravating circumstances relevant to case number 91-P-07909: respondent's record of discipline in case number 88-O-14228 and his multiple acts of wrongdoing. We conclude that these two circumstances are present in case number 91-P-07909.[10] (See stds. 1.2(b)(i), 1.2(b)(ii).) As discussed *ante*, we also conclude that respondent's grossly negligent failure to obtain therapy from a duly licensed psychologist or psychiatrist is an aggravating circumstance as an uncharged ethical violation. (See std. 1.2(b)(iii).)

4. Mitigating circumstances

The hearing decision's combined discussion of mitigation for cases number 91-P-07909 and number 91-O-05057 identified one factor relevant to case number 91-P-07909: respondent's chronic depression since 1987. Barker verified respondent's depression and prolonged grief over the death of his mother, as well as the deaths and serious health problems of close friends. The hearing judge concluded that respondent's depression is mitigating under standard 1.2(e)(iv), but not fully mitigating because the hearing judge was not persuaded that respondent no longer suffered from depression.

[10] Under standard 1.2(e)(iv), extreme emotional difficulties which are directly responsible for an attorney's misconduct constitute a mitigating circumstance if the attorney proves through clear and convincing evidence that he no longer suffers from such difficulties. The record supports the hearing judge's conclusion that chronic depression was a major cause of respondent's misconduct in case number 91-P-07909. Such depression, however, fails to constitute a mitigating circumstance because respondent has not clearly and convincingly established his recovery. (Cf. *In re Lamb* (1989) 49 Cal.3d 239, 248 [sustained recovery necessary]; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 595 [family and financial difficulties neither compelling nor overcome].)

Still, the record clearly and convincingly establishes three mitigating circumstances in case number 91-P-07909: respondent's good faith attempts to make two or three $100 restitution payments, his efforts to obtain therapy from Barker, and his candor and cooperation with OCTC since the filing of his answer to the amended notice to show cause. We give these circumstances significant weight.

[11a] In a brief on review, respondent's former counsel argued that respondent should receive "credit for time served" on the grounds that he had voluntarily limited his practice of law to avoid misconduct. Respondent's former counsel did not clarify how much credit respondent sought. Nor did respondent

10. In an original disciplinary proceeding, OCTC must prove aggravating circumstances by clear and convincing evidence; and the attorney accused of misconduct must prove mitigating circumstances by clear and convincing evidence. (*In the Matter of Sampson, supra*, 3 Cal. State Bar Ct. Rptr. at p. 125; Trans. Rules Proc. of State Bar, div. V, Standards for Atty. Sanctions for Prof. Misconduct (standards), stds. 1.2(b), 1.2(e).) Because the aggravating and mitigating circumstances in the current proceeding are established by clear and convincing evidence, we need not, and do not, decide whether the standard of proof for such circumstances in a probation proceeding is clear and convincing evidence or merely preponderance of the evidence.

offer clarification when asked at oral argument about the "credit for time served" argument.

[11b] We reject the argument for "credit for time served" in voluntary limitation of respondent's practice. No authority supporting the argument has been brought to our attention. Nor do the facts appear consistent with the argument. Although respondent testified that he terminated his practice in January 1991, much of his misconduct in case number 91-O-05057 occurred between February and October 1991. However, it appears that he should have been placed on inactive enrollment under section 6007 (d) at the time of the hearing judge's decision, and, if so, would automatically have received credit for his suspension from that time onward.[11]

5. Discipline

The hearing judge made no separate disciplinary recommendation for case number 91-P-07909, but did state that if the probation violations were respondent's only offenses and if respondent fully recovered from his depression, to which the hearing judge primarily attributed the probation violations, the appropriate level of discipline would be a short period of actual suspension to emphasize the need for strict compliance with probation requirements plus a modest extension of his probation. By contrast, the deputy trial counsel argues that in case number 91-P-07909 respondent should be actually suspended for the full two-year period stayed in case number 88-O-14228.

[12a] The protection of the public and the rehabilitation of the attorney are the chief aims of attorney disciplinary probation. (*In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 299.) The violation of a probation condition significantly related to the attorney's prior misconduct merits the greatest discipline, especially if the violation raises a serious concern about the need to protect the public or shows the attorney's failure to undertake steps toward rehabilitation. (*In the Matter of Hunter, supra*, 3 Cal. State Bar Ct. Rptr. at p. 78; *In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) By contrast, the least discipline is appropriate for the violation of a less important probation condition, particularly if the violation does not call into question the need for public protection or the attorney's progress toward rehabilitation. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.)

In *In the Matter of Hunter, supra*, 3 Cal. State Bar Ct. Rptr. 63, Hunter's misconduct in the probationary proceeding and in concurrent original disciplinary proceedings was significantly related to the prior misconduct for which he had been disciplined insofar as his present and prior wrongdoing involved the disobedience of court orders. Hunter's misconduct in the probationary proceeding included a failure to file his first quarterly probation report and a failure to make himself available to his probation monitor to review the terms and conditions of his probation. These two violations showed that he had not begun to take steps to rehabilitate himself. He also violated the conditions of his probation by failing to maintain his current address with the State Bar. In aggravation, Hunter had two prior records of discipline, one for his prior misconduct and the other for the misconduct in the concurrent original disciplinary proceeding; his misconduct involved multiple acts of wrongdoing; and he did not cooperate in the proceeding. The record established no mitigating circumstances. The recommended discipline was the imposition of the entire two-year period of stayed suspension resulting from his prior misconduct.

[12b] Like Hunter, respondent is culpable of misconduct involving multiple acts of wrongdoing. Also like Hunter, respondent's violations reflect adversely on his rehabilitation efforts and thereby call into question the need to protect the public. The payment of restitution and the filing of quarterly reports are important steps toward rehabilitation. Further, as an uncharged ethical violation, respondent violated the probation requirement to obtain therapy from a duly licensed psychologist or psychiatrist.

11. See discussion, *post*, of involuntary inactive enrollment under section 6007 (d).

[12c] Unlike Hunter, respondent has established substantial mitigating circumstances: his inability to make more than two or three $100 restitution payments, his therapy with Barker, and his candor and cooperation with OCTC. Primarily because of these mitigating circumstances, the current proceeding calls for significantly less actual suspension than *In the Matter of Hunter, supra.* We conclude that the appropriate discipline is three years stayed suspension and four years probation, conditioned on one year of actual suspension.[12] **[13 - see fn. 12]** In concluding that one year of actual suspension is sufficient at this juncture, we are also mindful that more than a year has passed since the filing of the hearing judge's decision. (See *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 516.)

[14] Without explanation, the hearing judge delayed until after respondent resumes the active practice of law the probation requirements that respondent file quarterly reports with the State Bar and that respondent make monthly restitution payments of at least $100 to the Joyners. We discern no justification for this delay. At oral argument, respondent expressed his willingness to begin restitution promptly. Because the filing of quarterly reports and payment of restitution constitute important steps toward rehabilitation, they are appropriate from the effective date of the Supreme Court order.

[15] OCTC's brief on review expressed concern that respondent will not complete restitution to the Joyners within four years if he makes monthly payments of only $100. The fact that $100 is specified as a *minimum* monthly payment does not relieve respondent from paying the full required amount of restitution within four years of probation.

[16] The hearing judge recommended, as a probation condition, that respondent be required to obtain assistance from a psychiatrist or clinical psychologist. We assume that the hearing judge omitted the requirement that the psychiatrist or clinical psychologist be duly licensed so that respondent may continue to see Barker, who testified before the hearing judge. Given the hearing judge's confidence in Barker and the therapeutic relationship which respondent has evidently established with Barker, we consider it appropriate to allow respondent satisfy the therapy requirement of his probation by continuing to see Barker; otherwise, he must obtain assistance from a duly licensed psychiatrist or clinical psychologist.

6. Involuntary inactive enrollment

[17a] The notice to show cause in case number 91-P-07909 notified respondent that OCTC could seek his inactive enrollment under section 6007 (d)(1), but OCTC chose not to do so. In light of its request that respondent be actually suspended for two years for the protection of the public, the failure is disturbing. Section 6007 (d) allows the State Bar Court to order the involuntary inactive enrollment of an attorney for violation of probation if the attorney is under a suspension order any portion of which has been stayed during a period of probation, if the State Bar Court finds that the attorney has violated probation, and if the State Bar Court recommends that the attorney be actually suspended on account of the probation violation or other disciplinary matter. The current proceeding satisfies all the conditions for such an order, which is appropriate to protect the public and should have been requested at the hearing below. (Cf. *In the Matter of Howard, supra,* 2 Cal. State Bar Ct. Rptr. at p. 453.)

Section 6007 (d)(3) provides that any period of involuntary inactive enrollment under section 6007 (d)(1) shall be credited against the period of actual suspension ordered. If respondent had been involuntarily enrolled inactive under section 6007 (d)(1) upon the filing of the hearing decision on April 30, 1993, respondent would automatically already have earned more than one year of credit toward the period of recommended actual suspension.

12. [13] As required by the Supreme Court order in Supreme Court case number S021309, respondent must still take and pass the Professional Responsibility Examination given by the National Conference of Bar Examiners, and will remain suspended from practice until he does so. Accordingly, we do not recommend imposition of an additional PRE requirement in either of the matters consolidated in this proceeding.

At oral argument, we inquired why OCTC had not sought the involuntary inactive enrollment of respondent after the filing of the hearing judge's decision. The deputy trial counsel asked to address this inquiry in supplementary briefing. **[17b]** In the supplementary brief, OCTC asserts that respondent could have requested involuntary inactive enrollment under section 6007 (d)(1). Yet OCTC, not respondent, is the State Bar's prosecutorial office responsible for protection of the public.

[17c] OCTC's position is anomalous. On the one hand, OCTC argues that respondent poses so grave a danger to the public as to merit actual suspension for two years. On the other hand, OCTC has not sought to ensure the protection of the public from respondent for the past sixteen months by requesting his involuntary inactive enrollment under section 6007 (d)(1).[13] **[17d - see fn. 13]**

C. Case Number 91-O-05057

1. Findings of fact

On November 29, 1988, Donna Sutton suffered personal injuries in a car accident. She was a passenger in a vehicle driven by George Carpenter and was hurt when he drove off the road.

A week or two later, Sutton met with respondent, who agreed to represent her in seeking reimbursement for her medical expenses. Respondent sent a copy of Sutton's hospital bill to the Progressive Insurance Company (Progressive), the insurer of Carpenter's car.

In February 1989, Progressive sent Sutton a check for $1,316.46 to reimburse her hospital expenses. For reasons which the record fails to specify, respondent told Sutton not to cash the check, collected the check from her, and indicated that he would keep the check for her. Respondent later lost the check, although the record does not reveal precisely how or when the loss occurred. The check was not cashed.

In June 1989, Progressive sent Sutton an additional check for $262.50 to cover her medical expenses. What happened to this check is not known. Sutton testified that she did not receive it, and respondent testified that he was not aware of it. Like the $1,316.46 check, the $262.50 check was not cashed.

Respondent filed a summons and complaint for Sutton on November 30, 1989, one day after the statute of limitations had run. Shortly thereafter, he met with her, explained that the statute had run, and admitted that he was at fault for failing to file a timely complaint.

Progressive closed its file on the matter when it learned that respondent had failed to protect Sutton from the running of the statute of limitations. Progressive issued no replacement for the $1,316.46 and $262.50 checks.

In April 1990,[14] Sutton moved to Arkansas. Several weeks before the move, she visited respondent, who could not find her file or the $1,316.46 check.

After returning to Arkansas, she wrote to respondent at least once and left telephone messages for him to inquire about her case, but he did not respond to her. When a credit bureau demanded payment of her medical bills, she hired Arkansas attorney Buford Gardner to write to respondent to find out the status of her case. Although Gardner wrote to respondent in February, March, and April 1991, respondent did not reply. Eventually, Sutton's medical bill of $1,578.96 was discounted to a sum of approximately $800 to $1,000, and she paid the discounted amount. Gardner thereafter complained to the State Bar about respondent.

In early July 1991, the balance in respondent's client trust account was $9.04. The account was

13. **[17d]** As OCTC's supplementary brief on review acknowledges, respondent could have resumed the active practice of law without limitation and without oversight by OCTC if he had paid his State Bar membership fees and passed the PRE. OCTC left respondent's status solely within his control.

14. Although the hearing judge found that Sutton moved from California to Arkansas in April 1989, Sutton's testimony establishes that the move occurred a year later.

overdrawn by $86.96 in late July and remained overdrawn by $0.56 in August and September. All the funds in the account were respondent's own personal funds; the account contained no client trust funds. He wrote personal checks on the account, including a check for car registration fees and a check to a hobby shop. The account was overdrawn because of insufficient funds charges, service charges, and a returned item debit.

On August 27 and October 15, 1991, a State Bar investigator wrote to respondent about his handling of the Sutton matter. He did not reply to these letters.

2. Conclusions of culpability

The notice to show cause for case number 91-O-05057 consists of three counts. The hearing judge concluded that respondent was culpable of all charges in these counts. Respondent does not dispute these conclusions.

In an original disciplinary proceeding, the record must establish culpability by clear and convincing evidence. All reasonable doubts must be resolved in favor of the respondent. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239-240, and cases cited therein.)

a. Count 1. Count 1 of the notice alleged that respondent's use of his client trust account from July through September 1991 violated rule 4-100(A) of the Rules of Professional Conduct effective from May 27, 1989, to September 13, 1992 (current rules). In pertinent part, current rule 4-100(A) prohibits an attorney from keeping personal funds in a client trust account. From July through September 1991, respondent kept personal funds in his client trust account and wrote personal checks on the account. Thus, respondent wilfully violated current rule 4-100(A).[15] (See *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54 [trust account never to be used for personal purposes, barring very narrow exceptions].)

b. Count 2. Count 2 of the notice to show cause addressed respondent's mishandling of Sutton's personal injury matter. It stated that Sutton had employed him and entrusted the $1,316.46 and $262.50 insurance checks to him, that he had not competently performed legal services for Sutton, that he had not adequately communicated with Sutton despite her attempts to contact him and had not informed her about significant developments in her case, that he had told her about his misplacing one or more of the checks, and that he had failed to maintain the checks in a place of safekeeping. By such conduct, he was alleged to have violated section 6068 (m); rules 6-101(A) and 8-101(B)(2) of the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989 (former rules); and current rules 3-110(A), 3-500, and 4-100(B)(2).

i. Section 6068 (m) and current rule 3-500. Pursuant to section 6068 (m), an attorney has the duty to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of developments in the clients' matters. Current rule 3-500 requires that an attorney keep a client reasonably informed about significant developments relating to the representation of the client and promptly comply with reasonable requests for information. Although respondent promptly informed Sutton of his failure to file a complaint within the statute of limitations, he was grossly negligent in failing to respond both to her personal requests for information after she moved to Arkansas and to the three letters written by Gardner on her behalf. Thus, respondent violated section 6068 (m) and current rule 3-500. Since the two charges address the same misconduct, we give no additional weight to the violation of current rule 3-500 in determining the appropriate discipline.

ii. Former rule 8-101(B)(2) and current rule 4-100(B)(2). [18] In relevant part, former rule 8-101(B)(2) and current rule 4-100(B)(2) require an attorney who receives property from a client to put such property in a place of safekeeping as soon as practicable. Respondent collected the $1,316.46

15. The violation of a rule of professional conduct must be wilful. (*In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 203, fn. 6; see Bus. & Prof. Code, § 6077; Rules Prof. Conduct, current rule 1-100(A).)

check from Sutton shortly after she received it in February 1989. Although the record does not specify where respondent put the check and whether he lost it before or after May 27, 1989, the record clearly and convincingly establishes that he did not keep the check in a safe place. Thus, he wilfully violated either former rule 8-101(B)(2) or current rule 4-100(B)(2). (See *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 400, fn. 7.)

iii. Former rule 6-101(A) and current rule 3-110(A). Former rule 6-101(A)(2) and current rule 3-110(A) prohibit intentional, reckless, or repeated failure to perform legal services competently. The notice to show cause specifically identified two factual bases for the allegation that respondent failed to perform legal services competently: his failure to communicate with Sutton and his failure to keep the $1,316.46 check in a safe place. **[19]** As discussed *ante*, respondent was grossly negligent in failing to respond to requests for information from Sutton and Gardner and wilfully failed to maintain the $1,316.46 check in a safe place. Although the record does not establish that respondent's failures to perform competently resulted from recklessness or intentional misconduct[16] **[20 - see fn. 16]** and does not show whether they occurred before or after May 27, 1989, the record does clearly and convincingly show that respondent repeatedly failed to perform legal services competently. Thus, respondent wilfully violated either former rule 6-101(A)(2) or current rule 3-110(A). However, because the charge that respondent violated section 6068 (m) and current rule 3-500 and the charge that he violated former rule 8-101(B)(2) and current rule 4-100(B)(2) address the same misconduct as the charge that he violated former rule 6-101(A)(2) and current rule 3-110(A), we give no additional weight in determining the appropriate discipline to his wilful violation of either former rule 6-101(A)(2) or current rule 3-110(A).

[21a] Respondent also failed to perform legal services competently insofar as he did not file a complaint for Sutton within the statutory period. Because this failure was not mentioned in the notice to show cause, it cannot form a basis for culpability. However, this failure does constitute an aggravating circumstance, because while the record lacks clear and convincing evidence that it was reckless or intentional,[17] **[21b - see fn. 17]** respondent's failure to file a timely complaint was part of a series of repeated failures to perform competently, which significantly harmed the client. (See std. 1.2(b)(iv).)

c. Count 3. Count 3 of the notice to show cause alleged that a State Bar investigator had written to respondent on September 30 and October 14, 1991, about the allegations set forth in count 1; that the two letters were sent to his official membership records address and were not returned as undeliverable; and that he failed to reply. Also, count 3 alleged that a State Bar investigator had written to respondent on August 27 and October 15, 1991, about the allegations set forth in count 2; that the two letters were sent to his official membership records address and were not returned as undeliverable; and that he failed to reply. Count 3 charged that by such conduct, respondent wilfully violated section 6068 (i).

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16. **[20]** The hearing judge concluded: "It was grossly incompetent and in reckless disregard of his client's cause for Respondent to have taken the $1,000.00 check from Sutton and then to have misplaced it." The record, however, contains no evidence about the circumstances of the loss of the $1,316.46 check. Thus, we cannot conclude that the loss resulted from recklessness.

17. **[21b]** The hearing judge concluded: "Respondent demonstrated further incompetence, also in reckless disregard of his client's cause when he failed to timely file the Complaint." The hearing judge recognized that "miscalendaring a due date for a complaint, arguably could be only negligence and not in reckless disregard of a client's cause," but asserted that respondent "admitted he was with fault." Based upon respondent's failure to communicate with Sutton and his failure to testify that he had otherwise been diligent, the hearing judge concluded: "it seems likely that Respondent had not calendared the case at all."

Respondent did not admit that his failure to file a timely complaint was reckless. He testified merely that when he spoke with Sutton after failing to file a complaint within the statutory period, he said: "I was in the soup on this one . . . ."

Further, a violation of current rule 3-110(A) must rest on clear and convincing evidence. Respondent's gross negligence in failing to respond to inquiries from Sutton and Gardner and his failure to testify that he had otherwise been diligent do not amount to clear and convincing evidence that he was reckless in failing to file a timely complaint.

In relevant part, section 6068 (i) provides that an attorney has the duty to cooperate in any disciplinary investigation. The copies of the State Bar investigator's letters pertaining to count 1 were withdrawn and are not in evidence. The copies of the letters pertaining to count 2 were admitted. The parties stipulated that the State Bar investigator sent the letters pertaining to count 2 on August 27 and October 15, 1991, and that respondent failed to reply to either letter. Respondent was extremely inattentive to his obligation to cooperate with the State Bar's investigation. By his grossly negligent failure to reply to the State Bar's letters, he violated section 6068 (i).

3. Aggravating circumstances

The hearing judge's combined discussion of aggravation for cases number 91-P-07909 and number 91-O-05057 identified three aggravating circumstances relevant to case number 91-O-05057: respondent's prior record of discipline in case number 88-O-14228, his multiple acts of wrongdoing, and the significant harm suffered by Sutton as a result of respondent's loss of the $1,316.46 check and his failure to file the complaint timely. We agree that these three circumstances are present in case number 91-O-05057. (See stds. 1.2(b)(i), 1.2(b)(ii), 1.2(b)(iv).)

4. Mitigating circumstances

[22] The hearing judge's combined discussion of mitigation for cases number 91-P-07909 and number 91-O-05057 identified respondent's 17 years of discipline-free practice before the misconduct addressed in case number 88-O-14228 as a mitigating circumstance in the current proceeding under standard 1.2(e)(i). We disagree. Only if an attorney's prior and present misconduct occurred during the same time period and within a narrow time frame can many years of discipline-free practice by the attorney before the prior misconduct be deemed a mitigating circumstance in determining the appropriate discipline for the present misconduct. (*Shapiro v. State Bar* (1990) 51 Cal.3d 251, 259; *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 379.) Respondent committed his misconduct in case number 88-O-14228 from late 1987 to the middle of 1989 and his misconduct in case number 91-O-05057 from February 1989 to October 1991. Because his prior and present misconduct occurred neither during the same time period nor within a narrow time frame, and particularly because his misconduct in the present matter, specifically his failure to communicate with Sutton, continued after he had already been formally charged in the prior matter and while that proceeding was before the State Bar Court, his discipline-free practice before his prior misconduct is not a mitigating circumstance in the current proceeding. (See *In the Matter of Hunter, supra,* 3 Cal. State Bar Ct. Rptr. at p. 80.)

The hearing judge also concluded that respondent's depression is mitigating under standard 1.2(e)(iv). As discussed *ante*, his depression does not constitute a mitigating circumstance because he has not clearly and convincingly established his recovery.

[23] The record does reveal a mitigating circumstance. Since the filing of his answer to the notice to show cause in case number 91-O-05057, respondent has been candid and cooperative with OCTC, especially in agreeing to allow Sutton to testify by telephone at the hearing. (See std. 1.2(e)(v).)

5. Discipline

For both cases number 91-P-07909 and number 91-O-05057, the hearing judge recommended three years stayed suspension and four years probation, conditioned on actual suspension for one year and until respondent provides a psychiatrist's or licensed psychologist's letter stating that respondent is mentally and emotionally able to serve as an attorney. Further, the hearing judge recommended that if respondent's actual suspension lasts for more than two years, he must continue to remain actually suspended until he has complied with standard 1.4(c)(ii). According to the hearing judge, the misconduct in case number 91-O-05057 was primarily responsible for this recommendation.

On review, OCTC argued initially that case number 91-O-05057 merits a period of actual suspension consecutive to the actual suspension in case number 91-P-07909 and that the actual suspension in case number 91-O-07909 should last for one year

and until respondent proves his rehabilitation, present fitness to practice law, and present learning and ability in the general law at a hearing under standard 1.4(c)(ii). At oral argument, OCTC contended that respondent should be actually suspended and remain so until he complies with standard 1.4(c)(ii). In a supplementary brief, OCTC argued that case number 91-O-05057 warrants the actual suspension of respondent for more than 90 days.

In a review brief, respondent's former counsel characterized the hearing judge's disciplinary recommendation as harsh, but did not argue that it should be reduced; instead, respondent's former counsel maintained that respondent should receive "credit for time served." At oral argument, respondent stated that he supported the hearing judge's recommendation.

To determine the appropriate discipline, we look first to the standards for guidance. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 134.) Under standard 1.3, the primary purposes of discipline are 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. Standard 1.6(a) requires the most severe of different applicable sanctions to be applied. Standard 2.2(b) provides that commingling or the violation of the rule governing trust funds shall result in an actual suspension of at least three months, irrespective of mitigating circumstances. Under standard 2.4(b), the failure to perform services competently or communicate with a client shall result in reproval or suspension.

A disciplinary recommendation must be consistent with the discipline in similar proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 135.) Also, the recommended discipline must rest upon a balanced consideration of relevant factors. (*Grim* v. *State Bar*, *supra*, 53 Cal.3d at p. 35; *In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 135.)

In *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, Koehler repeatedly misused his client trust account as a personal account, twice failed to refund unearned advanced costs promptly on request, and failed to perform legal services competently in a matter. In aggravation, Koehler had been privately reproved for misconduct in four matters, had committed multiple acts of wrongdoing in the current proceeding, and had committed an uncharged act of moral turpitude by concealing funds from the California Franchise Tax Board. In mitigation, Koehler acted in good faith with regards to his payment of taxes, was candid and cooperative with the State Bar, and had done pro bono and community service work. Also, Koehler presented favorable, but limited, character evidence. The discipline was three years stayed suspension and five years probation, conditioned on six months actual suspension and other requirements.

Respondent's misconduct is roughly equivalent to Koehler's. **[24a]** Respondent misused his client trust account as a personal account and failed to respond to reasonable status inquiries, to keep the $1,316.46 check in a safe place, and to reply to two letters from a State Bar investigator. The aggravation in the current proceeding appears similar to the aggravation in *In the Matter of Koehler*, *supra*, except that the current proceeding presents no aggravating circumstance as serious as Koehler's uncharged act of moral turpitude. Yet Koehler established greater mitigation than respondent.

[24b] We must also consider other important factors. Between June 1991 and February 1992, respondent committed the probation violations underlying our disciplinary recommendation in case number 91-P-07909. As of the disciplinary hearings in March 1993, respondent still suffered from the chronic depression which was a major factor responsible for his misconduct and in cases number 88-O-14228, number 91-O-05057, and number 91-P-07909. Further, he has been ineligible to practice law for over two years.

[24c] Balancing all the relevant factors, we conclude that the appropriate discipline is three years stayed suspension and four years probation, conditioned on actual suspension for one year and until respondent proves his rehabilitation, present fitness to practice law, and present learning and ability in the

general law at a hearing under standard 1.4(c)(ii). (See *In the Matter of Katz, supra,* 1 Cal. State Bar Ct. Rptr. at p. 516.) This discipline will sufficiently protect the public, courts, and legal profession; maintain high professional standards by attorneys; and preserve public confidence in the legal profession. The requirement that respondent remain actually suspended until he complies with standard 1.4(c)(ii) ensures that he cannot return to the practice of law unless he proves that he is capable of practicing competently.[18] [25] In light of the extended time which has passed since the hearing judge's decision (see *In the Matter of Katz, supra,* 1 Cal. State Bar Ct. Rptr. at p. 516), respondent's period of actual suspension in case number 91-O-05057 should be fully concurrent with his period of actual suspension in case number 91-P-07909, and therefore should be made retroactive to the effective date of the latter. As discussed *ante,* we perceive no justification for delaying the reporting and restitution requirements of probation until respondent resumes the active practice of law, and we conclude that respondent should be allowed to satisfy the therapy requirement by continuing to see Dr. Barker or by obtaining assistance from a duly licensed psychiatrist or clinical psychologist.

III. RECOMMENDATIONS

A. Case Number 91-P-07909

We recommend that the probation ordered in case number 88-O-14228 be revoked and that respondent be suspended from the practice of law in the State of California for three years, that execution of such suspension be stayed, and that respondent be placed on probation for four years upon the following conditions:

1. That respondent shall be actually suspended from the practice of law in California for the first year of the probation with credit for time spent on inactive enrollment under section 6007 (d).

2. That respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California.

3. That during his probation in case number 91-P-07909, respondent shall report not later than January 10, April 10, July 10, and October 10 of each year or part thereof during which the remainder of his probation is in effect, in writing, to the Probation Unit, Office of Trials (provided that if his probation becomes effective less than 30 days before any of these due dates, his first report shall be filed on the second quarterly due date after the effective date of probation). Each report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury: (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 the Supreme Court order in case number 91-P-07079; (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 he shall file a final report covering the remaining portion of the period of probation after the last report required by the foregoing provisions of this paragraph and certifying to the matters set forth in subparagraph (b) hereof; and (d) each report shall also provide proof of restitution payments as provided below.

4. That respondent shall be referred to the Probation Unit, Office of Trials, for assignment of a probation monitor referee. Upon the effective date of the Supreme Court order in case number 91-P-07909, 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. Respondent shall cooperate fully with the probation monitor to enable the monitor to discharge the monitor's duties pursuant to rule 611 of the Transitional Rules of Procedure of the State Bar.

18. Because we recommend that respondent remain actually suspended until he establishes his rehabilitation, present fitness to practice law, and present learning and ability in the general law at a hearing under standard 1.4(c)(ii), we do not adopt the hearing judge's recommendation that respondent remain actually suspended until he provides a psychiatrist's or licensed psychologist's letter stating that he is mentally and emotionally able to serve as an attorney. At a standard 1.4(c)(ii) hearing, respondent would have to prove his mental and emotional fitness.

5. That respondent shall pay restitution to the Joyners in the amount of $4,466.60 plus interest at 10 percent per annum commencing June 1, 1991. Restitution shall be paid in monthly payments of not less than $100.00, with the first payment due not later than 30 days after the effective date of the Supreme Court's order in case number 91-P-07909. Payment shall be made to the Joyners or to any agent designated in writing by them. Suitable proof of each payment shall be sent within five days following the making of such payment to the Probation Unit, Office of Trials. The entire amount of the restitution shall be paid by the end of the probation period unless otherwise ordered pursuant to a motion or stipulation to modify this condition of probation.

6. That subject to the assertion of applicable privileges, respondent shall answer fully, promptly, and truthfully all inquiries from the Probation Unit, Office of Trials, and from the probation monitor relating to respondent's compliance with these terms of probation.

7. That respondent shall promptly report within ten days to the membership records office of the State Bar and to the Probation Unit, Office of Trials, all changes of information, including current office or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

8. That respondent shall maintain with the Probation Unit a current address and a current telephone number at which telephone number respondent can he reached and respond within 12 hours.

9. That within one year of the effective date of the Supreme Court order in case number 91-P-07909, respondent shall attend the State Bar Ethics School and take and pass the test given at the end of each session. This requirement is separate and apart from fulfilling any Minimum Continuing Legal Education requirements.

10. That until Dr. Ercil Barker or a duly licensed psychiatrist or clinical psychologist verifies that respondent no longer needs mental health assistance, respondent shall obtain or continue to obtain, at respondent's expense, assistance from Dr. Barker or a duly licensed psychiatrist or clinical psychologist. Respondent shall furnish evidence to the Probation Unit, Office of Trials, that respondent is so complying with each report which he is required to render under these conditions of probation. If Dr. Barker or a duly licensed psychiatrist or clinical psychologist determines that respondent no longer needs mental health assistance, respondent may submit to the Probation Unit, Office of Trials, a written statement in which Dr. Barker or the duly licensed psychiatrist or clinical psychologist certifies this determination by affirmation or under penalty of perjury. After such submission, respondent shall no longer be required to obtain mental health assistance and to report that he is doing so.

11. That the period of probation shall commence as of the effective date of the Supreme Court order in case number 91-P-07909.

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

Also, we recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of rule 955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court order in case number 91-P-07909.

Finally, we recommend that costs be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code and that such costs be added to, and become part of, the membership fee of respondent for the calendar year following the effective date of the Supreme Court order in case number 91-P-07909.

B. Case Number 91-O-05057

We recommend that respondent be suspended from the practice of law in the State of California for three years, that execution of such suspension be

stayed, and that respondent be placed on probation for a period of four years upon the following conditions:

1. That respondent shall be actually suspended from the practice of law in California for one year, retroactive to the date respondent was inactively enrolled under section 6007 (d) in case number 91-P-07909, and shall remain actually suspended until he proves his rehabilitation, present fitness to practice law, and present learning and ability in the general law at a hearing under standard 1.4(c)(ii). In addition to all other requirements at this hearing, respondent shall present a law office management/organization plan which includes procedures for sending periodic status reports to clients, documenting telephone messages received and sent, maintaining files, meeting deadlines, and for withdrawing as attorney, whether of record or not, when clients cannot be contacted or located, and for training and supervising support personnel.

2. That respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California.

3. That during his probation in case number 91-O-05057, respondent shall comply with all probation conditions imposed in case number 91-P-07909, in addition to the probation conditions imposed in case number 91-O-05057.

4. That respondent shall pay restitution to Sutton in the amount of $1,000.00 plus interest at 10 percent per annum commencing February 24, 1989. Restitution shall be paid in monthly payments of not less than $50.00, with the first payment due not later than 60 days after the effective date of the Supreme Court order in case number 91-O-05057.

5. That the period of probation shall commence as of the effective date of the Supreme Court order in case number 91-O-05057.

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

Also, we recommend that if respondent has not already complied with the provisions of rule 955 of the California Rules of Court pursuant to the Supreme Court order in case number 91-P-07909, he be ordered to comply with the provisions of rule 955 and to perform the acts specified in subdivisions (a) and (c) of rule 955 within thirty days and forty days, respectively, of the effective date of the Supreme Court order in case number 91-O-05057.

Finally, we recommend that costs be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code and that such costs be added to, and become part of, the membership fee of respondent for the calendar year following the effective date of the Supreme Court order in case number 91-O-05057.

IV. ORDER

[26] We order that respondent be enrolled as an inactive member of the State Bar pursuant to section 6007 (d)(1). We do so effective immediately, and without first issuing an order to show cause, because respondent is already precluded from practicing law for other reasons.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STANLEY A. LANGFUS

A Member of the State Bar

No. 86-O-12336

Filed October 5, 1994; as modified and corrected, October 20, 1994

SUMMARY

Langfus filed a motion to correct the State Bar's official record of his membership status, contending that he should not have been listed as suspended from practice during the interval between the termination of his 90-day disciplinary suspension and the date on which he paid the costs assessed against him in connection with the proceeding which had resulted in that disciplinary suspension. The motion was denied. (Hon. Carlos E. Velarde, Hearing Judge.)

Langfus sought review. After considering the legislative history of the applicable statutes; the construction of those statutes; the interpretation of the Supreme Court order imposing Langfus's suspension and awarding costs, and the requirements of due process, the review department determined that the Legislature did not intend that a member of the State Bar ordered to pay disciplinary costs in connection with a Supreme Court order imposing actual suspension would be automatically suspended until the costs are paid. Rather, under the relevant statutes, the member cannot be suspended for failure to pay the costs except by an administrative order suspending the member for failure to pay the costs as part of the member's annual membership fee for the following calendar year. Since no such order was obtained in Langfus's case, the review department ordered that Langfus's membership record be corrected to reflect that his disciplinary suspension expired at the end of its 90-day term.

COUNSEL FOR PARTIES

For Office of Trials: Donald R. Steedman

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] **178.90 Costs—Miscellaneous**
199 General Issues—Miscellaneous

Under applicable provisions of the State Bar Act, read together, costs of a disciplinary proceeding need not be paid by a disciplinarily suspended member of the State Bar as a condition of reinstatement of active membership unless the member has also been administratively suspended for failure to pay such costs as part of the member's next annual bill for membership fees. (Bus. & Prof. Code, §§ 6140(b), 6140.7, 6142, 6143.)

[2 a-c] **178.90 Costs—Miscellaneous**
192 Due Process/Procedural Rights

A statute raising constitutional questions must be construed in a manner that avoids any doubt as to its validity. Because there is no provision for challenging a disciplinary cost award prior to the issuance of the Supreme Court's disciplinary order, due process concerns would be implicated if the costs statute were interpreted to mean that a State Bar member receiving an actual disciplinary suspension must pay the associated costs prior to being entitled to resume practice at the conclusion of the disciplinary suspension.

ADDITIONAL ANALYSIS

Other

103 Procedure—Disqualification—Judge
146 Evidence—Judicial Notice
178.10 Costs—Imposed
178.71 Relief from Costs—Granted

OPINION

PEARLMAN, P.J.:

Respondent Stanley Alan Langfus ("Langfus") has petitioned for review of an order denying his motion to correct State Bar membership records. Langfus contends that he was improperly listed as suspended after his disciplinary suspension expired on February 25, 1993, and while he was contesting the amount of costs assessed against him in the disciplinary proceeding. His petition presents a threshold question of statutory interpretation regarding the Legislature's intent as to the timing and manner of suspension of attorneys for nonpayment of costs of a disciplinary proceeding—an issue which was not fully briefed in the hearing department by either party. It also presents a question of interpretation of the Supreme Court order suspending Langfus.

After reviewing the history of Business and Professions Code section 6140.7, including the original formulation by the State Bar of a proposed rule of court on the same subject, we conclude that the Legislature intended that costs assessed against a suspended member would be added to and become a part of the membership fee for the next calendar year and that suspension of any member for nonpayment of costs would be accomplished by an administrative suspension order for nonpayment of annual membership fees since the costs become part of membership fees.

We therefore conclude that the State Bar's interpretation of both the Supreme Court order and the relevant provisions of the State Bar Act was erroneous. Since the State Bar never gave Langfus proper written notice of delinquency in the payment of costs, Langfus was improperly listed as suspended from February 25, 1993, through September 20, 1993, for nonpayment of costs.

HISTORY OF THIS PROCEEDING

This proceeding arose following a Supreme Court order dated October 28, 1992, approving a stipulation as to facts and discipline providing for Langfus's actual suspension for the first 90 days of the probationary period "and until" he provided proof of specified restitution to two clients or the Client Security Fund. The order also provided, inter alia, that Langfus take and pass the California Professional Responsibility Examination within one year and timely comply with rule 955 of the California Rules of Court. The order concluded with the statement "Costs are awarded to the State Bar." (*In re Langfus*, min. order filed Oct. 28, 1992 (S028352).)

Langfus was placed on probation on November 27, 1992, and simultaneously began serving his actual suspension. Proof of restitution was made within the 90-day period. Langfus contends that his actual suspension pursuant to the October 28, 1992, Supreme Court order, by its own terms, should have expired on February 27, 1993 [sic].[1]

On December 2, 1992, Langfus's counsel filed a timely verified petition for relief from that part of the Supreme Court order assessing costs of the disciplinary proceeding as provided in rule 462 of the Transitional Rules of Procedure of the State Bar. On December 7, 1992, the State Bar's Office of Membership Services ("Membership Services") notified Langfus by letter that he was required to pay $478 (his regular membership fees) plus $3,309 in disciplinary costs and that payment of the costs was a condition of his reinstatement. Langfus's counsel responded to Membership Services on January 8, 1993, explaining that Langfus's disciplinary costs were under review by the State Bar Court and that he had advised Langfus to pay only the regular membership fees pending a decision on the petition for relief from costs. Langfus's counsel requested a response

1. Counsel for both parties in this proceeding referred in their briefs to February 27, 1993, as the expiration date of Langfus's 90-day actual suspension. In fact, however, the 90th day of Langfus's actual suspension, which began on November 27, 1992, was February *24*, 1993. Accordingly, the State Bar's official computer records correctly reflect February *25* as the "projected end date" of the actual suspension, i.e., the date on which Langfus would be entitled to resume active status after the conclusion of his actual suspension. We have used the February 25 date elsewhere throughout this opinion.

from Membership Services if it disagreed with his advice to his client. Membership Services did not respond. Langfus timely paid his regular membership fees of $478, but did not pay the disputed costs. Membership Services continued to reflect Langfus as suspended for disciplinary purposes on and after February 25, 1993, but never notified him of any delinquency. Nor did the State Bar ever apply for an administrative order from the Supreme Court suspending Langfus for nonpayment of costs.

On March 4, 1993, Langfus's petition for relief from costs was partially granted, reducing the disciplinary cost award to $2,322. On March 17, 1993, Langfus's counsel received a copy of the amended certificate of costs from the State Bar Court clerk's office notifying him that a copy of the amended certificate was simultaneously being forwarded to Membership Services to ensure proper billing. Langfus received no bill from Membership Services and assumed that the costs would be added to his 1994 membership fee bill pursuant to Business and Professions Code section 6140.7. Langfus learned from an opposing counsel in September 1993 that he had not been removed from disciplinary suspension on February 25, 1993, but continued to be listed as suspended by Membership Services. On September 17, 1993, he provided Membership Services with a certified check in the amount of $1,844 and was restored to active membership status on September 20, 1993.[2]

On October 12, 1993, Langfus filed a motion to correct his membership records status. The motion was opposed by the Office of the Chief Trial Counsel ("OCTC") on behalf of the State Bar. On November 4, 1993, the assigned hearing judge filed an order denying Langfus's motion, on the ground that Langfus had not sought a stay or extension of time to pay costs pending a ruling on his motion for cost relief.

DISCUSSION

The Issues

Section 6140.7 of the Business and Professions Code[3] states that "Costs assessed against a publicly reproved or suspended member shall be added to and become a part of the membership fee of the member, for the next calendar year. Costs unpaid by a member who resigns with disciplinary charges pending or by a member who is suspended or disbarred shall be paid as a condition of reinstatement of membership." The State Bar contends that the second sentence supersedes the first with respect to members who have been ordered actually suspended for any period of time and that in effect all disciplined members who receive any actual suspension are automatically suspended "and until costs are paid."

At the request of the review department, both parties have briefed the legislative history of section 6140.7 and both believe it must be read together with and harmonized with sections 6140 (b) and 6143.

Langfus contends that, by analogy to Code of Civil Procedure section 916,[4] the Supreme Court order to pay costs should have been stayed by operation of law while his petition for relief from costs was pending and that, pursuant to section 6140.7, the reduced costs of his disciplinary proceeding should have been added to his 1994 membership fee bill. In the alternative, he contends that he reasonably relied on advice of counsel and on the subsequent letter of the State Bar Court clerk in not paying the costs sooner and his actions should be viewed as excusable neglect. He requests that the State Bar membership records be corrected to reflect termination of his suspension on February 25, 1993.

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2. He had deducted from the $2,322 the amount of $478 which he had previously paid to the State Bar.

3. All further references to sections are to the Business and Professions Code, unless otherwise noted.

4. Code of Civil Procedure section 916, subdivision (a) provides in pertinent part: "Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from . . . ."

The State Bar argues that Langfus properly remained on suspension on and after February 25, 1993, because he did not timely satisfy the cost assessment and that he practiced law while on suspension for failure to pay these costs. The State Bar further argues that Langfus ignores the plain language of section 6140.7 in claiming that it does not provide for the continuation of actual disciplinary suspension when a member has not paid costs prior to the completion of suspension. It also argues that Langfus never requested or obtained a stay; that Langfus had no reasonable basis for assuming that his suspension had ended; and that he cannot argue for equitable relief on the basis of error by his counsel because he had a nondelegable duty to ascertain his membership status prior to practicing law. Finally, the State Bar argues that alleged reliance on mistaken advice of counsel would more appropriately be considered in the mitigation phase of a disciplinary proceeding for unauthorized practice of law should the State Bar hereafter bring such a proceeding.

We need not reach any of the other issues raised by Langfus or the State Bar if we determine that neither the Supreme Court nor the Legislature provided for Langfus to be suspended "and until" he paid disputed disciplinary costs.

Legislative History

Pursuant to our request, both parties have provided us with the legislative history of the cost assessment provisions of the State Bar Act. The State Bar has also included a certified copy of the history of proposed rule 958 of the California Rules of Court ("rule 958") which addressed the same subject. This history discloses that a subcommittee was appointed by the Board Committee on Adjudication and Discipline ("Board Committee") in October 1982 to study and report its recommendation as to whether costs should be assessed in State Bar disciplinary matters.[5] The subcommittee recommended that a new rule 958 be adopted by the Supreme Court assessing costs in disciplinary proceedings. The subcommittee's recommendation was approved by Board resolution dated November 18, 1983, and submitted to the Supreme Court by the State Bar on March 28, 1984, with supporting documents.

Among other things, proposed rule 958 would have provided that "Costs assessed against a reproved or suspended member shall be added to and become a part of the membership fee levied under Section 6140, Business and Professions Code, and shall accrue during the next calendar year membership fees would accrue after the year of cost assessment. Costs assessed against a member seeking to resign with disciplinary charges pending or against a disbarred member shall be paid as a condition to reinstatement." The proposed rule also included a provision for relief from or extension of time to comply with an order assessing costs for good cause shown, and the subcommittee proposed complementary rules of procedure for determination by the State Bar Court of requests for such relief.

In explaining the mechanism for enforcement of cost awards to the State Bar, the subcommittee's June 1983 report to the Board Committee stated, "For reproved or suspended attorneys, assessed costs would become part of the membership fee set under Section 6140, Business and Professions Code. The cost assessment would accrue during the next calendar year in which membership fees would accrue after the year of cost assessment. For example, if costs are assessed in 1984 but membership fees do not accrue against the member until 1987, then the costs would be due in 1987. Because costs assessed would become part of the member's statutory membership fee, failure to pay any part of it would be grounds for suspension (Section 6143, Business and Professions Code)." (Enclosure 4, Memorandum and Supporting Documents in Support of the Request that the Supreme Court of California Adopt Proposed New Rule 958 of the California Rules of Court [hereafter Memorandum in Support of Proposed Rule 958], p. 9.)

5. As both parties are aware, that subcommittee (a certified copy of whose published report was provided to this court by the State Bar as part of the background of the legislation in question) included Judge Ronald W. Stovitz in his former capacity as assistant director of the former volunteer State Bar Court. Neither party has sought Judge Stovitz's recusal in this proceeding based on that role, nor does his recusal appear warranted. Indeed, no material issue of fact or law has been raised regarding the interpretation of proposed rule 958.

The subcommittee further explained, "*The Subcommittee recommends addition of assessed costs to the member's accrued State Bar membership fee, in cases of reproved or suspended attorneys. It is a system which is easy to administer. Also, in most cases, it would permit an attorney having good cause to seek relief or an extension of time, the ability to avail himself or herself of the recommended relief procedures before assessed costs were due and before an order of suspension would be made by the Supreme Court for failure to pay membership fees (Section 6143, Business and Professions Code).*" (Memorandum in Support of Proposed Rule 958, p. 17, emphasis added.)

The Supreme Court rejected proposed rule 958 without comment by letter dated September 27, 1984, addressed to the General Counsel of the State Bar.[6] On March 4, 1985, Assembly Bill No. 1260 (hereafter AB 1260) was introduced which sought to provide legislative authority for assessing costs by amending sections 6142 and 6143 of the Business and Professions Code and adding sections 6086.8 and 6140.7 to that code. On April 19, 1985, the State Bar Board Committee on Admissions and Discipline considered whether to take a position on AB 1260 and declined to do so, stating, "In light of the facts that (a) the Board originally proposed to the California Supreme Court that costs be assessed in disciplinary proceedings, (b) the Supreme Court declined to adopt the proposal and (c) the State Bar functions as the Supreme Court's administrative arm in matters of attorney discipline, the Board Committee resolved to recommend that the Board take no position on AB 1260, but that the State Bar furnish to the Legislature all materials relating to the Board's cost proposal and individual members of the Board be free to express their own personal views on the proposal as individuals, but not as representatives of the State Bar." (Action Summary, Open Session, Board Committee on Admissions and Discipline, April 19, 1985, pp. 1-2.)

AB 1260 included a similar provision to that of proposed rule 958 that "Costs assessed against a reproved or suspended member shall be added to and become a part of the membership fee of the member, for the next calendar year." Unlike proposed rule 958, however, AB 1260 added the phrase "suspended or" to the next provision so that it read "Costs unpaid by a member who resigns with disciplinary charges pending or by a member who is *suspended or* disbarred shall be paid as a condition of reinstatement of membership." (Emphasis added.) No explanation of this additional language is to be found in the legislative history. However, it is noteworthy that the Assembly Subcommittee on Administration of Justice, in its analysis dated January 13, 1986, described the bill as still being similar to the State Bar proposal which was submitted to the California Supreme Court in March of 1984. Of greater significance is that with regard to the timing of cost assessments, the comment simply stated "The bill provides that costs assessed against a reproved or suspended attorney would be added to and become a part of that attorney's membership fee for the 'next calendar year.' As a technical point, suspension may be ordered for up to three years. The bill should therefore specify that the cost assessment would accrue during the next calendar year in which membership fees would accrue after the year of cost assessment." (Certified transcript of legislative history of AB 1260, p. 3.)

The State Bar concedes that had proposed rule 958 gone into effect, it would have provided for costs to be assessed against suspended attorneys only as part of the membership fees for the next calendar year. The State Bar also argues that all provisions of section 6140.7 must be given a reasonable construction and must be read in light of sections 6140 (b) and 6143. We agree. It appears evident from the legislative history that the Legislature had before it the history of proposed rule 958 and that it incorporated the provision for costs to be added to the membership

6. On August 18, 1994, after oral argument and supplemental briefing in this matter, we notified the parties by letter that we intended to take judicial notice of the Supreme Conrt's September 27, 1984, letter. Our letter gave the parties 10 days to object. Neither party objected. We therefore take judicial notice of the letter and deem the submission of this matter to have been vacated on August 18, 1994, and resubmitted as of August 28.

fees for the same purpose—to provide for administrative suspension of attorneys for nonpayment of costs. That explains why the Legislature amended section 6143 expressly to provide for administrative suspension of any member for failing to pay costs after they become due and after two months written notice of his or her delinquency.

Statutory Interpretation

Given the lack of discussion of the reason for adding the phrase "suspended or" to the second sentence of section 6140.7, we cannot attribute to it the sweeping effect that the State Bar now asserts. **[1]** Indeed, the most logical way to harmonize the provisions of sections 6140 (b), 6140.7, 6142 and 6143 is to hold that costs of a disciplinary proceeding need not be paid by a disciplinarily suspended member as a condition of reinstatement of active membership unless the member has *also* been *administratively* suspended for failure to pay such costs as part of the member's next annual bill for membership fees. In that event, the costs must be paid along with the fees as a condition of return to active membership pursuant to section 6143.

Section 6140 (b) provides that annual fees are due and payable on February 1 of the calendar year. Section 6140.7 specifies that costs awarded against suspended attorneys are added to the membership fee for the next calendar year. Section 6142 specifies that the annual membership fee payment includes payments due under section 6140.7, and section 6143 provides that any member "failing to pay any fees, penalties or costs after they become due, and after two months written notice of his or her delinquency, shall be suspended from membership in the State Bar. [¶] The member may be reinstated upon the payment of accrued fees or costs and such penalties as may be imposed by the board . . . ." It is clear that nonpayment of costs does not lead to disciplinary suspension, but only to administrative suspension pursuant to section 6143.

There are several reasons why we cannot accept the alternative interpretation of the second sentence of section 6140.7 proffered by the State Bar as meaning that suspended attorneys were intended by the Legislature to be suspended "and until" they paid disciplinary costs. First, as OCTC itself points out, the use of the word "reinstated" is a term of art applicable both to attorneys who have been disbarred or resigned and to attorneys who are placed back on active status following *administrative* suspension pursuant to section 6143. It is not a term used to describe members who resume practice following the expiration of a disciplinary suspension.

Second, the State Bar's interpretation would clearly be inconsistent with the first sentence of section 6140.7 which unequivocally provides that costs of disciplinary proceedings are added to and become part of the suspended attorney's membership fees for the *following* year.[7] This provision means that the obligation to pay disciplinary costs does not ripen until February 1 of the year *after* the suspension is ordered. The Legislature cannot have intended the result that attorneys would remain on an otherwise terminable disciplinary suspension because of a failure to pay costs not yet due.

Third, the State Bar's interpretation would be inconsistent with the provisions of section 6142 defining the payment of annual membership fees as "including *any costs imposed pursuant to Section 6140.7.*" (Emphasis added.)

Fourth, the State Bar's interpretation of the second sentence of section 6140.7 is totally inconsistent with section 6143 which provides that: "*Any member, active or inactive,* failing to pay any fees, penalties or *costs after they become due, and after two months written notice of his or her delinquency, shall be suspended from membership in the State Bar.*" (Emphasis added.)

Not only is there no support in the legislative history for the State Bar's interpretation of section

7. We do not accept OCTC's argument that the Legislature intended sub silentio to limit the first sentence to apply only to suspended members who received no actual suspension. No such drastic limitation was ever discussed in any of the legislative history.

6140.7, it is also clearly at odds with the Supreme Court order of Langfus's disciplinary suspension and totally thwarts the stated purpose of the right of respondents to seek relief from cost awards.

Supreme Court Order

The Supreme Court order of October 28, 1992, includes many conditions, completion of only one of which—restitution—was stated by the Court to be a prerequisite to termination of Langfus's actual suspension. Indeed, although the Supreme Court considers violation of rule 955 of the California Rules of Court an extremely serious offense (see, e.g., *Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131) even compliance with that rule was not a precondition to Langfus's resumption of practice. Instead, if Langfus had allegedly violated rule 955, such allegations would have had to be the subject of a separate disciplinary proceeding. (See rule 955(d), Cal. Rules of Court; rules 620-622, Trans. Rules Proc. of State Bar.) There is no question that the rules would have permitted Langfus to resume practice despite the pendency of a rule 955 proceeding if his disciplinary suspension was otherwise completed. It does not make sense to interpret the Supreme Court order as *impliedly* suspending Langfus "and until" costs are paid when no such interpretation can be given to other provisions of the order such as the required compliance with rule 955.

Relief From Costs

[2a] There is another reason we must construe the Supreme Court order and the statutory scheme to provide for a hearing prior to suspension for nonpayment of costs and that is constitutional due process.

The statutory scheme allows respondents to seek partial or total relief for good cause *from an order assessing costs* (§ 6086.10 (c)) and State Bar rules of procedure provide a mechanism for obtaining such relief. This relief, by definition, must be sought *after* authorization for costs is included in a State Bar Court order of public reproval or a Supreme Court order of suspension or disbarment.

[2b] No provision is made for challenging the cost award prior to the Supreme Court's order. The respondent's first opportunity for relief from costs is the Supreme Court's order which triggers the time running for filing any motion for relief from costs. This is in contrast to the disciplinary suspension portion of the same Supreme Court order, which is clearly intended to be final 30 days after issuance. This is because a disciplinary ruling by the Supreme Court has been preceded by opportunities required by due process for the respondent to challenge all aspects of the culpability findings and disciplinary recommendation of the State Bar Court.

[2c] Serious due process concerns would be implicated if we were to interpret section 6140.7 as suggested by the State Bar. A statute raising constitutional questions must be construed "in a manner that avoids *any* doubt about its validity." (*Association for Retarded Citizens* v. *Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394 (emphasis in original); see also *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433, fn. 11.) It would not comport with due process to suspend respondents first and then give them an opportunity to seek relief retroactively authorizing their active status. Nor does it make sense that respondents would be expected to have to seek a stay in order to pursue their right to a hearing on a request for cost relief despite no express provision in the statute for obtaining a stay. Indeed, the State Bar's own records indicate that it furnished the Legislature with the State Bar subcommittee's analysis of proposed rule 958 suggesting that an attorney could generally avail himself or herself of relief procedures before assessed costs were due. The Legislature appears to have intended the same opportunity to occur.[8]

If the statute were interpreted otherwise, as the State Bar now urges, other respondents like Langfus

8. Thus, we interpret "costs unpaid . . . by a member who is suspended . . ." in section 6140.7 to mean costs unpaid *after* the statutory opportunity to seek relief from costs pursuant to section 6086.10 (c) is provided, not prior to any such opportunity as the State Bar argues.

could easily be unwittingly entangled in a trap for the unwary. Moreover, respondents with the shortest suspension orders (presumably for lesser misconduct) would automatically be given the least amount of time to pay costs before they were able to resume practice. For example, members of the State Bar receiving 30 days actual suspension would be constrained to pay all costs assessed within 30 days following the effective date of the Supreme Court order or suffer continued disciplinary suspension as a consequence despite the total impracticability of a hearing on a motion for relief from costs prior to the end of their suspension. But according to the State Bar, if only stayed suspension were ordered, the member would have until the following year to pay and then could only be administratively suspended following two months notice of delinquency. If the Legislature had intended such a dichotomy of approach, it could also raise equal protection issues. We see no evidence of any such intention on the part of the Legislature.

CONCLUSION

We conclude that the Supreme Court clearly did not order Langfus suspended "and until" he paid costs to the State Bar. Nor, in any event, would the Supreme Court have been bound by any contrary legislative intent had the Legislature sought to accomplish such a result. (See *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-301.) However, it is also very clear from reading all of the relevant provisions of the State Bar Act and the history of AB 1260 that the sole mechanism intended by the Legislature for enforcement of disciplinary cost awards is a separate Supreme Court order of administrative suspension following proper notice by the State Bar pursuant to section 6143.

We assume the State Bar will forthwith correct its records in accordance with this opinion to reflect that Langfus's 90-day disciplinary suspension which commenced on November 27, 1992, expired on February 25, 1993. We encourage the State Bar to identify any other members of the State Bar who were similarly erroneously categorized as suspended "and until" payment of costs, to provide notice to them and correct the records of the State Bar to reflect the appropriate termination date of such members' disciplinary suspensions.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BRUCE HOWARD BLUM

A Member of the State Bar

Nos. 90-O-14823, 90-O-16589

Filed October 14, 1994

SUMMARY

Respondent misappropriated $55,000 which a client had placed in respondent's trust account for use in making a real estate purchase. Subsequently, at the client's request, respondent agreed to a plan to repay the money in exchange for the client's agreement not to pursue any relief against respondent or complain to the State Bar. Respondent did not advise the client of his right to consult independent counsel before entering into this agreement. In a separate matter, respondent failed to report court-ordered sanctions to the State Bar. The hearing judge recommended that respondent be disbarred. (Richard D. Burstein, Judge Pro Tempore.)

Respondent sought review, arguing that his misappropriation did not involve moral turpitude and that he thought his client had consented to his use of the entrusted funds. The review department concluded that at most, respondent had obtained from the client an agreement to agree in the future, and that respondent did not have a reasonable or honest belief that his client had consented to his use of the funds. The review department also agreed that respondent's failure to report the sanctions was a disciplinable violation of the statute requiring such reports, despite respondent's ignorance of the reporting requirement. Respondent's misconduct was aggravated by deceit and overreaching of his client and by failure to repay the Client Security Fund after it reimbursed the client. Noting that these factors predominated over any showing in mitigation, the review department concurred in the hearing judge's disbarment recommendation.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: Bruce H. Blum, in pro. per.

HEADNOTES

[1 a-c] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
Where hearing judge found that respondent discussed borrowing client's entrusted funds with client, but intentionally did so in vague terms, and that client's consent to respondent's use of funds

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.

was not knowing or intelligent, and review department concluded that at most, client had consented to some use of funds to be agreed upon in future, respondent had neither reasonable nor honest belief in right to use client's funds, and respondent's misappropriation of such funds involved moral turpitude.

[2] **162.20 Proof—Respondent's Burden**
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
420.00 Misappropriation

Attorney disciplinary proceedings are not decided on principles of contract law, but where, due to vagueness of terms of purported agreement allowing attorney to use client's funds, contract law principles would not permit court to find any binding contract, such purported agreement could not provide defense to charges of professional misconduct.

[3 a, b] **218.00 State Bar Act—Section 6090.5**

Where respondent offered to repay client funds which respondent had misappropriated, and client in turn proposed different repayment terms which included client's agreement not to file complaint with State Bar, evidence did not clearly and convincingly show violation by respondent of statute prohibiting attorneys from requiring agreement not to complain to State Bar as condition of settlement of civil action for professional misconduct.

[4] **204.10 Culpability—Wilfulness Requirement**
214.50 State Bar Act—Section 6068(o)
791 Mitigation—Other—Found

Respondent's ignorance of statute requiring attorneys to report court-ordered sanctions to State Bar was not a defense to violation of such statute, but respondent's awareness that court itself had reported sanctions to State Bar substantially mitigated such violation.

[5] **213.90 State Bar Act—Section 6068(i)**

Where respondent did not answer letters from State Bar investigators, but testified that he had discussed matters under investigation with a State Bar attorney at generally the same or a somewhat later time, and State Bar did not call its attorney as witness and did not seek review, review department concluded that hearing judge did not err in finding lack of clear and convincing proof of respondent's failure to cooperate in investigation.

[6] **710.33 Mitigation—No Prior Record—Found but Discounted**
710.39 Mitigation—No Prior Record—Found but Discounted

Where respondent had refrained from practicing law for five years and then had committed misconduct just over a year after returning to practice, respondent's lack of prior discipline record was properly discounted as mitigating circumstance.

[7] **525 Aggravation—Multiple Acts—Declined to Find**
541 Aggravation—Bad Faith, Dishonesty—Found
551 Aggravation—Overreaching—Found
591 Aggravation—Indifference—Found

Where respondent misappropriated client trust funds and failed to report court-ordered sanctions, aggravation on account of multiple acts of misconduct was not present, but respondent's misconduct was aggravated by failure to pay sanctions; by failure to make restitution; and, most grievously, by his abuse of his vulnerable client's trust and his misrepresentation of his actions to client and opposing counsel.

[8 a, b] **165 Adequacy of Hearing Decision**
420.00 Misappropriation
822.10 Standards—Misappropriation—Disbarment
Where respondent's wilful misappropriation of client trust funds was accompanied by aggravating factors which clearly predominated over mitigation, and where hearing judge recommended disbarment based on consideration of respondent's demeanor and related issues, review department concurred that disbarment was appropriate.

[9 a, b] **175 Discipline—Rule 955**
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
2503 Reinstatement—Showing to Shorten Waiting Period
Where respondent had been placed on inactive enrollment based on hearing judge's disbarment recommendation, review department recommended that if respondent provided proof of compliance with State Bar Court's notification rule (Trans. Rules Proc. of State Bar, rule 795.5) at time of inactive enrollment, respondent be excused from complying with Supreme Court's notification rule (rule 955, Cal. Rules of Court) upon disbarment, and also that respondent receive credit for time on inactive enrollment toward waiting period to apply for reinstatement.

ADDITIONAL ANALYSIS

Culpability
Found
214.51 Section 6068(o)
221.11 Section 6106—Deliberate Dishonesty/Fraud
274.01 Rule 3-400 [former 6-102]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.13 Misappropriation—Wrongful Claim to Funds
Not Found
213.95 Section 6068(i)
218.05 Section 6090.5
273.05 Rule 3-300 [former 5-101]
274.05 Rule 3-400 [former 6-102]
Aggravation
Found
582.10 Harm to Client
Mitigation
Declined to Find
745.52 Remorse/Restitution
Discipline
1010 Disbarment
Other
2311 Section 6007—Inactive Enrollment After Disbarment—Imposed

OPINION

STOVITZ, J.:

Respondent, Bruce H. Blum, has requested that we review a decision of a hearing judge of the State Bar Court recommending that he be disbarred. The hearing judge's disbarment recommendation rests on findings and conclusions that respondent failed to pay his client on request $55,000 his client had deposited with respondent to complete a realty purchase, that respondent misappropriated those funds, and that respondent violated other rules of professional conduct regarding proposals to make restitution. In a separate matter, the hearing judge found that respondent violated the provision of the State Bar Act requiring attorneys to report the imposition of court-ordered sanctions to the State Bar. (Bus. & Prof. Code, § 6068 (o)(3).) Concluding that aggravating factors outweighed mitigating ones, the hearing judge recommended disbarment.

Respondent's request for review is based on his view that no moral turpitude was involved in the handling of his client's funds. He also disputes the hearing judge's findings regarding his claim that he had consent from his client to use the client's funds. He does not dispute the findings that he wilfully violated the trust account rule of professional conduct or that he improperly failed to report court-imposed sanctions. The Office of the Chief Trial Counsel (OCTC) urges that we adopt the hearing judge's findings and disbarment recommendation.

Upon our independent review of the record, we adopt the hearing judge's principal findings and conclusions and his recommendation of disbarment. Respondent's misappropriation was wilful, sizable, and accompanied by deceit and overreaching of his client, whom he knew had limited English-speaking ability. Respondent has ignored his duty to repay the Client Security Fund and he did not explain why he failed to pay the court-imposed sanctions in the other matter comprising these proceedings. In this proceeding, disbarment is the appropriate degree of discipline to recommend.

I. FACTS AND FINDINGS AS TO CULPABILITY

Respondent was admitted to practice in 1973. He has no prior disciplinary record. His practice emphasized civil and business matters. He left law practice for five years between about mid-1982 to mid-1987. His return to practice was under weak financial circumstances.

A. Park Matter.

In May 1988, Chol Sik Park hired respondent to represent him in the purchase of real property and a market in Los Angeles from Clarence and Maxwell Lee. Park intended to continue the business as a grocery. Prior to 1988, Park had not met respondent. Park used English for basic communication with respondent but for complex matters, he communicated in his native language, Korean. Although respondent did not speak Korean, he employed a secretary who did.

Park paid respondent $1,075, which included a $175 fee to join respondent's "pre-paid legal services plan."[1] Sometime during mid-1988, Park had funded an escrow for the grocery purchase with a $5,000 deposit and he was prepared to add another $55,000 to the down payment, most of which he had borrowed from family members. Respondent told Park that dealing with the Lees might become difficult, and to prevail, Park had to show the Lees that he was ready, willing and able to buy the property. According to respondent, the best chance of doing that would be for Park to deposit the $55,000 into respondent's trust account. Park did so on or about October 20, 1988. When the sale did not close shortly thereafter, Park asked respondent to sue the Lees and respondent agreed to do so.

By early 1989 respondent had not filed suit and Park asked for his deposit back. By mid-1989 re-

1. The only other evidence in the record about this plan is a brochure respondent or his staff gave Park appearing to describe the plan briefly in Korean.

spondent showed Park the court papers he had prepared but Park was very concerned because they bore no court filing stamp.[2] Meanwhile, the property sale had still not closed and Park was contacting respondent several times per month to press respondent to act.

It is undisputed that respondent used all of Park's $55,000 for personal purposes. Since the hearing judge's decision is not clear on that point, we adopt such a finding. The record also shows that respondent started using Park's funds within two months of deposit. By March 28, 1988, five months after deposit, only $8,828 remained. Three months later, only $86 was left in respondent's trust account.

Respondent's defense to this misappropriation charge was that he had Park's verbal authority to borrow Park's $55,000. Park denied that he had given respondent any such authority. He testified that he understood that a trust account was an account "where [respondent] or anyone could not get the money out. It's the same in Korea."

Respondent conceded that he had no writing supporting his authority to borrow Park's funds. None of the letters from respondent to Park in any way reflects any plan or agreement to borrow any funds. On the contrary, these letters misrepresented to Park that his funds were still intact when they were largely or entirely spent.[3]

Respondent also wrote two letters to the attorney representing the Lees in which respondent stated that Park remained ready, willing and able to complete the deal. Yet respondent had already begun using Park's $55,000 prior to the first letter to opposing counsel.

Respondent's testimony that he had Park's permission to borrow was corroborated by the testimony of respondent's Korean-speaking secretary, Serena Hong. However, neither witness offered convincing evidence that this authority was based on any but the most general request that respondent be allowed to use some unspecified part of Park's funds at a future time. Beyond telling Park that the funds would be there when they needed them for the Lees, respondent offered no limits, definitions, amounts, interest rates or time periods surrounding this alleged authority. Hong, who translated for Park, could only recall Park's words of assent to this highly general authority to borrow as "okay."

On the final trial day (on the issue of degree of discipline), respondent conceded that his actions toward Park's funds were wilful in a legal sense, but contended that they were not in bad faith. Respondent conceded that they were "not with the full consent" of Park "as it turns out." He added, "I believe, perhaps because of the language barrier, because of the looseness of the agreement that I dealt with [Park], I can see where there may not have been a full knowing consent .... [¶] [Park] was deprived of the use of his money, based on my acts. And I do understand the consequences—the severe consequences that were suffered by Mr. Park. And I do take full responsibility for that."

[1a] The hearing judge found that respondent did discuss with Park respondent's borrowing of Park's money but that these discussions were intentionally done in the most vague and general terms in order to further respondent's aim of depriving Park of his money. Although the judge found that Park consented to respondent's personal use of the funds, the judge also found that Park's consent was not

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2. The specific performance action respondent prepared for Park was filed in Los Angeles Superior Court on May 10, 1989.

3. On April 13, 1989, respondent wrote Park that, ". . . As I previously explained to you, I feel the money on deposit could be returned upon the [sellers'] filing an answer in this action. [¶] You must remain ready, willing and able to perform pursuant to the terms of the [property sale] agreement . . . ." At the time respondent wrote this, his trust account balance was only $8,967 and he did not file the action he referred to until nearly a month later.

On July 10, 1989, after Park had asked for his $55,000 back, respondent wrote him that the Lees had been served by substituted service, their answer would be due August 1, 1989, and "*After that date*, I do not believe your case will be prejudiced by removing all or a portion of the money from the trust account." (Emphasis added.) On July 10, respondent's trust account balance was only $86 and for a month before or after July 10, was never higher than $1,318.

knowing or intelligent. Respondent's use of the money was therefore made, according to the hearing judge, without Park's proper consent. From these findings, the hearing judge concluded that respondent misappropriated trust funds and wilfully violated Business and Professions Code section 6106 as a result.[4]

[1b] The foregoing findings rest largely on the credibility assessment of the hearing judge. Our rules require us to give great deference to those findings. (Trans. Rules Proc. of State Bar, rule 453(a); see, e.g., *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716, 724-725.) Giving proper deference to the hearing judge, but also discharging our function of independent review of the record (*ibid.*), we conclude that at most, Park gave consent for some to-be-agreed-upon use of his funds in the future. This is consistent with Hong's testimony. **[2]** All that respondent obtained from this most vague and general consent of Park was an agreement to agree in the future, not one which provided any defense to the charges of professional misconduct as respondent ultimately acknowledged in the portion of the trial on degree of discipline. Although this attorney disciplinary proceeding is not decided on the principles of contract law, even if we were to consult those principles, they would not permit us to conclude that any binding agreement occurred here between Park and respondent that would allow respondent's use of Park's money. (See, e.g., *Peterson Development Co.* v. *Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 113-115 [material contractual terms of letter of loan commitment were so broadly and inadequately defined that no enforceable contract was created by the document even if reference is made to other documents].)

[1c] Independently reviewing the evidence, we find the record supports the hearing judge's conclusions on this count that respondent had neither a reasonable nor honest belief that he had been duly authorized by Park to use Park's funds. (See *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 190-191.) Accordingly, we agree with the hearing judge that respondent committed acts of moral turpitude in misappropriating Park's funds (§ 6106) and that he wilfully violated rule 4-100(B)(4) of the Rules of Professional Conduct[5] when he failed to promptly pay the funds at Park's request.

Park's efforts to obtain repayment consumed over two years and required the largesse of the State Bar's Client Security Fund to pay the bulk of restitution ($33,500). Respondent had repaid Park about $21,000, but as of the last day of trial, July 1, 1993, respondent had not reimbursed the Client Security Fund at all for its $33,500 payment. Park testified to his emotional suffering from respondent's misappropriation. One or two of his relatives from whom he had borrowed most of the $55,000 even accused him of lying about the funds. Park developed a dislike of the United States which he had thought had laws to protect against what had happened to his funds.

[3a] The facts regarding restitution spawned a second count of misconduct. In October 1989, respondent offered Park an agreement to make certain payments in order to make full restitution and an additional $400 per month for four years. The next month, respondent agreed to terms which had been prepared by a paralegal Park had consulted. This more complex proposal gave Park two promissory notes. In return, Park agreed not to pursue any relief or file any complaint even with the State Bar.

[3b] The hearing judge concluded that the charges that respondent violated section 6090.5 were not sustained.[6] The evidence showed that the clause regarding forbearance of a State Bar complaint came from Park, not respondent. The hearing judge determined that to violate section 6090.5, the offending language must emanate from the respondent. Ac-

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

5. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct which became effective May 27, 1989.

6. Section 6090.5 makes it a ground of attorney discipline for an attorney to "require as a condition of a settlement of a civil action for professional misconduct" against the attorney that the plaintiff agree to not file a State Bar disciplinary complaint.

cordingly, the judge found that respondent did not violate the section. We also do not find respondent culpable of violating this section. However, we reach our conclusion because we find that there is no clear and convincing evidence that respondent required Park to forbear from making a State Bar complaint as a condition of a civil settlement.

The hearing judge found respondent culpable of a violation of rule 3-400(B) by not informing Park in writing of the opportunity to consult independent counsel or giving Park a reasonable opportunity to do so in connection with settling a potential malpractice claim. Clearly this violation occurred. We also agree with the judge that respondent did not violate rule 3-400(A) as to improper prospective limitation of his liability.

The judge also found that respondent's settlement efforts violated rule 3-300(B). This is the 1989 successor to former rule 5-101. (Rule 5-101, former Rules of Professional Conduct [in effect from January 1, 1975, through May 26, 1989].) As pertinent here, rule 3-300(B) prohibits attorneys from entering into a business transaction with a client without, in part, informing the client in writing of the opportunity to seek the advice of independent counsel. It is undisputed that respondent did not afford such opportunity to Park. OCTC assumes, without citing authority, that the restitution agreement used here comes within the terms of rule 3-300(B). We need not decide whether or not the agreement for restitution comes within the terms of rule 3-300(B), for even if we decided in the affirmative, the culpability would essentially duplicate respondent's other violations, particularly his violation of rule 3-400(B). (Cf. *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

B. Greenstein Matter.

The only issue which was tried in this matter was whether respondent's failure to report to the State Bar superior court-ordered sanctions while representing Stephen Greenstein in a family law matter was a violation of section 6068 (o)(3).[7] In November 1990, the Los Angeles Superior Court imposed $5,448 in sanctions on respondent (and his client, jointly). The minute order imposing the sanctions, of which respondent was aware at the time, also recited that a copy of the order was being mailed to the State Bar addressed to the Chief Trial Counsel, citing section 6089.[8] [4] Respondent testified that although he was not aware of section 6068 (o)(3), he was aware of the superior court's mailing of notice of sanctions to the State Bar. The hearing judge concluded that OCTC presented clear and convincing evidence of respondent's violation of section 6068 (o)(3) and that respondent's ignorance of the provisions of the law was not a defense. Respondent has not sought review of those conclusions. We agree that proof of a violation of section 6068 (o)(3) does not require bad faith or actual knowledge of the violated provision and we conclude that on this record, respondent is culpable of violating this section. We also conclude that under the circumstances, the violation was substantially mitigated by his awareness that the superior court was notifying the State Bar of the sanctions.

C. Failure to Cooperate Charges.

[5] Respondent was charged with violating section 6068 (i) by allegedly failing to participate or cooperate in the State Bar investigation of several matters. Respondent conceded he did not answer the letters which the State Bar investigators sent but he

7. The hearing judge's decision suggests that more serious charges concerning the merits of the sanctions were submitted for trial but that the proof was not clear and convincing to support the charges. As the record shows, the deputy trial counsel withdrew those more serious charges before respondent put on his defense and the judge and parties understood at trial that the only issue remaining in the Greenstein matter pertained to section 6068 (o)(3), the duty of a member of the State Bar to report to the bar certain court-imposed sanctions.

8. Section 6089, which was repealed effective January 1, 1991, required courts to notify the State Bar of, inter alia, the imposition of sanctions of $1,000 or more not resulting from failure to make discovery. (See also § 6086.7 (c) [eff. Jan. 1, 1991].)

also testified that he did discuss all of the matters with an OCTC attorney, Peter Eng, at either generally the same or a somewhat later time. OCTC did not call Eng as a witness and did not seek review of the hearing judge's findings of lack of clear and convincing proof of violation of section 6068 (i). The hearing judge's findings are warranted.

II. DEGREE OF DISCIPLINE

[6] The hearing judge identified respondent's lack of prior discipline as mitigating, but depreciated the number of years of practice because he did not practice for five years in the 1980s and because his misconduct began just over a year after he returned to practice. We agree with the hearing judge's analysis and also with his later observation that respondent never presented evidence that his misconduct was caused by any special factors such as stress, family problems, illness or alcoholism. Moreover, respondent produced no positive evidence of community service, good character or other contributions which could serve as mitigating.

[7] As aggravating circumstances, the judge cited respondent's multiple acts of misconduct and indifference toward rectification, noting that respondent failed to pay the sanctions in the Greenstein matter and gave no explanation for that failure. We agree with the latter factor. However, as to the former, we do not see this case as strongly presenting aggravation on account of multiple acts of misconduct but rather one in which respondent's abuse of the trust placed in him by Park was manifest. Knowing of Park's English language limitations, and the need for Park to prove that he was ready, willing and able to consummate the purchase of the property at issue, respondent used the most vague language as a justification to misappropriate a large sum of money, while misrepresenting his actions to both Park and opposing counsel. This is most grievous misconduct which is further aggravated by respondent's indifference to completing restitution to Park (and the Client Security Fund) and failure to pay sanctions in the Greenstein matter.

Although at the end of trial, respondent did express regret for the effect of his conduct on Park, we do not consider that a sufficient showing of remorse to qualify as mitigating.

We consult the Standards for Attorney Sanctions for Professional Misconduct as guidelines. (Trans. Rules Proc. of State Bar, div. V; see *In the Matter of Morse* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 24, 37.) **[8a]** Under the standards, respondent's wilful misappropriation of trust funds warrants disbarment unless the amount of money is insignificant or the most compelling mitigating circumstances clearly predominate. (Std. 2.2(a).) Neither exception applies here. Rather, aggravating factors clearly predominate. This was exactly the view of the hearing judge whose decision we have independently reviewed and in which we concur.

Our consideration of all relevant factors bearing on discipline is supported by guiding case law as well. *In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, cited by the judge, involved a $25,000 theft committed by a series of unauthorized withdrawals from the trust account over eight months by an attorney who had been in practice seven years. We found no evidence of Tindall's intentional deceit to his client (unlike here and in the disbarment case of *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, where the attorney's misappropriation was surrounded by repeated deceit) and we found some mitigation in Tindall's performance of services to disadvantaged clients. (*In the Matter of Tindall, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 664-665.) We increased the hearing judge's recommended two-year actual suspension (and until a standard 1.4(c)(ii) rehabilitative showing) to a recommended three-year actual suspension and until Tindall made the rehabilitative showing. Our Presiding Judge wrote separately in *Tindall* to observe that the real issue was whether disbarment was not warranted in view of Supreme Court and State Bar Court decisions. She pointed out that the Supreme Court has taken into account a referee's declination to recommend disbarment in a single misappropriation based on the referee's evaluation of the respondent's overall character and demeanor. (*Id.* at pp. 666-667 (conc. opn. of Pearlman, P.J.).) **[8b]** Here, as noted *ante*, the judge considered demeanor and all related issues and recommended disbarment.

In *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, an attorney with 12 years of practice and no prior record of discipline misappropriated about $29,000 of law firm funds over an 8-month period. Kaplan presented impressive mitigation including 16 character witnesses and psychiatric evidence as to his fragile emotional state and the family pressures acting on him. The hearing panel recommended suspension and the former volunteer review department recommended disbarment. The Supreme Court ordered Kaplan's disbarment. It found Kaplan's behavior to show a level of dishonesty which warranted the highest level of public protection, when viewed with inadequate evidence to show that Kaplan had been rehabilitated from the conditions which led to his misappropriation. (*Id.* at pp. 1072-1073.) Here, the misappropriation was almost double the size of Kaplan's and it was from a client rather than from law partners. The mitigation was minuscule compared to what Kaplan presented. Moreover, unlike in *Kaplan*, here the hearing judge recommended disbarment. Disbarment is therefore amply warranted here.

III. FORMAL RECOMMENDATION

For the foregoing reasons, we concur in the hearing judge's decision to recommend disbarment in this matter. Accordingly, we recommend that Bruce Howard Blum be disbarred from the practice of law in this state. We also recommend that the Supreme Court order that respondent comply with the provisions of rule 955, California Rules of Court, within the time customary in such matters. [9a] We note, however, that respondent has been inactively enrolled under section 6007 (c) since May 17, 1994, based on the disbarment recommendation of the hearing judge, and that rule 795.5 of our Transitional Rules of Procedure requires an attorney enrolled inactive under that section to give notice equivalent to that required by rule 955, California Rules of Court. Accordingly, we recommend that the Supreme Court order that if respondent provides proof to the State Bar Court, within the time for compliance with rule 955(c) of the California Rules of Court, that he complied timely with rule 795.5 of the Transitional Rules of Procedure incident to his May 1994 involuntary inactive enrollment, then he need not comply with rule 955, California Rules of Court.

We recommend that respondent be ordered to pay costs to the State Bar pursuant to section 6086.10. [9b] Should respondent wish to apply for reinstatement at a later time, he may have credit for the time spent continuously on inactive enrollment. (See *In the Matter of Heiner* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559, 570.)

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WALTER ALEXANDER VARAKIN

A Member of the State Bar

No. 90-O-10296

Filed November 1, 1994

SUMMARY

Representing himself and sometimes his mother, respondent repeatedly filed frivolous motions and appeals in four different cases for the purpose of delay and harassment of his ex-wife and others who became embroiled in his vendetta against her. He continued this pattern of misconduct for a dozen years despite many sanctions. Also, he intentionally refused to report sanctions and to cooperate with a State Bar investigation. Although he had a long discipline-free record, he greatly harmed individuals and the administration of justice, lacked any insight into his misconduct, expressed no remorse, and refused to mend his ways. The hearing judge recommended a four-year stayed suspension and four-year probation, conditioned on actual suspension for two years and until respondent proved rehabilitation, present fitness to practice law, and present learning and ability in the general law. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent requested review. Although the review department agreed with respondent that the notice to show cause did not adequately correlate the charged violations with the alleged misconduct, it found that respondent was not prejudiced because the reason for the charges was specified in the State Bar's pretrial statement. Stressing respondent's serious abuse of the judicial system, lack of repentance, and obdurate persistence in misconduct, the review department concluded that no discipline less than disbarment was consistent with the goals of maintaining high ethical standards for attorneys and preserving public confidence in the legal profession.

COUNSEL FOR PARTIES

For Office of Trials: Donald R. Steedman

For Respondent: Walter A. Varakin, in pro. per.

HEADNOTES

[1 a-d] **106.20 Procedure—Pleadings—Notice of Charges**
106.30 Procedure—Pleadings—Duplicative Charges
The State Bar must articulate in its pleading the reason why violation of each listed statute and rule was charged in the notice to show cause. A notice which recites factual allegations separately from

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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.

a charging paragraph that gives no explanation for the citation of charged statutes and rules, and which fails to correlate each alleged statutory and rule violation with the conduct upon which it was based, is inadequate. Such correlation would allow the identification of alternative theories of culpability and lesser included offenses, thus permitting the elimination of duplicative charges at the time of pretrial or trial.

[2] **106.10 Procedure—Pleadings—Sufficiency**
135 Procedure—Rules of Procedure

Before the State Bar files charges, it has a duty to determine whether reasonable cause exists to charge statutory or rule violations. (Trans. Rules Proc. of State Bar, rule 510.)

[3] **106.20 Procedure—Pleadings—Notice of Charges**
119 Procedure—Other Pretrial Matters
169 Standard of Proof or Review—Miscellaneous

Where the reason for each charged violation was specified by the State Bar in its pretrial statement and where respondent was not prejudiced at trial, the inadequate specification of the reasons for the charges in the notice to show cause was not grounds for reversal.

[4] **135 Procedure—Rules of Procedure**
146 Evidence—Judicial Notice
162.90 Quantum of Proof—Miscellaneous
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act

The State Bar Court may take judicial notice of the records of any California court. (See Evid. Code, § 452, subd. (d)(1); Trans. Rules Proc. of State Bar, rule 556.) Such notice may include the facts stated in court orders, findings of fact, conclusions of law, and judgments. Although civil findings bear a strong presumption of validity if supported by substantial evidence, they must be assessed independently under the more stringent standard of proof applicable to disciplinary proceedings.

[5] **221.00 State Bar Act—Section 6106**
531 Aggravation—Pattern—Found

Acts of moral turpitude are those done contrary to honesty and good morals and are a cause for discipline whether or not they are committed in the practice of law. Even if individual acts do not involve moral turpitude, a pattern of misconduct may amount to moral turpitude. Where respondent repeatedly misstated facts and failed to reveal prior adverse rulings to trial and appellate courts, failed to follow court rules, and flouted the authority of the courts, such serious, habitual abuse of the judicial system constituted moral turpitude.

[6] **213.20 State Bar Act—Section 6068(b)**

By deliberately disobeying court orders, respondent violated an attorney's duty to maintain the respect due to courts of justice.

[7] **213.30 State Bar Act—Section 6068(c)**

By repeatedly filing baseless and vexatious litigation, respondent violated an attorney's duty to counsel or maintain only such actions as appear legal or just.

[8] **213.60 State Bar Act—Section 6068(f)**

By repeatedly requesting courts to hold all opponents in contempt or subject to sanctions with no legitimate grounds for such requests, which were gratuitously insulting and offensive, respondent violated an attorney's duty to abstain from offensive personality.

[9] **213.70 State Bar Act—Section 6068(g)**
By acting in bad faith, out of spite, and with the purpose to harm others and cause delay, respondent violated an attorney's duty to refrain from encouraging the commencement or continuance of an action from a corrupt motive.

[10] **106.30 Procedure—Pleadings—Duplicative Charges**
130 Procedure—Procedure on Review
165 Adequacy of Hearing Decision
169 Standard of Proof or Review—Miscellaneous
Where hearing judge concluded that certain alleged rule violations were duplicative and inconsequential in considering level of discipline, and State Bar did not take issue with such conclusion, and review department determined that respondent should be disbarred based on other findings, review department did not address allegations found to be duplicative.

[11 a-c] **204.10 Culpability—Wilfulness Requirement**
214.50 State Bar Act—Section 6068(o)
The statutory duty to report to the State Bar any judicial sanction of more than $1,000 not imposed for failure to make discovery applies to a sanction incurred by an attorney during self-representation. Violation of this duty may serve as a basis for discipline even though the court imposing the sanction is also required to report the sanction. Knowledge of the reporting requirement is not necessary to find a violation thereof.

[12] **213.90 State Bar Act—Section 6068(i)**
By choosing not to reply in writing to an investigatory letter from the State Bar when he knew a written reply was necessary, respondent intentionally violated an attorney's duty to cooperate with any State Bar investigation. Neither leaving telephone messages nor meeting with a State Bar attorney two years later exonerated respondent of the violation.

[13] **113 Procedure—Discovery**
119 Procedure—Other Pretrial Matters
611 Aggravation—Lack of Candor—Bar—Found
691 Aggravation—Other—Found
Respondent's use of obstructive tactics during his disciplinary proceeding, including abuse of discovery and frivolous motions, constituted a serious aggravating circumstance.

[14 a-c] **172.19 Discipline—Probation—Other Issues**
221.00 State Bar Act—Section 6106
521 Aggravation—Multiple Acts—Found
621 Aggravation—Lack of Remorse—Found
691 Aggravation—Other—Found
802.30 Standards—Purposes of Sanctions
831.20 Standards—Moral Turpitude—Disbarment
861.10 Standards—Standard 2.6—Disbarment
1093 Substantive Issues re Discipline—Inadequacy
Where respondent seriously abused the judicial system for a dozen years despite heavy sanctions, showed no remorse, and refused to mend his ways, no discipline less than disbarment was consistent with the goals of maintaining high ethical standards for attorneys and preserving public confidence in the legal profession. Because of respondent's total lack of repentance, a lengthy suspension coupled with probation terms was inappropriate; there was a great danger that respondent would fail to comply with any probation terms imposed. Respondent's repeated acts of moral turpitude demonstrated that he was no longer worthy of membership in the bar.

ADDITIONAL ANALYSIS

Culpability

Found

213.21 Section 6068(b)
213.31 Section 6068(c)
213.61 Section 6068(f)
213.71 Section 6068(g)
213.91 Section 6068(i)
214.51 Section 6068(o)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.19 Section 6106—Other Factual Basis
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Not Found

271.05 Rule 3-200 [former 2-110]
277.35 Rule 3-700(B) [former 2-111(B)]

Aggravation

Found

584.10 Harm to Public
586.11 Harm to Administration of Justice
586.12 Harm to Administration of Justice

Mitigation

Found

710.10 No Prior Record

Found but Discounted

710.35 No Prior Record

Standards

802.64 Appropriate Sanction
807 Prior Record Not Required
831.30 Moral Turpitude—Disbarment

Discipline

1010 Disbarment

Other

162.11 Proof—State Bar's Burden—Clear and Convincing
162.20 Proof—Respondent's Burden
166 Independent Review of Record
1091 Substantive Issues re Discipline—Proportionality

OPINION

PEARLMAN, P.J.:

For a dozen years, respondent, Walter Alexander Varakin, representing himself and sometimes his mother, repeatedly filed frivolous motions and appeals in four different cases for the purpose of delay and harassment of his ex-wife and others who became embroiled in his vendetta against her. He persisted in this pattern of misconduct despite many sanctions. He also intentionally refused to report sanctions and to cooperate with a State Bar investigation. Although he had a long discipline-free record, he greatly harmed individuals and the administration of justice, lacks any insight into his misconduct, expresses no remorse, and refuses to mend his ways.

At respondent's request, we review a decision recommending a four-year stayed suspension and four-year probation, conditioned on actual suspension for two years and until respondent proves rehabilitation, present fitness to practice law, and present learning and ability in the general law. We recommend that he be disbarred.

I. PROCEDURAL POSTURE

The Office of the Chief Trial Counsel (OCTC) filed an initial notice to show cause on behalf of the State Bar in October 1992 and a first amended notice to show cause in May 1993. After a hearing in June 1993, the hearing judge filed a tentative decision as to culpability in July 1993. Following a further hearing in August 1993, the hearing judge filed a final decision in October 1993.

Neither party sought timely review. The Presiding Judge granted permission to respondent to file a late request for review for good cause shown and denied permission to the State Bar to file a late request for review both for failure to demonstrate good cause and because the State Bar had the opportunity in response to respondent's request for review to raise all of the same issues it would have raised if it had sought review.

II. DISCUSSION

We must independently review the record and may adopt findings, conclusions, and a disciplinary recommendation at variance with the hearing decision. (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 145-146.) In a disciplinary proceeding, OCTC must prove culpability and aggravating circumstances by clear and convincing evidence. An attorney accused of misconduct must prove mitigating circumstances by clear and convincing evidence. (*In the Matter of Broderick, supra,* 3 Cal. State Bar Ct. Rptr. at p. 150, fn. 10; Trans. Rules Proc. of State Bar, div. V, Standards for Atty. Sanctions for Prof. Misconduct (standards), stds. 1.2(b), (e).)

We have independently reviewed the record and based upon this review we adopt the hearing judge's findings of fact. We set forth those findings in summary fashion in our discussion below.

A. Count 1

1. Findings of fact

Respondent was admitted to the bar in November 1951.

Anne Kirueshkin sued respondent for divorce in 1969.

The current proceeding focuses on respondent's conduct in four matters: the Tarnavsky, Kirueshkin, TICOR, and Steinberg cases. In the Tarnavsky case, the conservator of Amalia Tarnavsky sought the partition of real property located on Portola Drive in San Francisco. This property belonged to Tarnavsky, the former marital estate of respondent and Kirueshkin, and respondent's mother. Respondent represented himself and his mother.

The Kirueshkin case resulted from respondent's alleged refusal to abide by a property stipulation. Kirueshkin sought the partition of real property

located on Ninth Avenue in San Francisco. This property belonged to the former marital estate of respondent and Kirueshkin. Respondent represented himself.

The TICOR case was an interpleader action in which TICOR placed $75,000 plus interest from the proceeds of the sale of the Portola Drive property for division among the defendants. Respondent represented himself and his mother.

In the Steinberg case, respondent sought damages from Kirueshkin and her attorney, Steinberg, for alleged slander and infliction of emotional distress. Respondent represented himself.

From July 1983 to August 1993, respondent repeatedly filed frivolous motions and appeals. Between November 1986 and November 1990, he received eight sanctions from the superior court and six sanctions from the Court of Appeal. These fourteen sanctions totalled more than $80,000, which the record indicates respondent has paid.

The appellate sanctions reflect the egregiousness of respondent's conduct in litigation. In November 1986, the Court of Appeal imposed a sanction of $2,000 on respondent in the Kirueshkin case. Respondent mischaracterized the record, persistently failed to support his factual assertions with citations to the record, only sporadically supported his legal contentions by citations to authorities, misdescribed authorities, failed to address the standard of review, and repeatedly made points not raised below or inadequately preserved for appeal. As the court stated, respondent ignored the most elementary rules of appellate review and presented an incoherent melange of half-formed arguments and hints of error.

In November 1988, the Court of Appeal imposed a sanction of $9,419 on respondent and his mother in the Tarnavsky case. Respondent raised five claims: three which the Court of Appeal had rejected in a prior appeal and two which respondent had failed to raise at the trial level. As the court stressed, respondent consistently abused every legal process, raised completely meritless issues, and unnecessarily wasted the time and resources of the parties and the court.

In January 1990, the Court of Appeal imposed a sanction of $2,568 on respondent and his mother in the TICOR case. Respondent presented long, rambling, frequently unintelligible briefs containing completely meritless arguments. As the Court of Appeal concluded, the sole purpose of the appeal was to delay the time when Kirueshkin could obtain her share of the interpled funds.

In January 1990, the Court of Appeal imposed a sanction of $25,000 on respondent and his mother in a consolidation of appeals connected with the Tarnavsky, Kirueshkin, and TICOR cases. As the court stated, respondent made absurd legal contentions, abused every available legal process to delay fulfilling his obligations, and harmed Kirueshkin, the court system, the taxpayers, and other parties by his frivolous appeals.

In May 1990, the Court of Appeal imposed a sanction of $3,600 on respondent in the Steinberg case. In the Kirueshkin case, respondent had called Steinberg to answer questions about documents. While testifying, Steinberg stated that respondent had stolen some files. As a communication in a judicial proceeding with a connection to the action, this statement was privileged. (See ***Rubin* v. *Green*** (1993) 4 Cal.4th 1187, 1193-1194.) Nevertheless, respondent sued Steinberg for slander. After the superior court sustained Steinberg's demurrer without leave to amend, respondent appealed. The court concluded that the appeal was totally without merit and was prosecuted solely for harassment.

In November 1990, the Court of Appeal imposed a sanction of $18,995 on respondent in a consolidation of appeals connected with the Tarnavsky and Kirueshkin cases. As the court observed, respondent's appeals were manifestly frivolous and completely meritless and were taken solely for the purpose of delay and harassment. Observing that prior sanctions had not deterred respondent, the court ordered that parties opposing respondent and real parties in interest would not be required to file briefs or opposing memorandums in

any further appeals, motions, or writ petitions filed by respondent related to his marital dissolution unless requested to do so by the court.

2. *Notice to show cause*

Count 1 of the first amended notice to show cause alleges that respondent engaged in meritless litigation in four different cases frivolously and in bad faith. It includes several pages describing the cases and monetary sanctions imposed against respondent in each case. Count 1 of the notice to show cause concludes with a single paragraph stating: "You committed the above-referenced acts in wilful violation of your oath and duties as an attorney under disciplinary case law and/or California Business and Professions Code sections 6068(b), 6068(c), 6068(f), 6068(g), 6103 and 6106; and of former Rules of Professional Conduct 2-110(A), 2-110(B), 2-110(C), 6-101(A)(2), and 6-101(B)(2); and of current Rules of Professional Conduct 3-110(A), 3-200(A), 3-200(B), 3-700(B)(1)."[1]

[1a] Respondent argues that the notice was inadequate because it did not correlate each alleged statutory and rule violation with the conduct upon which it was based. The State Bar contends, among other things, that respondent waived the issue of the adequacy of the notice to show cause by failing to file an appropriate motion to dismiss; that respondent failed to explain how he was prejudiced; and that in any event respondent received a detailed response to his initial set of interrogatories and admission requests concerning the substance of the charges and, in addition, received a pretrial statement which set forth the State Bar's contentions in detail.

[1b] We agree with both parties. The State Bar still appears to be following its historic pleading practice of reciting all of the factual allegations separately from a catch-all charging paragraph which gives no explanation for the citation of any particular statute or rule allegedly violated. No justification has been offered for the continuation of this practice which was severely criticized several years ago in two Supreme Court opinions—*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 931, and *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968—and criticized again by the Supreme Court two years later in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816.

Although the opinions in *Maltaman* and *Guzzetta* are best known for their criticism of the inadequacy of the volunteer referees' written decisions, in both *Maltaman* and *Guzzetta* the Supreme Court specified that the charges were just as problematic as the volunteer referees' conclusory findings, noting that, "Not only does this failure make the work of this court more difficult . . ., but it also brings into question the adequacy of the notice given to an attorney of the basis for the disciplinary charges. [Citations.]" (*Guzzetta* v. *State Bar, supra*, 43 Cal.3d at p. 968, fn. 1; accord, *Maltaman* v. *State Bar, supra*, 43 Cal.3d at p. 931, fn. 1.)

In *Baker* v. *State Bar, supra*, the Supreme Court again pointed to the vexing problem created when the State Bar did not identify "*with specificity both the rule or statutory provision that underlies each charge and the manner* in which the conduct allegedly violated that rule or statutory provision." (49 Cal.3d at p. 816, emphasis added.) Again in *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 172 the State Bar was reminded of the three prior Supreme Court admonitions. This review department then noted "It is not only incumbent upon the Office of Trial Counsel to determine which specific conduct of the respondent is at issue, but to articulate the nature of the conduct with particularity in the notice to show cause, *correlating the alleged misconduct with the rule or statute allegedly violated thereby.*" (*Ibid.*, emphasis added.) It is disturbing that the same pleading problems persist despite three Supreme Court opinions and a review department opinion on the subject in the past seven years.

1. Unless otherwise indicated, all further references to sections denote sections of the Business and Professions Code; all references to former rules denote provisions of the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989; and all references to current rules denote provisions of the Rules of Professional Conduct in effect from May 27, 1989, onwards.

[2] As we observed in *In the Matter of Glasser*, before the State Bar files charges it has a duty to determine whether reasonable cause exists for charging a member with statutory or rule violations. (*Ibid.*, citing rule 510, Trans. Rules Proc. of State Bar.) **[1c]** Presumably, the draftspersons of the notices to show cause in *Maltaman, Guzzetta, Baker, Glasser* and the instant case knew why violation of every statute and rule listed in the catch-all final paragraph of each pleading was charged. All that the Supreme Court and this court require is that the reason be articulated in the pleading so that neither the respondent nor the court is left to guess at the reason for any specified rule or statute being listed as violated. This should not place an undue burden on the State Bar which must in any event establish that correlation clearly and convincingly in order to prevail at trial.[2] **[1d - see fn. 2] [3]** Nonetheless, we agree with the hearing judge that the reason for each of the charges in this matter was ultimately specified by the State Bar in its pretrial statement and respondent was not prejudiced at trial.

3. Court records

The hearing judge admitted into evidence approximately 6,500 pages of records from the superior court and Court of Appeal about respondent's frivolous litigation. Respondent argued at the hearing level, and argues before us, that these records should be excluded as hearsay.

We disagree. **[4]** We may take judicial notice of the records of any California court. (See Evid. Code, § 452, subd. (d)(1); Trans. Rules Proc. of State Bar, rule 556 [rules of evidence in civil cases generally applicable to State Bar Court proceedings].) In doing so, we may take judicial notice of the facts stated in court orders, findings of fact, conclusions of law, and judgments. (See *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 254-255, and cases cited therein.) Nevertheless, although "civil findings bear a strong presumption of validity if supported by substantial evidence," they must be assessed "independently under the more stringent standard of proof applicable to disciplinary proceedings." (*Maltaman* v. *State Bar, supra*, 43 Cal.3d at p. 947.) In reaching our conclusions in this matter, we have followed the dictates of the above authorities.

4. Conclusions of culpability

The most serious charge against respondent in count 1 of the notice is the allegation that he violated section 6106, which prohibits acts of moral turpitude.[3] The hearing judge concluded that respondent was culpable.

We agree. **[5]** Acts of moral turpitude are those done contrary to honesty and good morals. (*Kitsis* v. *State Bar* (1979) 23 Cal.3d 857, 865; *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 187.) They are a cause for discipline whether or not they are committed in the practice of law. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.) Even if individual acts do not involve moral turpitude, a pattern of misconduct may amount to moral turpitude. (*In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 14.) The record clearly and convincingly establishes that respondent repeatedly misstated facts and failed to reveal prior adverse rulings to trial and appellate courts, failed to follow court rules and flouted the authority of the courts. Such serious, habitual abuse of the judicial system constitutes moral turpitude in violation of section 6106. (Cf. *Maltaman* v. *State Bar, supra*, 43 Cal.3d at p. 951

2. **[1d]** Also, if the State Bar in its initial pleading correlates the alleged misconduct with the rules or statutes which it charges were violated, this would permit the State Bar to identify specifically those charges which constitute alternative theories of culpability or lesser included offenses. If this is done, then at the time of pretrial or trial, it should be possible to identify and eliminate those charges which prove to be duplicative. This would avoid the unnecessary expenditure of effort by the parties and the court on duplicative charges. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 634.)

3. As an example of what might have constituted proper notice pleading, correlation of the misconduct to the alleged violation of section 6106 could have been achieved simply by alleging that the pattern of frivolous and meritless motions and appeals, coupled with repeated misstatement of facts and concealment of prior adverse rulings, constituted acts of moral turpitude in violation of section 6106, if that was in fact the basis upon which the statute was invoked.

[moral turpitude involved in an attorney's noncompliance with court orders if no plausible ground for noncompliance existed or if the attorney lacked belief in plausible grounds for noncompliance].)

Count 1 of the notice also involved charges that respondent violated section 6068 (b) which sets forth a member's duties to maintain the respect due to courts of justice; section 6068 (c) which requires members of the State Bar to counsel or maintain only such actions as appear legal or just; section 6068 (f) which requires members of the State Bar to abstain from offensive personality; and section 6068 (g) which requires members of the State Bar to refrain from encouraging the commencement or continuance of an action from a corrupt motive.

[6] We agree with the hearing judge that respondent violated section 6068 (b) by deliberate disobedience of court orders. [7] We also agree that respondent violated section 6068 (c) by repeatedly filing baseless and vexatious litigation. (See *Geibel* v. *State Bar* (1938) 11 Cal.2d 412; *Light* v. *State Bar* (1939) 14 Cal.2d 328, 334.) [8] We further agree that respondent violated section 6068 (f) as specified in the pretrial statement by making repeated requests of the court to hold all those who opposed his interests in contempt or subject to sanctions when there was no legitimate ground for his requests which were also gratuitously insulting and offensive. [9] We further agree that the section 6068 (g) charge was proved because respondent was shown to have acted in bad faith, out of spite and with the purpose to harm others and cause delay.

Further, count 1 alleged violations of rules concerning the acceptance of employment, failure to perform legal services competently, prohibited objectives of employment, and mandatory withdrawal from employment (i.e., former rules 2-110(A), 2-110(B), 2-110(C), 6-101(A)(2), and 6-101(B)(2) and current rules 3-110(A), 3-200(B), and 3-700(B)(1)). [10] The hearing judge concluded that respondent was culpable of violating former rules 6-101(A)(2) and 6-101(B) and current rule 3-110(A)[4] by repeated acts of incompetence but concluded that the remaining allegations of rule violations were duplicative and inconsequential in considering the level of discipline to be imposed. (See *Bates* v. *State Bar, supra,* 51 Cal.3d at p. 1060.) OCTC has not raised any issue with respect to the hearing judge's decision in this regard. Consequently, we have not addressed the additional allegations in count 1 in light of our determination that respondent should be disbarred based on the hearing judge's other findings.

B. Count 2

1. Findings of fact

Former section 6068 (n)(3) provided that an attorney had the duty to report to the State Bar in writing within 30 days of the time the attorney had knowledge of the imposition of any judicial sanctions against the attorney, except sanctions for failure to make discovery or monetary sanctions of less than $1,000. Former section 6068 (n)(3) became effective January 1, 1987.

In 1987 and 1988, courts four times imposed judicial sanctions exceeding $1,000 on respondent. He made no report to the State Bar. Effective January 1, 1989, former section 6068 (n)(3) was redesignated as current section 6068 (o)(3). Its provisions remained the same. In 1989 and 1990, courts five times imposed judicial sanctions greater than $1,000 on respondent. He made no report to the State Bar.

On May 10, 1990, the State Bar sent respondent a letter inquiring about judicial sanctions of which it had learned. The letter asked him for information about the sanctions and advised him of his duty under current section 6068 (o)(3) to report sanctions. Respondent received this letter, but did not contact the State Bar to determine whether the State Bar's knowledge of any sanctions against him relieved him of his duty to report them.

On May 18, 1990, the Court of Appeal imposed a sanction of $3,600 on respondent. Although he

4. Current rule 3-110 became effective on May 27, 1989, replacing former rule 6-101(A)(2).

knew about the statutory reporting requirement, he made no report to the State Bar.

On August 1, 1990, the State Bar sent respondent another letter which he received. The second letter reminded him of the first letter, asked him for information about the judicial sanctions imposed in January and May 1990, and again advised him of his duty to comply with current section 6068 (o)(3).

On November 9, 1990, the Court of Appeal imposed a sanction of $18,995 against respondent. He did not report this sanction to the State Bar.

2. Conclusions of culpability

Count 2 of the initial and amended notices to show cause alleged that by failing to report the judicial sanctions against him greater than $1,000 from 1987 onwards, respondent violated former section 6068 (n)(3) and current section 6068 (o)(3). The hearing judge concluded that respondent was culpable.

Citing no authority, respondent claims that the statutory reporting requirement applies when a sanction is imposed against an attorney for conduct in representing a party to an action, but not when a sanction is imposed against an attorney as a party to an action. Respondent thus argues that section 6068 (o)(3) applied only when the appellate sanctions of $25,000 and $2,568 were imposed against him in January 1990 because he was sanctioned on other occasions as a party to an action. Although respondent admitted in his answer to the initial notice to show cause that he failed to file timely reports with the State Bar regarding the sanctions, he denied that he wilfully violated any ethical duty. In his brief on review, he asserts that he did not report the $25,000 and $2,568 sanctions because the Court of Appeal had already reported them and because he did not feel it necessary to duplicate the court's reports.

[11a] Both former section 6068 (n)(3) and current section 6068 (o)(3) provide that an attorney must report *any* judicial sanction unless the sanction is for less than $1,000 or for failure to make discovery. The Legislature did not exclude sanctions incurred in self-representation. This is in contrast to the Legislature's explicit limitation of other reporting requirements to events involving the conduct of an attorney in a professional capacity. (See, e.g., §§ 6068 (o)(1) [the filing of three or more lawsuits in twelve months against an attorney for malpractice or other wrongful conduct committed in a professional capacity], 6068 (o)(2) [the entry of judgment against an attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity].) Given the absence of such an explicit limitation in either former section 6068 (n)(3) or current section 6068 (o)(3), we conclude that the provisions thereof apply to sanctions imposed against an attorney as a party to an action, as well as sanctions imposed against an attorney for conduct in representing a party to an action.

[11b] Respondent also argues that the reporting requirements were met by the courts. The Legislature has enacted statutes requiring that *both* the courts imposing sanctions of $1,000 or more on attorneys *and* the attorneys receiving such sanctions make reports to the State Bar, which may then investigate whether the attorney has committed misconduct warranting discipline. (See §§ 6068 (o)(3), 6086.7 (c).[5]) Further, the Legislature has specified that an attorney's failure to make a report required by current section 6068 (o) may serve as a basis for discipline. (See § 6068 (o)(10).)

[11c] Respondent invites us to rewrite the legislation to absolve him of responsibility for reporting sanctions in the event the court reports the sanctions pursuant to its statutory duty. The duties are not in the alternative, but separately imposed by statute on both the court and the attorney. Respondent cannot claim ignorance of this requirement. By choosing not to report the $3,600 sanction imposed on May 18, 1990, and the $18,995 sanction imposed on November 9, 1990, when he knew that he was required to do so,

5. Current section 6086.7 (c) became effective January 1, 1991. Its provisions are almost exactly the same as the provisions of former section 6089 (b), which was effective from January 1, 1987, through December 31, 1990.

respondent intentionally violated current section 6068 (o)(3). In any event knowledge of either former section 6068 (n)(3) or current section 6068 (o)(3) is not an element of the offense. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 176.) Therefore respondent violated these statutes by wilfully failing to report all of the sanctions imposed against him.

C. Count 3

1. Findings of fact

As discussed *ante*, the State Bar mailed inquiry letters to respondent on May 10 and August 1, 1990. An investigator in the Los Angeles office of the State Bar sent the May 10 letter; an investigator in the San Francisco office, the August 1 letter. Each letter referred to the State Bar's investigation of sanctions against him and indicated the need for a written reply discussing the sanctions. The second letter reminded him of his duty under section 6068 (i) to cooperate with any State Bar investigation.

Respondent received these letters, but did not reply to them in writing. He testified that he instead left several telephone messages with a receptionist for the State Bar and that he assumed the matter had been dropped because he received no return telephone calls. He admitted, however, that he never telephoned the Los Angeles office. Also, the San Francisco investigator testified about the existence of procedures to ensure the delivery of telephone messages and denied the receipt of any messages from respondent.

On August 24, 1992, the State Bar sent respondent a letter allowing him to meet with a State Bar attorney before the filing of the initial notice to show cause. He attended a meeting on September 3, 1992.

2. Conclusions of culpability

Count 3 of the initial and amended notices to show cause alleged that by failing to reply to the State Bar's letters of May 10 and August 1, 1990, respondent violated section 6068 (i). The hearing judge concluded that respondent was culpable. We agree.

[12] By choosing not to reply in writing to the State Bar's investigatory letter of August 1, 1990, when he knew a written reply was necessary, respondent intentionally violated section 6068 (i). Any telephone messages which he may have left were an obviously inadequate response to the State Bar's investigation. His meeting two years later with a State Bar attorney before the filing of the initial notice to show cause does not exonerate him. (*In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 452-453.)

D. Aggravating Circumstances

Clear and convincing evidence in the record shows a number of serious aggravating circumstances: multiple acts of wrongdoing (see std. 1.2(b)(ii)); significant harm to Kirueshkin, Steinberg, and others who were forced to defend against respondent's frivolous motions and appeals (see std. 1.2(b)(iv)); significant harm to the administration of justice resulting from respondent's waste of judicial time and resources over a dozen years (*ibid.*); respondent's complete lack of remorse and insight regarding his misconduct (see *Weber* v. *State Bar* (1988) 47 Cal.3d 492, 506, 508; *In the Matter of Morse* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 24, 35); and **[13]** respondent's use of obstructive tactics during the disciplinary proceeding, especially his abuse of discovery and frivolous motions. (See std. 1.2(b)(vi).)

E. Mitigating Circumstance

The record clearly and convincingly establishes a significant mitigating circumstance: respondent's lack of a disciplinary record between his admission to the bar in 1951 and his first misconduct by filing of a frivolous appeal in the Kirueshkin case in 1983. (See std. 1.2(e)(i).)

F. Discipline

The hearing judge recommended a four-year stayed suspension and four-year probation, conditioned on actual suspension for two years and until respondent proves rehabilitation, fitness to practice, and learning and ability in the general law at a

hearing under standard 1.4(c)(ii). In his brief on review, respondent argues that there is no basis for any actual suspension. OCTC seeks disbarment.

In determining the appropriate discipline, we look first to the standards for guidance. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Broderick, supra,* 3 Cal. State Bar Ct. Rptr. at p. 157.) Under standard 1.3, the primary purposes of discipline are 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. Standard 2.3 calls for the actual suspension or disbarment of an attorney culpable of committing acts of moral turpitude. Standard 2.6 calls for suspension or disbarment for violation of subdivisions of section 6068 depending on the gravity of the offense or the harm to the victim.

The recommended discipline must rest upon a balanced consideration of all relevant factors. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 35; *In the Matter of Broderick, supra,* 3 Cal. State Bar Ct. Rptr. at p. 157.) Also, it must be consistent with the discipline imposed in similar proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Broderick, supra,* 3 Cal. State Bar Ct. Rptr. at p. 157.)

[14a] Because of respondent's total lack of repentance we cannot agree with the hearing judge's recommendation of a lengthy suspension coupled with probation terms. In view of respondent's lack of repentance the danger is great that he will fail to comply with any probation terms imposed. (Cf. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 501; *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 385, 388.)

[14b] For a dozen years, respondent seriously abused the judicial system. Many heavy sanctions failed to deter him. Having pursued a relentless pattern of filing motions and appeals which were manifestly frivolous, meritless and taken solely for the purpose of delay and harassment, he is culpable of acts of moral turpitude. He also intentionally violated the statutory requirements to report sanctions greater than $1,000 and to cooperate with the State Bar's investigation of his misconduct. His very long period in practice without a prior disciplinary record deserves substantial weight in mitigation, but does not preclude disbarment. (See *Weber* v. *State Bar, supra,* 47 Cal.3d at p. 508; *Bambic* v. *State Bar* (1985) 40 Cal.3d 314, 324-325.) He significantly harmed Kirueshkin, Steinberg, and other parties, as well as the administration of justice, and tried to obstruct the disciplinary proceedings. He is devoid of insight into his misconduct and has shown no remorse. Instead, he testified that he is proud of his conduct, that he believes he did nothing wrong, and that he would basically act in the same way if he had it all to do over again. Even after the hearing judge's tentative decision as to culpability, respondent filed a totally frivolous disqualification statement against the superior court judge in the TICOR case. He obdurately refuses to mend his ways. He appealed the hearing judge's decision arguing that the State Bar had not met its burden of proof regarding *any* of the charges of count 1 and that no suspension was warranted because there was no threat shown to the public at large.

We agree with the State Bar that the frivolous lawsuit involved in *Sorenson* v. *State Bar* (1991) 52 Cal.3d 1036[6] pales in comparison to respondent's odyssey.

We also agree with the State Bar that like the attorney in *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, respondent engaged in conduct intended to harass others, delay court proceedings, obstruct justice and abuse the legal process. Like Rosenthal, respondent "shows no remorse and adamantly main-

6. In *Sorensen* v. *State Bar, supra,* 52 Cal.3d 1036, Sorensen vindictively reacted to a $45 billing dispute with a court reporter by filing a complaint for fraud which sought $14,000 in punitive damages and which required the reporter to incur legal fees and expenses of about $4,375. (*Id.* at pp. 1038-1040, 1045.) Declaring that the discipline for this abuse of the judicial process had to reflect the harm to the reporter, provide assurance to the public and the bar that such misconduct would not be tolerated, and reflect Sorensen's lack of insight and remorse, the Supreme Court imposed a one-year stayed suspension and two-year probation, conditioned on restitution and a thirty-day actual suspension. (*Id.* at pp. 1044, 1045.)

tains that he is completely free of any wrongdoing." (*Id.* at p. 636.)

Another instructive case is *Lebbos* v. *State Bar* (1991) 53 Cal.3d 37, 45. Stressing Lebbos's rampant pattern of misconduct and deceit, her noncooperation with the State Bar during the disciplinary proceedings, and her failure to appreciate the totally unethical nature of her conduct, the Supreme Court concluded that disbarment was necessary to protect the public, preserve confidence in the profession, and maintain high professional standards. Here, too, no discipline less than disbarment is consistent with the goals of maintaining high ethical standards for attorneys and preserving public confidence in the legal profession.

[14c] Respondent's repeated acts of moral turpitude demonstrate that he is no longer worthy of membership in the bar. Nothing the attorney discipline system can do will prevent respondent from continuing to abuse the legal system as a litigant, if he so chooses. But disbarring respondent will at least prevent him from continuing his abusive course of conduct under the cloak of authority conferred on him by his membership in the bar.

III. RECOMMENDATION

We recommend that respondent be disbarred. We also recommend that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of rule 955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court order. We further recommend that the State Bar be awarded costs under section 6086.10 of the Business and Professions Code.

We concur:

NORIAN, J.
STOVITZ, J.

State Bar Court
Review Department

In the Matter of

Mason Harry Rose V

A Member of the State Bar

Nos. 91-C-07603, 92-P-13660, 92-N-16099

Filed December 7, 1994; reconsideration denied, March 6, 1995

Summary

Respondent was convicted of carrying a loaded firearm in a vehicle in a city, a misdemeanor. Respondent was also charged with failing to comply with probation conditions imposed in a prior discipline matter and with failing to file an affidavit of compliance with rule 955, California Rules of Court, as ordered in a second prior discipline matter. In this consolidated proceeding, the hearing judge dismissed the criminal conviction matter because he found that the circumstances surrounding the conviction did not involve moral turpitude or other misconduct warranting discipline. However, the hearing judge found that respondent failed to comply with the reporting conditions of his probation and wilfully failed to file timely the affidavit required by rule 955, California Rules of Court. Based on this misconduct and respondent's record of prior discipline, the hearing judge recommended disbarment. (Hon. Christopher W. Smith, Hearing Judge.) The parties' subsequent proposal to stipulate to lesser discipline was rejected. (Hon. David S. Wesley, Hearing Judge.)

Respondent requested review, arguing that the recommended discipline should be reduced to nine months actual suspension. The review department adopted the hearing judge's culpability conclusions. Although the misconduct was serious, the review department found less aggravation and more mitigation than the hearing judge. Respondent had timely complied with the conditions of his disciplinary probation for two years prior to the present violation, and he had attempted to file the rule 955 affidavit within two weeks of when it was due. Balancing these and other factors, the review department reduced the recommended discipline in the probation matter to five years stayed suspension and five years probation, with two years actual suspension; and in the rule 955 matter to two years stayed suspension and two years probation, with nine months actual suspension. The review department also recommended that the discipline in these two matters run concurrently.

Counsel for Parties

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: James M. Weinberg

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-e] **1517 Conviction Matters—Nature of Conviction—Regulatory Laws**
1527 Conviction Matters—Moral Turpitude—Not Found
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
Where respondent was convicted of carrying a loaded firearm in a vehicle in a city, and respondent had an expired concealed weapons permit which he had intended to renew, and was carrying the gun due to a reasonable belief that he and his family were in danger from a person who had made death threats against him, respondent's conviction involved neither moral turpitude nor misconduct constituting a basis for the imposition of professional discipline.

[2] **175 Discipline—Rule 955**
1913.60 Rule 955—Not in Active Practice
Even though respondent had no clients or opposing counsel to notify of his disciplinary suspension under rule 955(a), California Rules of Court, he was still required to file the affidavit required by subdivision (c) of that rule.

[3 a, b] **715.50 Mitigation—Good Faith—Declined to Find**
1719 Probation Cases—Miscellaneous
Respondent was not entitled to finding in mitigation based on asserted good faith belief that reports required by disciplinary probation conditions were due only during actual suspension, where hearing judge did not find respondent's testimony regarding his belief credible; where language of probation conditions at best established ambiguity; where respondent did not research the issue, did not seek clarification, and did not consult with anyone regarding his interpretation of disciplinary order; and where probation department informed respondent that reports were due during entire period of probation.

[4 a-d] **795 Mitigation—Other—Declined to Find**
1719 Probation Cases—Miscellaneous
Respondent was not entitled to finding in mitigation based on asserted reliance on advice of probation clerk regarding due date of probation reports, where hearing judge found clerk's testimony denying such advice credible; where any confusion respondent may have had regarding due date of reports was not reasonable; and where letter sent to respondent by probation department contained information which should have dispelled any confusion respondent may have had regarding due dates of reports.

[5] **136 Procedure—Rules of Practice**
735.50 Mitigation—Candor—Bar—Declined to Find
Where respondent was ordered by hearing judge to file pretrial statement as provided by rule 1222, Provisional Rules of Practice, respondent's actions in entering into joint pretrial statement with State Bar did not constitute spontaneous candor and cooperation which would warrant finding in mitigation.

[6 a, b] **586.50 Aggravation—Harm to Administration of Justice—Declined to Find**
1719 Probation Cases—Miscellaneous
1913.24 Rule 955—Delay—Filing Affidavit
Where, in a particular case involving violation of rule 955, California Rules of Court, and of disciplinary probation reporting requirements, there was no evidence to support a finding of significant harm to the administration of justice, separate and apart from evidence that supported culpability for charged violations, no finding in aggravation based on such harm was appropriate.

[7 a-d] **199 General Issues—Miscellaneous**
695 Aggravation—Other—Declined to Find
795 Mitigation—Other—Declined to Find
1099 Substantive Issues re Discipline—Miscellaneous
1714 Probation Cases—Degree of Discipline
1913.60 Rule 955—Not in Active Practice

Where respondent's first actual suspension ended in December 1991, and his second actual suspension, which was ordered to be "consecutive" to the first, did not take effect until June 1992, hearing judge did not err in finding that respondent could have practiced law during the interval, and fact that respondent did not in fact practice law during such time did not entitle him to "credit for time served" and was neither a mitigating nor an aggravating circumstance in subsequent proceeding for probation violation and failure to comply with rule 955, California Rules of Court.

[8] **745.59 Mitigation—Remorse/Restitution—Declined to Find**
1719 Probation Cases—Miscellaneous

A disciplinary probationer's belated filing of required probation reports could, under appropriate circumstances, demonstrate recognition of wrongdoing, even if such reports were technically defective. However, where respondent did not file late reports until after he learned probation revocation proceeding was pending against him, his actions were not a spontaneous recognition of wrongdoing and thus were not a mitigating circumstance.

[9] **745.10 Mitigation—Remorse/Restitution—Found**
1913.24 Rule 955—Delay—Filing Affidavit

Where respondent was not aware of pendency of rule 955 violation proceeding when he belatedly attempted to file affidavit required by rule 955(c), California Rules of Court, respondent's attempted untimely filing was basis for mitigation as spontaneous recognition of wrongdoing.

[10] **535.20 Aggravation—Pattern—Declined to Find**

Where vast majority of respondent's prior misconduct involved inattention to needs of clients, and current misconduct involved inattention to disciplinary orders, there was no common thread demonstrating a pattern of misconduct.

[11 a, b] **801.41 Standards—Deviation From—Justified**
806.59 Standards—Disbarment After Two Priors

Where Supreme Court opinion in respondent's first disciplinary matter was filed after respondent committed misconduct involved in second disciplinary matter, but respondent was already involved in disciplinary process before he committed much of misconduct in second matter, respondent had opportunity to heed warning that disciplinary process should have provided him. However, timing of misconduct in various disciplinary proceedings is but one factor to consider, and review department did not apply standard providing for disbarment for third instance of misconduct, where other factors weighed against its strict application.

[12 a, b] **174 Discipline—Office Management/Trust Account Auditing**
1714 Probation Cases—Degree of Discipline

Greatest degree of discipline for violating probation conditions is merited for violation significantly related to attorney's prior misconduct, especially where violation raises serious concern about need for public protection or shows probationer's failure to undertake rehabilitative steps. Violation of probation which involved failing to comply with trust account audit condition was substantially related to respondent's underlying misconduct involving failure to keep accurate

records of entrusted funds, failure to maintain sufficient funds in trust, and failure to account to clients and other persons to whom respondent had fiduciary duty.

[13] **179 Discipline Conditions—Miscellaneous**
802.30 Standards—Purposes of Sanctions
1714 Probation Cases—Degree of Discipline
1913.19 Rule 955—Wilfulness—Other Issues
Respondent's unilateral and ill-conceived interpretations of disciplinary orders demonstrated tendency toward interpreting important and significant court orders in such a way as to fit his needs, which might negatively impact future clients and thus raised concern about need to protect public.

[14 a, b] **1714 Probation Cases—Degree of Discipline**
Where respondent timely complied with disciplinary probation conditions for two years prior to violating them, and therefore had taken important steps toward rehabilitation, imposing entire period of stayed suspension was not necessary to achieve goals of attorney disciplinary probation.

[15 a, b] **511 Aggravation—Prior Record—Found**
720.10 Mitigation—Lack of Harm—Found
745.10 Mitigation—Remorse/Restitution—Found
1913.24 Rule 955—Delay—Filing Affidavit
1913.70 Rule 955—Lesser Sanction than Disbarment
Where respondent attempted to file required affidavit of compliance with rule 955, California Rules of Court, within two weeks after it was due and before he was aware of initiation of rule 955 violation proceeding, and no clients were harmed, but respondent had also violated probation and had substantial prior discipline record, nine months actual suspension was appropriate discipline for respondent's wilful failure to comply with rule 955(c).

[16] **179 Discipline Conditions—Miscellaneous**
1099 Substantive Issues re Discipline—Miscellaneous
1913.70 Rule 955—Lesser Sanction than Disbarment
Period of stayed suspension was required for respondent's wilful failure to comply with rule 955(c), California Rules of Court, so as to provide enforcement mechanism for compliance with terms and conditions of probation.

[17] **199 General Issues—Miscellaneous**
1099 Substantive Issues re Discipline—Miscellaneous
Discipline imposed in separate disciplinary proceedings may be "concurrent" without either starting together or ending at same time, in sense that periods of probation and actual suspension imposed in different proceedings run together only during time periods that they overlap.

ADDITIONAL ANALYSIS

Culpability

Found

1751 Probation Cases—Probation Revoked
1915.10 Rule 955

Aggravation

Found

521 Multiple Acts

Mitigation

Found

765.10 Pro Bono Work

Discipline

1813.11 Stayed Suspension—5 Years
1815.08 Actual Suspension—2 Years
1817.11 Additional Probation—5 Years
1923.08 Stayed Suspension—2 Years
1924.05 Actual Suspension—9 Months
1925.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing
1820 Probation Conditions

Other

1715 Probation Cases—Inactive Enrollment

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge that respondent, Mason Harry Rose V, be disbarred from the practice of law. These three consolidated proceedings involve a criminal conviction matter, a probation revocation matter, and a matter to determine whether respondent wilfully failed to comply with rule 955 of the California Rules of Court (rule 955). The hearing judge concluded that respondent violated his disciplinary probation and failed to comply with rule 955, subdivision (c), but that respondent was not culpable of professional misconduct in the criminal conviction matter.

Based on this misconduct and the record the hearing judge concluded that respondent should be disbarred. The hearing judge also enrolled respondent as an inactive member of the State Bar, effective June 18, 1993, under section 6007, subdivision (d) of the Business and Professions Code.[1]

Respondent requested review, arguing that the recommended discipline should be reduced to nine months actual suspension. The Office of the Chief Trial Counsel (OCTC) argues in reply that we should adopt the hearing judge's decision, including the disbarment recommendation.

We have independently reviewed the record and conclude that respondent is culpable of the misconduct found by the hearing judge. Although we view the misconduct as serious, we find more mitigating and less aggravating circumstances than did the hearing judge and we therefore reduce the recommended discipline. In addition, the hearing judge made a single recommendation as to discipline for both the probation revocation and rule 955 cases. We make separate recommendations. (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 68-69.)

In the probation revocation matter, we recommend that respondent's probation be revoked and that an additional five-year period of stayed suspension and five-year period of conditional probation be imposed, with two years actual suspension but with credit for the period of time he was inactively enrolled under section 6007 (d). In the rule 955 matter, we recommend that a two-year period of stayed suspension and two-year period of conditional probation be imposed, with nine months actual suspension. We further recommend that the discipline in these two matters run concurrently, recognizing that the discipline in the probation revocation matter may begin before the discipline in the rule 955 matter. (See rule 952(a) and (b), Cal. Rules of Court.)

BACKGROUND

Hearings in these consolidated matters were held before Judge Christopher W. Smith in August 1992 and January 1993 and his decision was filed in June 1993. Judge Smith retired and July 31, 1993, was his last day as a State Bar Court judge. Pursuant to rules 113 and 262 of the Transitional Rules of Procedure of the State Bar, the Presiding Judge of the State Bar Court ordered that all proceedings assigned to Judge Smith, including the present proceeding, be reassigned to Judge David S. Wesley, effective August 1, 1993. (See Gen. Order 93-9, filed July 28, 1993.)

In August 1993, respondent requested review of the hearing judge's disbarment recommendation. Thereafter several extensions of time to file the opening brief were granted upon respondent's request because the parties were attempting to agree to a stipulation as to facts and disposition. In January 1994, the Presiding Judge remanded these matters to Judge Wesley for further proceedings relating to the submission and approval of the parties' intended stipulation.

1. All further references to sections are to the Business and Professions Code, unless otherwise noted. Inactive enrollment under section 6007 (d) may be ordered upon the finding of a probation violation incident to a probation that included stayed suspension when the discipline recommended for the probation violation includes a period of actual suspension.

In February 1994, the parties filed their stipulation. The stipulation incorporated the findings of fact, conclusions of law, and aggravating and mitigating circumstances found by Judge Smith in his June 1993 decision, but the recommended discipline was reduced to one year probation, no stayed suspension, nine months actual suspension with credit for the period of inactive enrollment, and a requirement that before respondent be relieved of his actual suspension he comply with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V (standard[s]).) As authority supporting the modified discipline, the parties cited *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, stating: "We have stipulated to a modified level of discipline to be consistent with the *Friedman* case." (Stip., p. 9.)[2] In March 1994, Judge Wesley rejected the stipulation because the agreed disposition was inadequate. The effect of this rejection was to leave Judge Smith's original decision standing as the disposition of the matter in the hearing department. In April 1994, respondent again sought review of Judge Smith's decision.

FACTS AND FINDINGS

The hearing judge's factual findings and culpability conclusions are, for the most part, not disputed by the parties on review in all three consolidated cases. We adopt the following findings of fact from Judge Smith's decision and the record.

A. Criminal Conviction Matter
(Case No. 91-C-07603)

In October 1991, respondent was stopped while driving because his car did not have license plates. The police found an expired concealed weapons permit in his possession. Upon seeing the permit, the police asked respondent if he were carrying a weapon. Respondent answered that he had a loaded pistol under the car's front floor mat on the driver's side. The police removed the gun. The ammunition clip in the gun contained 14 rounds. Respondent also gave the police another loaded clip for the gun. The gun that was found was not the gun listed on the expired permit.

Respondent is very familiar with guns. He taught weaponry and qualified as a weaponry expert in the military. Furthermore, before his permit expired in 1988, respondent had maintained a permit to carry a concealed weapon for approximately 20 years.

As a result of injuries he suffered in a plane crash while in the United States Marine Corps, respondent is a paraplegic and confined to a wheelchair. **[1a]** Respondent began carrying this gun in approximately October 1991, because he reasonably believed that he and his family were in danger from a 25-year-old known drug addict named Joe Gallagher. In the mid-1980's, when he was a teenager, Gallagher was thrown out of his family's house because of his illegal drug use. Respondent attempted to help Gallagher and took Gallagher in to live in his house. After only about two or three months, respondent told Gallagher to move out of his house because of Gallagher's anti-social behavior.

Once, after he was told to move out of respondent's house, Gallagher came back, kicked the door off its hinges, and barged into respondent's house. When he was told to leave, he left laughing. In addition, between 1985 and 1986, Gallagher telephoned respondent's home four or six times and threatened respondent. Sometime thereafter Gallagher was incarcerated for burglary, and the threatening phone calls stopped for a number of years. However, when Gallagher was in jail he wrote respondent a letter stating that he wanted money and clothes from respondent. Respondent did not respond to Gallagher's letter. While Gallagher was incarcerated, he developed his muscles and physique. Gallagher is approximately six feet, five inches tall and now weighs approximately 250 pounds.

In April 1991, Gallagher was released from jail, and respondent again began receiving threatening phone calls from him. At about this same time, Gallagher also telephoned one of his old girlfriends

2. At trial, the deputy trial counsel's recommended discipline was six to nine months actual suspension.

and threatened to kill her and her father. In addition, respondent's wife became very upset when she saw Gallagher driving around their house and parking and sitting in his car near their house. [1b] In August 1991, Gallagher began calling respondent again and telling him "You're dead; I'm going to kill you." Respondent did not report Gallagher to the police because he wanted to avoid further agitating Gallagher. Respondent believed that Gallagher was the kind of person that was best handled by not opposing him. It was shortly after these phone calls that respondent began to carry a gun. He intended to have his concealed weapons permit renewed, but was arrested before he could do so.

In October 1991, a misdemeanor complaint was filed against respondent, charging him with violating section 12025, subdivision (a) of the Penal Code (having a concealed firearm in a vehicle); section 12031, subdivision (a) of the Penal Code (carrying a loaded firearm in a vehicle in a city); section 5200 of the Vehicle Code (failure to display license plates); and section 4000, subdivision (a) of the Vehicle Code (driving an unregistered motor vehicle). [1c] In November 1991, respondent pleaded no contest to the section 12031, subdivision (a) charge (carrying a loaded firearm in a vehicle in a city) and the remaining charges were dismissed.

[1d] The parties stipulated that the facts and circumstances surrounding the conviction did not involve moral turpitude and the hearing judge agreed. The hearing judge also concluded that OCTC failed to establish that the facts and circumstances surrounding the conviction amounted to other misconduct warranting discipline in that there was no nexus between respondent's conviction and the practice of law and that respondent's single episode of criminal conduct was not so reprehensible that it demeaned the integrity of the profession or constituted a breach of respondent's responsibility to society.

B. Probation Revocation Matter
(Case No. 92-P-13660)

In *Rose* v. *State Bar* (1989) 49 Cal.3d 646 ("*Rose I*"), the Supreme Court suspended respondent from the practice of law for five years, stayed the execution of the suspension, and placed respondent on probation for five years subject to conditions, including a two-year actual suspension, the filing of quarterly probation reports, and the submitting of semi-annual audits of his client trust account compiled by an accountant. The discipline became effective on December 5, 1989. Respondent's two-year actual suspension terminated on December 4, 1991.

Respondent read the Supreme Court opinion in *Rose I* shortly after it was filed and he complied with the quarterly reporting and trust account audit conditions of the probation during the entire period of his actual suspension. Respondent did not file the quarterly reports that were due January 10, 1992; April 10, 1992; and July 10, 1992; and did not file the client trust account audits that were due January 10, 1992, and July 10, 1992. On August 3, 1992, after learning of the pendency of a probation revocation proceeding, respondent filed the three quarterly reports. The January 10 and July 10 quarterly reports stated, inter alia, that since respondent did not have a client trust account and would not have one "during the period of my suspension," he would "not be filing an audit."

The notice to show cause in this matter was filed in May 1992 and amended in August 1992. The amended notice charged respondent with willfully failing to file the above three probation reports and with willfully failing to file the above two client trust account audits. Respondent admitted that he did not timely file the required reports and audits. He asserted at trial that as he interpreted *Rose I*, he was only required to file the reports and audits through the two-year period of his actual suspension, not the entire five-year period of his probation. Respondent also asserted at trial that the report and audit that were due July 10 were not filed until August 3 because a probation department clerk told him in a telephone conversation on July 8, 1992, that no reports were due until October 10, 1992. The hearing judge rejected these contentions and found that respondent wilfully violated the terms and conditions of his probation as charged in the notice.

C. Rule 955 Matter (Case No. 92-N-16099)

Effective June 12, 1992, the Supreme Court suspended respondent from the practice of law for

three years "consecutive to the period of suspension previously imposed in" *Rose I*, stayed execution of that suspension, and placed respondent on probation for three years, "concurrent with the probation previously imposed in" *Rose I*, on conditions, including one year of actual suspension "consecutive to the period of actual suspension previously imposed in" *Rose I*, and until he complies with standard 1.4(c)(ii). (*In the Matter of Rose* (S025490 [State Bar Court Case No. 85-O-13737], min. order filed May 13, 1994 ("*Rose II*").) The Court also imposed a requirement that respondent comply with subdivisions (a) and (c) of rule 955 within 30 and 40 days, respectively, after the effective date of the order.[3] The affidavit required by rule 955(c) was to have been filed by July 22, 1992.

Respondent was also ordered to comply with rule 955 in *Rose I*. He filed the affidavit required by rule 955(c) in that matter in a timely manner. Since that time, respondent has not practiced law; he has had no clients or co-counsel to notify; he has had no papers, property, or unearned fees to return; and he has had no adverse parties or counsel to notify.

On July 8, 1992, the probation department sent respondent a letter advising him, inter alia, that the rule 955 affidavit required by *Rose II* had to be filed by July 22, 1992. The hearing judge found that respondent received this letter. On August 3, 1992, respondent submitted for filing the affidavit of compliance with rule 955. As a rule 955 proceeding was then pending because of respondent's failure to timely file this affidavit, the State Bar Court Clerk's Office did not accept the affidavit for filing. At the time he submitted the affidavit, respondent was not aware of the pendency of the rule 955 proceeding. At trial, respondent moved to file the affidavit. The hearing judge ruled that the issue was moot in light of the disbarment recommendation.

Respondent asserted at trial that he was not required to comply with rule 955 because, as he interpreted *Rose I* and *Rose II*, his actual suspension in both cases was ordered to be "consecutive" and therefore he was actually suspended continuously from December 1989. Furthermore, he in fact did not practice law between the end of the actual suspension in *Rose I* (December 1991) and the beginning of the actual suspension in *Rose II* (June 1992). Respondent contended that because he had not practiced since he complied with rule 955 as ordered in *Rose I*, he had "nothing to report that could fall within the definition of 955"; therefore, filing a second affidavit would not have served any purpose. The hearing judge rejected this contention and found respondent culpable of wilfully failing to timely comply with rule 955.

D. Aggravating Circumstances

Respondent has a record of prior discipline. In *Rose I*, respondent was found culpable on seven counts of numerous wrongful acts, including willful failure to communicate with clients, willful failure to provide services, willful failure to promptly and properly discharge obligations with regard to client funds and records, improper client solicitation, and improper business dealings with a client. The misconduct spanned a time period of some seven years from 1978 through 1985. Several notices to show cause were filed in this matter in late 1984. They were personally served on respondent in February 1985. The hearing panel decision was filed in November 1986, the former review department's decision was filed in August 1987, and the Supreme Court's opinion was filed in October 1989.

In *Rose II*, respondent did not file an answer to the notice to show cause and his default was entered. Respondent's motion for relief from the default was denied. Thereafter, he was found culpable of three instances of failure to communicate, three instances of failure to perform, and one instance of failure to cooperate with a State Bar disciplinary investigation. In one of the four counts in this matter, the misconduct occurred roughly from 1984 through 1986, and in the remaining three counts, the misconduct oc-

3. Subdivision (a) of rule 955 required respondent to give notice to clients, courts, and opposing counsel of his disciplinary suspension, and to deliver to all clients in pending matters their papers, property, and unearned fees. Subdivision (c) of the rule required respondent to file an affidavit with the State Bar Court showing he complied with the rule.

curred roughly during 1988 and 1989. The hearing judge in *Rose II* concluded that the strength of respondent's prior discipline as an aggravating circumstance was diminished because the misconduct in *Rose II* occurred before the Supreme Court's opinion in *Rose I* was filed. In light of the nature of the misconduct and the record, the hearing judge in *Rose II* declined to apply standard 1.7(a), which provides that the discipline imposed in a second disciplinary proceeding should generally be greater than that imposed in the first proceeding.

The hearing judge in the current matter concluded, without explanation, that respondent's misconduct evidenced multiple acts of wrongdoing and demonstrated a pattern of misconduct (std. 1.2(b)(ii)), and that the misconduct significantly harmed the administration of justice (std. 1.2(b)(iv)) in that respondent's failure to file the probation reports precluded the State Bar from monitoring whether he complied with the State Bar Act and the Rules of Professional Conduct during the period of time he was eligible to practice law between *Rose I* and *Rose II*, and in that respondent's failure to timely comply with rule 955(c) precluded the State Bar from monitoring whether he complied with the notice provisions of rule 955(a).

E. Mitigating Circumstances

The hearing judge found that respondent's submission of the late rule 955 affidavit was a mitigating circumstance under standard 1.2(e)(vii) (objective steps demonstrating remorse and recognition of wrongdoing). The hearing judge also found that respondent's efforts on behalf of physically handicapped persons through pro per litigation and other activities was a mitigating circumstance.

The hearing judge declined to find that respondent had a good faith belief that the probation reports and audits had to be filed only during the period of actual suspension and declined to find that respondent had a good faith belief that no reports were due after respondent's July telephone conversation with the probation department clerk. The hearing judge also declined to find that the late-filed probation reports and "audit" were a mitigating circumstance under standard 1.2(e)(vii) (objective steps demonstrating remorse and recognition of wrongdoing) because the probation reports were defective in that they did not contain a required averment and because the statement regarding the audit reports contained in the late-filed probation reports did not comply with the audit probation condition.

DISCUSSION

The parties' contentions on review are essentially directed at the appropriate degree of discipline. Neither party contests the hearing judge's findings or conclusions with regard to the criminal conviction matter. In addition, except for respondent's claim that more mitigating circumstances are present than the hearing judge found, neither party contests the hearing judge's findings of fact and conclusions of law in the probation revocation and rule 955 matters.

[1e] After independently reviewing the record, we agree with the hearing judge and the parties that respondent's criminal conviction and the circumstances surrounding it do not provide a basis for the imposition of professional discipline. We also conclude, as respondent admits, that his failure to timely file the affidavit required by rule 955(c) amounts to a wilful violation of that rule.[4] **[2 - see fn. 4]** Furthermore, we conclude, again as admitted by respondent, that his failure to timely file the quarterly reports due January 10, 1992; April 10, 1992; and July 10, 1992; and the client trust account audits that were due January 10, 1992, and July 10, 1992, amounts to a wilful failure to comply with the disciplinary probation ordered in *Rose I*. We therefore limit our opinion to the remaining issues.

Respondent argues that his case is sufficiently similar to *In the Matter of Friedman*, *supra*, 2 Cal. State Bar Ct. Rptr. 527, to justify a "modest" degree of discipline; that he is entitled to several findings in mitigation not found by the hearing judge; that the

4. **[2]** Even though respondent had no clients or counsel to notify under rule 955(a), he was still required to file the affidavit required by rule 955(c). (*Powers* v. *State Bar* (1988) 44 Cal.3d 337, 341.)

actual suspensions ordered in *Rose I* and *Rose II* ran in uninterrupted succession and he could not and did not practice law during the interval; and that the hearing judge improperly applied standard 1.7(b) (member with record of two prior disciplinary proceedings shall be disbarred in the current matter unless most compelling mitigating circumstances clearly predominate) because the misconduct in *Rose II* occurred before the Supreme Court's opinion in *Rose I* was filed. In reply, OCTC disputes respondent's contentions, basically arguing that *In the Matter of Friedman* is distinguishable and that disbarment is the appropriate discipline. Respondent's reply brief filed August 23, 1994, addresses OCTC's contentions and argues that the discipline agreed to in the rejected stipulation, nine months actual suspension, should be adopted. Before turning to the ultimate issue in this proceeding, the degree of discipline, we address several other matters.

A. Mitigating and Aggravating Circumstances

[3a] Respondent contends that he is entitled to a finding in mitigation based on his asserted good faith belief that the probation reports and audits were due only during the period of his actual suspension. There are seven enumerated conditions of probation in *Rose I*. Some of the conditions state: "During the period of probation, petitioner shall . . . ." However, the conditions requiring the probation reports and audits (conditions 3 and 7) do not contain that language. Thus, according to respondent, the time period during which he was required to file the reports and audits was not specified in conditions 3 and 7. Respondent argues that this omission caused him to believe that the reports were due only during his two-year actual suspension.

[3b] The hearing judge concluded that respondent's testimony on the issue of his good faith belief was not credible.[5] We find no reason on this record to modify this credibility determination. The missing language from conditions 3 and 7 at best establishes an ambiguity. No part of the disciplinary order indicates that the reports and audits were due only during the period of actual suspension. If, as respondent claims, no time period was specified for conditions 3 and 7, then his interpretation that a two-year time period was ordered was not based on the Supreme Court's opinion. Respondent did not research the issue, he did not seek clarification from the State Bar or Supreme Court, nor did he consult with an attorney or any other person or entity regarding his interpretation of the disciplinary order. In any event, the probation department sent respondent two letters in November 1989 and June 1990, which the hearing judge found were received by respondent, which indicated that the reports and audits were due during the entire period of the probation.[6]

[4a] Respondent also argues that he relied on the advice of the probation department clerk who told him that the report and audit that were due July 10 were not due until October 10, 1992. Respondent asserts he is entitled to a finding in mitigation because this advice reinforced his belief that no further reports or audits were due under *Rose I*, and it delayed his filing of the July 10 report and audit.

[4b] At the time respondent spoke with the probation department in July 1992 he had two probation cases pending as the result of *Rose I* and *Rose II*, and the first probation report ordered in *Rose II* was due on October 10, 1992. The probation department clerk testified that her office has procedures in place to prevent confusion from occurring when a probationer has more than one probation case pending at the same time, and that she would not have told respondent that no reports were due in *Rose I*. The hearing judge found the clerk's testimony credible and we find no reason on this record to alter the hearing judge's determination.

5. The hearing judge also held that in order to establish good faith, respondent would have to prove that his belief was both reasonable and honest, citing *Powers* v. *State Bar*, *supra*, 44 Cal.3d at p. 341. We agree with respondent that at the cited page the Supreme Court was addressing Powers's culpability, not mitigation. Nevertheless, we need not address this issue in light of the hearing judge's credibility determination.

6. These letters were not introduced into evidence. Instead, the hearing judge took judicial notice of them. Nevertheless, the hearing judge made findings based on the letters. At trial respondent did not contest the taking of judicial notice of the letters by the court and on review he does not contest the hearing judge's findings.

[4c] We also note that respondent testified that the probation department clerk told him that his "first" report was due October 10. Respondent was aware that he had filed reports for two years in *Rose I* and he should have been aware that his "first" report in *Rose II* was due October 10. Thus, any confusion was clearly not reasonable.

[4d] Finally, we note that even if there was some confusion regarding which case file respondent was calling about, the probation department sent respondent a letter dated July 8, 1992, which enclosed a copy of the probation revocation notice to show cause filed in *Rose I*. That notice alleged that the January 10 and April 10, 1992, reports were past due. Thus, any belief respondent may have held regarding the time period during which he was required to file reports should have been dispelled and any delay in filing the July 10 reports should have been minimal.[7] (Cf. *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 255-256 [no finding in mitigation based on alleged good faith where the attorney disregarded probation department's interpretation of probation conditions].)

[5] Respondent next argues that he is entitled to a finding in mitigation in that he cooperated in the rule 955 proceeding by entering into a joint pretrial statement with the State Bar. We find no merit to this contention. All parties are required to file pretrial statements if ordered by the hearing judge, and if agreeable, those statements must be filed jointly. (Rule 1222, Prov. Rules of Practice.) Here, respondent was ordered to file a statement. We do not find this to be "spontaneous candor and cooperation" as required under standard 1.2(e)(v).

Respondent next argues that he is entitled to a finding in mitigation in the rule 955 proceeding because no harm occurred as a result of his late-filed affidavit. We agree. (See *In the Matter of Friedman*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 532.)

[6a] The hearing judge concluded that respondent's failure to comply with rule 955(c) significantly harmed the administration of justice. As noted by the hearing judge, the Supreme Court has held that "Rule 955, subdivision (c), makes it possible for the court to monitor compliance with conditions of suspension. Failure to comply with the rule causes serious disruption in judicial administration of disciplinary proceedings—proceedings designed to protect the public, the courts, and the legal profession." (*Durbin* v. *State Bar* (1979) 23 Cal.3d 461, 468.) Nevertheless, there is no evidence in this particular case to support a finding of significant harm separate and apart from the evidence that supports culpability and we therefore reject this finding in aggravation. (See *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 777.)

[7a] Respondent next argues that the actual suspensions ordered in *Rose I* and *Rose II* ran in uninterrupted succession and he could not and did not practice law during the interval. Therefore, according to respondent, the hearing judge's reliance on the fact that he could have practiced during that time was in error, and he should be credited with that time against any period of actual suspension imposed in the present matter; or he should at least be entitled to a finding in mitigation based on his not practicing. We again find no merit to any of these contentions.

[7b] Respondent has dealt at considerable length with the definition of the term "consecutive" in his attempt to argue that the suspension orders ran in uninterrupted succession. However, the order in *Rose II* did not take effect until June 1992 (rule 24(a), Cal. Rules of Court), and respondent's prior suspension ended in December 1991. The Supreme Court did not order pursuant to rule 24(a) that its decision become final in a shorter period of time. Thus, the suspension in *Rose II* did not begin until June.

[7c] In any event, respondent cites no authority, and our research reveals none, establishing that, under the circumstances presented here, respondent

7. The notice was served on respondent in the probation revocation proceeding in June 1992, but was returned as unclaimed by the post office. He testified that he first learned of the probation revocation matter on July 8, 1992. As indicated above, respondent filed the missing reports on August 3, 1992.

should be entitled to a "credit for time served" or establishing that his not practicing is a mitigating circumstance.[8] Thus, assuming for the sake of argument that his interpretation is correct, respondent is not entitled to the relief he requests. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 150-151.)

[7d] Finally, we note that our de novo review of the record renders moot the issue of error by the hearing judge. We have attached no particular significance to respondent's ability to practice during part of this time period. Whether legally entitled to or not, respondent did not practice. However, as discussed above and below, the fact that he did not practice is neither a mitigating nor an aggravating circumstance in the present proceeding.

We also modify the hearing judge's decision in other areas as to which respondent has not raised any issue on review. First, the hearing judge concluded that respondent was not entitled to a finding in mitigation under standard 1.2(e)(vii) (objective steps promptly taken demonstrating remorse and recognition) on account of respondent's late-filed reports and audits. The judge concluded that respondent's probation and audit reports were defective and therefore they did not qualify as a mitigating circumstance.

In his probation reports, respondent did not aver that he had complied with the terms of the disciplinary order. Instead, he stated that he had complied to "the best of my knowledge." In his audit reports, respondent stated that he did not have a client trust account "during the period of my suspension." The hearing judge reasoned that the probation reports were defective because whether respondent had complied with the terms of the disciplinary order was capable of positive averment and therefore respondent's reports were improperly qualified. The hearing judge also reasoned that the audit reports were defective because they did not cover the time period between *Rose I* and *Rose II* during which respondent could have practiced law.

[8] For purposes of standard 1.2(e)(vii), we view the issue as whether respondent promptly took objective steps demonstrating remorse and recognition of his wrongdoing. The fact that he did file these reports could, under the appropriate circumstances, demonstrate a recognition of wrongdoing, even if they were technically defective. Nevertheless, we do not find the late-filed reports to be mitigating circumstances because respondent did not file them until after he learned that there was a probation revocation proceeding pending and thus we do not find his actions to be a "spontaneous" recognition of wrongdoing.[9] **[9 - see fn. 9]**

[10] Next, we disagree with the hearing judge's unexplained conclusion that respondent's misconduct demonstrated a pattern of misconduct. The vast majority of respondent's prior misconduct involved his inattention to the needs of his clients. The current misconduct involves respondent's inattention to his prior disciplinary orders. While there may be some overlap, we do not find a common thread between respondent's past and present misconduct. (See *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14 ["In our prior cases we have held that only the most serious instances of repeated misconduct over a prolonged period of time could be characterized as demonstrating a pattern of wrongdoing."].)

[6b] Finally, we reject the hearing judge's conclusion that respondent's failure to file the probation reports significantly harmed the administration of justice. As with the rule 955 violation, there are no facts separate and apart from those that support culpability which demonstrate significant harm.

In summary, we conclude that respondent is culpable of wilfully failing to file timely the probation reports and audits as charged in the notice to

8. Respondent was also suspended from the practice of law from January 1, 1992, until March 13, 1992, for failing to take and pass the professional responsibility examination within the time period ordered in *Rose II*.

9. [9] We do, however, adopt the hearing judge's finding in mitigation that respondent's attempted filing of the rule 955 affidavit was a spontaneous recognition of wrongdoing under standard 1.2(e)(vii) as respondent was not aware of the pendency of the rule 955 proceeding when he attempted to file the document.

show cause and of wilfully failing to comply timely with rule 955(c). In aggravation, respondent has a record of prior discipline, *Rose I* and *Rose II*, and his probation violations evidence multiple acts of misconduct. We find as mitigating circumstances respondent's recognition of wrongdoing demonstrated by his attempted filing of the rule 955 affidavit; his efforts on behalf of physically handicapped persons through pro per litigation and other activities; and the lack of harm to clients in the rule 955 matter.

B. Discipline

As indicated above, the hearing judge's decision was filed in June 1993. Thereafter, respondent sought reconsideration of the discipline recommendation only and the hearing judge denied the request, citing, inter alia, standard 1.7(b) (disbarment appropriate for third instance of misconduct). Respondent contends on review that the hearing judge improperly applied this standard because the misconduct in *Rose II* occurred before the opinion in *Rose I* was filed.[10] OCTC asserts that the standard was properly applied because the misconduct in *Rose II* occurred during the pendency of *Rose I* in the State Bar Court.

[11a] The opinion in *Rose I* was filed in October 1989. The notice to show cause in that case was filed in 1984 and served in 1985, the hearing department decision was filed in 1986, and the former review department's decision was filed in 1987. The misconduct in *Rose II* occurred in 1984 through 1986 and during 1988 and 1989. Thus, we agree with OCTC in that respondent had an opportunity to heed the warning that he should have recognized from his participation in the disciplinary process in *Rose I* prior to committing much of the misconduct in *Rose II*.

[11b] Nevertheless, the standards are guidelines and are not to be followed in talismanic fashion. (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221.) Standard 1.7(b) must be applied with due regard for the purposes of imposing professional discipline. (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) Standard 1.3 sets out those purposes: the protection of the public, courts and the legal profession; the maintenance of high professional standards by attorneys, and the preservation of public confidence in the legal profession. We have also held that the primary goals of disciplinary probation are the protection of the public and the rehabilitation of the attorney. (*In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 299.) Therefore, the timing of the misconduct in the various disciplinary proceedings is but one factor to consider. As discussed below, other factors present in the record weigh against strict application of standard 1.7(b).

1. Probation Revocation Matter

In the probation revocation matter, the parties do not cite, and our research has not revealed, any substantially similar cases for purposes of the appropriate discipline. As we previously noted, there is very little Supreme Court guidance in this regard. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.) **[12a]** However, a violation of probation significantly related to the attorney's prior misconduct merits the greatest degree of discipline, especially where the violation raises serious concern about the need for public protection or shows the probationer's failure to undertake rehabilitative steps. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 78.)

[12b] We view respondent's failure to comply with the trust account audit condition of his probation as substantially related to the underlying

10. Respondent also contends in his reply brief that he was prejudiced because the hearing judge relied on this standard in denying the request for reconsideration and therefore he had no opportunity to present evidence or argument on the issue. As an example, respondent asserts that he was precluded from analyzing the prior records of discipline to show the timing of the misconduct. Respondent did not file a second request for reconsideration with the hearing judge seeking to present new evidence on this issue and does not make such a request on review. In addition, the records of the prior discipline were introduced into evidence at trial and he therefore has had ample opportunity to analyze them and their impact on the present proceeding in view of standard 1.7(b). Finally, he has raised and briefed the applicability of the standard in his briefs on review and our de novo review renders moot the issue of prejudice to respondent.

misconduct for which he was disciplined. Part of that underlying misconduct involved the failure to keep accurate records of entrusted funds, the failure to maintain sufficient funds in trust to meet all entrusted obligations, and the failure to account to clients and other persons to whom respondent had a fiduciary duty. (*Rose* v. *State Bar*, *supra*, 49 Cal.3d at pp. 652-653, 663-664.) The preparation of the audit reports would require respondent to perform correctly many of the same tasks for which he was disciplined. **[13]** In addition, respondent's unilateral and ill-conceived interpretation of the Court's disciplinary order in *Rose I*, coupled with his claim at trial, again based on his unilateral and ill-conceived interpretation of a Supreme Court order, that he did not have to comply with rule 955 because he had not practiced law, are circumstances which raise additional concern about the need to protect the public. Respondent's demonstrated tendency toward interpreting important and significant court orders in such a way as to fit his needs may negatively impact his future clients.

Respondent's prior discipline also weighs heavily toward imposing significant discipline. (See *In the Matter of Carr*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 258.) As a result of *Rose I* and *Rose II*, respondent has been actually suspended from the practice of law for three years. His misconduct in these cases, though not involving moral turpitude, was serious, as evidenced by the discipline imposed, and protracted, as evidenced by the approximately 11-year time period of the misconduct. Respondent committed the present misconduct in spite of the substantial discipline previously imposed and the possibility of additional substantial discipline being imposed as a result of his probation violations. Thus, respondent's prior discipline also raises a concern about the need to protect the public.

[14a] Although the above factors indicate that significant discipline is warranted for the probation violations, we do not believe that imposing the entire period of the stayed suspension is necessary to achieve the goals of attorney disciplinary probation. In *In the Matter of Hunter*, *supra*, 3 Cal. State Bar Ct. Rptr. 63, the attorney failed to comply with the first steps required under the conditions of his disciplinary probation, which included failing to file his first quarterly report and failing to meet with his probation monitor. We concluded that Hunter's probation violations indicated that he had failed even to begin to take steps to rehabilitate himself and that this factor coupled with the other aggravating circumstances demonstrated that the imposition of the entire period of the previously stayed suspension was appropriate.

[14b] In contrast, respondent timely complied with his probation conditions for two years.[11] Thus, he has taken important steps toward rehabilitation, and the need to protect the public by imposition of the entire five-year period of stayed suspension is accordingly diminished. In light of the above, we recommend that respondent's probation be revoked and that he be suspended for five years, stayed, with five years probation on the conditions specified below, including two years actual suspension.[12]

2. Rule 955 Matter

In the rule 955 matter, the parties have devoted considerable time to comparing *In the Matter of Friedman*, *supra*, 2 Cal. State Bar Ct. Rptr. 527, to the present case. Friedman gave the proper notice in compliance with rule 955(a), but was 14 days late in filing the affidavit required by rule 955(c). However, he filed the affidavit before the rule 955 proceeding was initiated. We noted that *Friedman* was the first rule 955 case we reviewed that required only a modest degree of discipline and we recommended a 30-day suspension. (*Id.* at p. 530.)

[15a] We agree with respondent that there are many similarities. Both involved violations only of rule 955(c), both involved a short delay in filing the affidavit required by that rule, in both cases the

11. As noted above, respondent failed to timely take and pass the professional responsibility examination as ordered in *Rose I*. However, that requirement was not set out as a condition of his probation.

12. We note that the requirement of compliance with standard 1.4(c)(ii) imposed in *Rose II* remains in effect.

affidavits were submitted for filing before the attorneys were aware of the rule 955 proceeding, and no clients were harmed in either case. However, respondent's violation of probation and prior record of discipline distinguish this case from *Friedman*. Friedman had a record of two prior disciplines which we treated as one because they occurred during the same four-month time period, and which resulted in a minimum total of six months actual suspension. (*In the Matter of Friedman, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 530, 531.) As indicated above, respondent violated his probation in the current proceeding and his prior discipline is both substantial and protracted.

In *Durbin* v. *State Bar, supra*, 23 Cal.3d 461, the attorney notified the proper parties of his suspension in compliance with rule 955(a), but did not file the affidavit required by rule 955(c). The rule 955 proceeding stemmed from Durbin's prior discipline for which he was suspended for two years. In the rule 955 matter, the Supreme Court concluded that the discipline recommended by the State Bar, one year suspension, was too severe because Durbin had in fact complied with subdivision (a) of the rule, and failed only in reporting his compliance. (*Id.* at p. 469.) The Court suspended Durbin for six months or until he filed the affidavit, whichever was longer.

In *Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, the attorney also had timely notified the proper parties of his suspension, but was five months late in filing the affidavit. The rule 955 proceeding stemmed from Shapiro's prior discipline for which he was given a two-year period of stayed suspension along with three years probation on conditions, including one year of actual suspension. The prior discipline was imposed for misconduct in three separate matters, which involved client abandonment, failure to return unearned fees, failure to act competently, and practicing law while suspended. The Supreme Court found that Shapiro's violation of rule 955(c) was substantially mitigated by improper advice he received from his probation monitor, by Shapiro's diligent though unsuccessful attempts to comply with the rule, by his late-filed affidavit, and by his many years of practice without discipline. The Court imposed a one-year actual suspension for the rule 955 violation and one count of misconduct involving client abandonment.

[15b] Although respondent's record of prior discipline is more extensive than either Durbin's or Shapiro's, his misconduct is less serious as he attempted to file the rule 955 affidavit within two weeks after it was due. In contrast, Durbin did not file the affidavit and Shapiro was five months late. In addition, as in all three of the above cases, respondent's violation of the rule did not cause harm to any clients. In view of these cases and the record, the nine months of actual suspension stipulated to by the parties, but rejected by the hearing judge, appears appropriate.

[16] Contrary to the proposed stipulated disposition, however, we conclude that a period of stayed suspension is required. A period of stayed suspension provides an enforcement mechanism for compliance with the terms and conditions of probation in that if respondent violates his probation, all or part of the period of stayed suspension may be imposed promptly in an expedited proceeding. (See rules 610-615, Trans. Rules Proc. of State Bar.) In view of respondent's current misconduct, OCTC may wish to address any future violations of probation by way of such a proceeding.

We also conclude that a two-year period of probation is warranted in view of the record and the above three cases. Further, we do not recommend that respondent be required to take and pass the California Professional Responsibility Examination given by the Committee of Bar Examiners of the State Bar of California because of the nature of his misconduct in the current proceeding and because he passed the Professional Responsibility Examination given by the National Conference of Bar Examiners in 1992 pursuant to the order in *Rose I*. (Cf. *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 150.) Further, we do not recommend that respondent be ordered to comply with rule 955 again as he has not practiced law since he last complied with the rule.

[17] Finally, as noted above, we are recommending that the discipline in this rule 955 matter run concurrently with the discipline imposed in the probation revocation matter. We apply the term "concurrent" as it is applied in the context of criminal sentencing. "It would seem clear, however, that sentences may be concurrent, i.e., may run together,

without either starting together or ending together. What is meant is that they run together during the time that the periods overlap." (*In re Roberts* (1953) 40 Cal.2d 745, 749.) Thus, the periods of probation and actual suspension we recommend in this rule 955 matter will be concurrent to the periods of probation and actual suspension we recommend in the probation revocation matter only to the extent that they overlap.

RECOMMENDATION

A. Probation Revocation Matter
(Case No. 92-P-13660)

Based on the foregoing, we recommend that the probation ordered in *Rose* v. *State Bar* (1989) 49 Cal.3d 646, be revoked, that the stay of execution of the five-year suspension be lifted, that respondent be suspended from the practice of law for five years, that the execution of that suspension be stayed, and that he be placed on probation for a period of five years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California for the first two years of his probation, with credit for the period of time he was inactively enrolled under section 6007 (d) of the Business and Professions Code;

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

3. That during the period of probation, 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, whether he has complied with all provisions of the State Bar Act, Rules of Professional Conduct, and all the other terms and conditions of his probation since the effective date of said probation;

(b) in each subsequent report, whether he has complied with all provisions of the State Bar Act, Rules of Professional Conduct, and all the other terms and conditions of his probation 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. Respondent's final report to the Probation Unit pursuant to these terms of probation shall be filed no later than 60 days prior to the date respondent's probation is scheduled to expire;

4. 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 614.5, 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 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;

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

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;

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

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

8. That within one year of the effective date of the Supreme Court order in this matter, respondent shall attend the State Bar Ethics School, take and pass the test given at the end of the session, and provide proof that he has done so to the Probation Unit, Office of Trials, Los Angeles;

9. That the period of probation shall commence as of the effective date of the Supreme Court order in this matter;

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

11. That unless a different time period is specified in a specific provision of one of the above conditions of probation, respondent shall comply with these conditions of probation during the entire period of his probation.

We further recommend that costs be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code.

B. Rule 955 Matter (Case No. 92-N-16099)

Based on the foregoing, we recommend that respondent be suspended from the practice of law for a period of two years, that the execution of that suspension be stayed, and that he be placed on probation for a period of two years on the same terms and conditions as specified above in the probation revocation matter (92-P-13660), except that respon-

dent be actually suspended from the practice of law for a period of nine months, and except that for any reports required by the conditions of probation ordered in this case or the conditions of probation ordered in the probation revocation matter (92-P-13660) respondent may file a single report identifying both cases in satisfaction of the reporting requirement of each probation order.

We further recommend that the discipline ordered in this matter run concurrently with the discipline ordered in the probation revocation matter (92-P-13660).

We further recommend that costs be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS JOSEPH JEFFERS

A Member of the State Bar

No. 90-O-17808

Filed December 16, 1994

SUMMARY

A hearing judge found respondent culpable of failing to appear on behalf of his client as ordered at a mandatory settlement conference, failing to fully disclose certain information to an opposing attorney after informing the settlement conference judge that he would do so, and intentionally misleading the settlement conference judge regarding his client's death. The judge recommended a two-year stayed suspension, two years probation, and thirty days actual suspension. (Hon. Christopher W. Smith, Hearing Judge.) On motion for reconsideration after the first judge's retirement, a different hearing judge concluded that too much weight had been given to an aggravating circumstance involving respondent's misconduct in an unrelated federal case, and modified the recommended discipline by reducing the stayed suspension to one year and eliminating the actual suspension. (Hon. David S. Wesley, Hearing Judge.)

Respondent requested review, arguing that he was not culpable of the misconduct found by the first hearing judge. The State Bar argued in reply that the recommended discipline should be increased because aggravating circumstances not found by the hearing judge were present in the record. The review department found that respondent was culpable of failing to appear as ordered at the mandatory settlement conference and of intentionally misleading the settlement conference judge, but not of failing to disclose information to the opposing attorney. The review department also concluded that the federal court misconduct could not be relied on in aggravation, and rejected the State Bar's arguments regarding additional aggravating circumstances. Although it viewed the misconduct as serious, the review department concluded that the mitigating circumstances, lack of aggravating circumstances, and comparable case law demonstrated that the discipline recommended by the second hearing judge was appropriate.

COUNSEL FOR PARTIES

For Office of Trials: Donald R. Steedman

For Respondent: Elaine B. Fischel

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] **213.40 State Bar Act—Section 6068(d)**
320.00 Rule 5-200 [former 7-105(1)]
Statute and ethics rule prohibiting attorneys from misleading judges do not provide that only attorneys of record are subject to their requirements. Attorneys are required to refrain from deceptive acts without qualification. Thus, fact that respondent was not attorney of record and appeared voluntarily at mandatory settlement conference was not relevant to whether respondent was culpable of violating such statute and rule by intentionally misleading settlement conference judge.

[2 a, b] **213.40 State Bar Act—Section 6068(d)**
320.00 Rule 5-200 [former 7-105(1)]
Attorneys can be disciplined for making material misrepresentations to a court even when the facts are a matter of public record. Accordingly, where respondent's client's death was a matter of public record, but settlement judge in client's pending case was not aware of death, and death was material fact in settlement negotiations, respondent was culpable of misconduct for misleading settlement judge about client's death.

[3 a, b] **213.40 State Bar Act—Section 6068(d)**
320.00 Rule 5-200 [former 7-105(1)]
Concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline. Thus, respondent could be found culpable of intentionally misleading judge where he failed to reveal that his client had died, even though respondent was not directly asked if client was dead and even though respondent's answers to judge's questions may have been facially truthful, where respondent's statements to court and parties and his answers to judge's questions conveyed impression that client was alive and was exerting influence on respondent's ability to settle case.

[4] **204.90 Culpability—General Substantive Issues**
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
Dishonest acts by an attorney are grounds for suspension or disbarment even if no harm results.

[5 a-c] **106.30 Procedure—Pleadings—Duplicative Charges**
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
Statute prohibiting attorneys from engaging in acts of moral turpitude applies to misrepresentation and concealment of material facts. An attorney has a duty under statute and ethics rule never to seek to mislead a judge and acting otherwise constitutes moral turpitude and warrants discipline. Thus, respondent's intentional, material misrepresentation to a settlement conference judge was an act of moral turpitude. Nevertheless, where same misconduct underlay both finding of moral turpitude and findings of violation of statute and rule prohibiting misleading courts, misconduct was treated as single violation.

[6] **106.10 Procedure—Pleadings—Sufficiency**
139 Procedure—Miscellaneous
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106

An attorney's disobedience of a court order involves moral turpitude for disciplinary purposes only if the attorney acted in either objective or subjective bad faith. Review department declined to find respondent culpable of moral turpitude for failure to appear as ordered at settlement conference, where such culpability was argued for first time on review, notice to show cause did not allege that failure to appear was in bad faith, and hearing judge made no findings regarding respondent's objective or subjective bad faith in failing to obey order to appear.

[7] **213.20 State Bar Act—Section 6068(b)**

Respect due courts as required of attorneys by statute includes compliance with court orders absent good faith belief in legal right not to comply. Respondent violated statute where respondent did not attend settlement conference, as previously ordered by settlement judge, because he had other work to do and did not believe he was required to attend as he was not an attorney of record. Such facts did not establish good faith belief in legal right not to comply with order to appear. Respondent could not simply ignore order to appear before court because he believed his presence was unnecessary.

[8 a, b] **213.20 State Bar Act—Section 6068(b)**

Respondent did not demonstrate disrespect for court by failing to fully disclose information about client's assets to opposing counsel in course of settlement negotiations, where obligation to disclose such information was based on a promise, not an order, to do so, and where even if failing to comply with a promise could amount to disrespect for court, record lacked clear and convincing evidence that respondent had failed to disclose known assets.

[9] **139 Procedure—Miscellaneous**
162.30 Issues/Proof in § 6049.1 Matters
195 Discipline in Other Jurisdictions
1931.90 Section 6049.1 Cases—Other Procedural Issues

Attorney's out-of-state discipline was not entitled to preclusive effect under California statute providing for expedited disciplinary proceeding based on discipline in other jurisdictions where State Bar did not proceed pursuant to procedures set forth in such statute.

[10 a, b] **139 Procedure—Miscellaneous**
161 Duty to Present Evidence
195 Discipline in Other Jurisdictions

Possible collateral estoppel effect of attorney's out-of-state discipline could not be addressed where record did not reveal factual underpinnings of such discipline and did not permit determination as to what issues were actually litigated in out-of-state disciplinary matter.

[11 a-e] **162.11 Proof—State Bar's Burden—Clear and Convincing**
194 Statutes Outside State Bar Act
195 Discipline in Other Jurisdictions
513.90 Aggravation—Prior Record—Found but Discounted
802.21 Standards—Definitions—Prior Record

Attorney discipline is an available sanction for violation of rule 11 of Federal Rules of Civil Procedure. Where respondent testified that he had been disciplined by federal court as result of rule

11 matter, and federal court had suspended respondent from practice before it as part of relief granted in ruling on rule 11 motion, federal court's action constituted discipline. However, State Bar must prove aggravating circumstances by clear and convincing evidence. Where record before review department did not reveal factual underpinnings of federal court discipline, and review department was therefore unable to examine nature and chronology of respondent's prior discipline to determine impact it should have on current discipline recommendation, review department gave no weight to respondent's federal discipline as factor in aggravation.

[12 a, b] **161 Duty to Present Evidence**
162.11 Proof—State Bar's Burden—Clear and Convincing
191 Effect/Relationship of Other Proceedings
565 Aggravation—Uncharged Violations—Declined to Find

Respondent's alleged misconduct in federal civil appeal was not entitled to any weight in aggravation where State Bar did not introduce any evidence regarding respondent's conduct other than appellate court opinion establishing respondent's failure to comply with federal rule of appellate procedure regarding form of briefs, and where record did not provide basis to determine whether respondent's noncompliance with such rule was isolated act of negligence or disciplinable offense, or to assess respondent's conduct independently under clear and convincing standard of proof.

[13] **625.20 Aggravation—Lack of Remorse—Declined to Find**

Respondent's submission of allegedly frivolous review brief did not constitute aggravating circumstance where respondent's attorney filed brief in question and there was no evidence that respondent drafted or controlled its contents.

[14 a, b] **513.90 Aggravation—Prior Record—Found but Discounted**
710.10 Mitigation—No Prior Record—Found
710.39 Mitigation—No Prior Record—Found but Discounted

Where respondent had been disciplined in another jurisdiction, his record of practice prior to his first California disciplinary proceeding was not "unblemished." However, his over 30 years of practice prior to such out-of-state discipline constituted an important mitigating circumstance.

[15 a-c] **213.20 State Bar Act—Section 6068(b)**
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
710.10 Mitigation—No Prior Record—Found
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness

Failing to appear as ordered at settlement conference, and intentionally misleading settlement judge regarding client's death, was serious misconduct which threatened public and undermined its confidence in legal profession. However, considering comparable case law, and in view of respondent's many years of practice prior to misconduct, and lack of proven aggravating factors, appropriate discipline was one-year stayed suspension and two years probation with no actual suspension, rather than two-year stayed suspension with two years probation and thirty days actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

213.21 Section 6068(b)
213.41 Section 6068(d)
221.11 Section 6106—Deliberate Dishonesty/Fraud
320.01 Rule 5-200 [former 7-105(1)]

Not Found

213.25 Section 6068(b)

Mitigation

Found but Discounted

740.33 Good Character

Discipline

1013.06 Stayed Suspension—1 Year
1017.08 Probation—2 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge that respondent, Thomas Joseph Jeffers, Jr., be suspended from the practice of law for one year, that execution of such suspension be stayed, and that he be placed on probation for two years on conditions. The recommendation is based on respondent's misconduct in a single matter of failing to appear as ordered on behalf of his client at a mandatory settlement conference; of failing to fully disclose certain information to an opposing attorney after informing the settlement conference judge that he would do so; and of intentionally misleading the settlement conference judge regarding the status of a defendant.

Respondent requested review, arguing that he is not culpable of the misconduct found by the hearing judge. The Office of the Chief Trial Counsel (OCTC), through its deputy trial counsel, argues in reply that the recommended discipline is insufficient and should be increased to two years stayed suspension and, as a condition of two years probation, thirty days actual suspension.

We have independently reviewed the record and based thereon we conclude that respondent is culpable of most of the misconduct found by the hearing judge. Although we view the misconduct as serious, the mitigating circumstances surrounding the misconduct demonstrate that the discipline recommended by the hearing judge is appropriate.

BACKGROUND

The notice to show cause in this matter was filed in October 1991 and hearings were held before Judge Christopher W. Smith in October and December 1992 and March 1993. Judge Smith's decision was filed July 31, 1993. He recommended that respondent be suspended for two years, with the execution of that suspension stayed, and that respondent be placed on probation for two years on conditions, including thirty days actual suspension. Judge Smith retired and July 31, 1993, was his last day as a State Bar Court judge. Pursuant to rules 113 and 262 of the Transitional Rules of Procedure of the State Bar, the Presiding Judge of the State Bar Court ordered that all proceedings assigned to Judge Smith, including the present proceeding, be reassigned to Judge David S. Wesley, effective August 1, 1993. (See Gen. Order 93-9, filed July 28, 1993.)

Respondent thereafter filed a timely request for reconsideration of the discipline recommendation only. On reconsideration, Judge Wesley concluded that Judge Smith had given too much weight to an aggravating circumstance involving respondent's conduct in federal court in Wisconsin in an unrelated case, and he modified the recommended discipline to one year stayed suspension, two years probation, and no actual suspension.

FACTS AND FINDINGS

We adopt the following findings of fact from Judge Smith's decision and the record. On June 13, 1990, a mandatory settlement conference (MSC) was held before Judge Marvin D. Rowen in a personal injury case in superior court. Lowell Craddock was a defendant and cross-complainant in the case. Respondent and Craddock had known each other for many years. Prior to the MSC, Craddock had a stroke. On June 11, 1990, Robert Baird was appointed temporary conservator for Craddock to negotiate a settlement of the personal injury case. Respondent was the attorney for the conservator.

Several attorneys appeared at the MSC, including: Edward Digardi on behalf of the plaintiffs; Christopher Kent, James Catlow and James Lindeman on behalf of Craddock; and respondent on behalf of the conservator. Baird was also present. Respondent and Baird appeared voluntarily at the MSC in an attempt to settle the case. Respondent represented to counsel and the court that Craddock was in a convalescent hospital, that Baird had been appointed Craddock's conservator, and that respondent was the attorney for the conservator. Catlow offered the entire amount of Craddock's liability insurance ($200,000) toward settlement of the lawsuit. Respondent informed the court and counsel that it was Craddock's position that he was not responsible for the injuries that the plaintiffs had suffered in the accident; however, he would recommend to the conservator that $100,000 be paid from Craddock's estate to settle the matter.

Digardi informed the court that his clients' claim was worth in excess of $1,000,000 and that he did not have enough information about Craddock's personal estate to enable him to make a serious demand. Respondent informed the court that he had to ensure that there were sufficient monies left in Craddock's estate after any resolution of the lawsuit to pay for the convalescent care and treatment Craddock was receiving and to be able to provide for Craddock for the remainder of his life.

The court thereafter inquired as to whether respondent and Digardi were willing to exchange information concerning Craddock's personal assets. Both agreed to do so, although respondent did not believe that Digardi was entitled to that information at a MSC. By agreement, the MSC was continued to July 13, 1990, and the court ordered everyone, including respondent, to return on that date.

Respondent failed to appear at the July 13 MSC, although he had notice and the ability to appear. Baird also did not appear. Respondent had informed Catlow that he was available by telephone, and Catlow so informed the court at the time of the MSC. Catlow also told the court that respondent had advised him that respondent would again recommend to the conservator that $100,000 be paid from Craddock's personal assets to settle the matter. The court continued the MSC to September 14, 1990, and ordered respondent to appear then. The court also set for the same date an order to show cause (OSC) regarding sanctions for respondent's failure to appear at the July 13 MSC.

Respondent appeared on September 14 and during the settlement discussions he informed the court that he had discussed the case with Craddock, that Craddock did not believe he was responsible for the accident or for plaintiffs' injuries and damages, and that Craddock wanted the matter to go to trial. However, in an attempt to settle the matter, respondent repeated his prior offer: he would recommend to Baird that $100,000 be paid from Craddock's estate. Digardi then requested permission to speak to the court in private where he advised the court that respondent was not being truthful about Craddock's status. Digardi showed the court a copy of a petition for probate which had been signed by respondent indicating that Craddock had died on June 21, 1990.[1] Prior to this conversation, the judge did not know that Craddock was dead.

The judge then reconvened the attorneys in his chambers and began to question respondent. The judge asked respondent when he last communicated with Craddock. Respondent informed the court that he had last communicated with Craddock just before the MSC and that Craddock had indicated that he was not responsible for the accident and wanted the matter to go to trial. The court asked respondent how Craddock could communicate with respondent about his attitude toward the case in light of the fact that it had been necessary to appoint a conservator for him. Respondent stated that Craddock was able to think and was able to communicate his feelings and attitude, and that the conservator was needed to handle Craddock's business and accounting needs, such as collecting rents and paying bills.

The judge pressed respondent further regarding Craddock's current state of mind and respondent eventually admitted that Craddock was not presently able to communicate with him. The judge asked respondent if Craddock could not communicate because he was unconscious, he was otherwise mentally incapacitated, or his brain was not functioning. Respondent stated that it was the latter; Craddock's brain was not functioning. The judge inquired when this condition came about and whether there was any medical verification of Craddock's incapacity. Respondent stated that Craddock's condition had come about very recently, and that there was no medical verification of his condition; however, respondent stated that he had personal knowledge of Craddock's condition. The court then inquired of respondent how he could personally know of Craddock's incapacity if there had been no medical verification. After a long pause, respondent admitted to the court that Craddock was dead. Except for Digardi, Catlow,

1. On June 22, 1990, the day after Craddock's death, respondent filed a petition for probate and letters were issued appointing Baird special administrator of Craddock's estate. Baird was appointed executor of Craddock's estate in August 1990.

and Lindeman, prior to respondent's revelation, the other attorneys present at the MSC had not known that Craddock was dead. The judge ended the MSC after respondent's revelation because he believed further settlement discussions were pointless.[2]

Immediately thereafter the court held a hearing on the OSC regarding respondent's failure to appear at the July 13 MSC, and sanctions were imposed against respondent. The court also set a hearing on another OSC regarding sanctions for respondent's conduct at the September 14 MSC. As a result of the second OSC, further sanctions were imposed against respondent in November 1990.

Between the June 13 and the September 14 MSC's, there were numerous written communications between respondent and Digardi concerning Craddock's personal assets. As indicated above, respondent agreed to provide that information even though he did not believe that Digardi was entitled to it at a MSC. Respondent believed that it was Digardi's responsibility to discover Craddock's assets, and respondent felt that it was not proper on the eve of trial to engage in discovery on this issue. He therefore did not want to disclose Craddock's personal assets to Digardi, despite the fact that he had informed Digardi and the court that he would do so. Although respondent did provide some information, he apparently did not reveal all of Craddock's personal assets.

The notice to show cause in this matter charged violations of Business and Professions Code sections 6068 (b) (attorney's duty to maintain respect due to the courts), 6068 (d) (attorney's duty never to seek to mislead a judge), and 6106 (attorney's acts of moral turpitude are cause for discipline),[3] and rule 5-200(B) of the Rules of Professional Conduct of the State Bar (attorney prohibited from misleading judge by artifice or false statement).[4] Judge Smith concluded that respondent wilfully violated section 6068 (b) by failing to appear at the July 13 MSC, and by failing to fully disclose Craddock's assets to Digardi after respondent had informed the court he would do so; and that respondent wilfully violated section 6068 (d) and rule 5-200 by intentionally misleading the MSC judge regarding Craddock's death.[5] Judge Smith did not find respondent culpable of violating section 6106 because "respondent has already been found culpable of wilful violations of the more specific statutes and rule of professional conduct dealing with the misconduct involved in this matter . . . ." However, Judge Smith noted that even if he were to find a section 6106 violation, his recommended discipline would not change.

In mitigation, respondent was admitted to practice law in this state in 1954 and except for the Wisconsin federal court matter, discussed below, he has no prior record of discipline. In addition, respondent has been involved in numerous civic, charitable, religious, and professional organizations for many years: He has been active in Kiwanis Club for 38 years; he has been active in his local Chamber of Commerce and Junior Chamber of Commerce; he is a pilot and was active in an organization known as Mission Medica which flies doctors and dentists to remote areas of Mexico to provide care for children; he has been a board member of Boy Scouts and a president of JayCees; he has been a board member of the local YMCA; he served on a parking commission and beautification planning committee in his local community; he was a member of the Selective Service Board; he has been on the stewardship committee of his church and active in raising money for the

2. The lawsuit was eventually settled for $800,000, of which $600,000 was from Craddock's estate.

3. All further references to sections are to the Business and Professions Code unless otherwise noted.

4. All further references to rules herein, unless otherwise stated, are to the Rules of Professional Conduct of the State Bar of California in effect from May 27, 1989, as they read prior to the amendments which took effect September 14, 1992.

5. Judge Smith did not specify which particular subdivision of rule 5-200 he found respondent culpable of violating. However, he quoted both subdivisions (A) and (B) in the decision. As the notice only charged a violation of subdivision (B), we limit our consideration of culpability to that subdivision. Also, there is an obvious typographical error on page 2, line 12 of Judge Smith's decision; the violation is of section 6068 (b), not of section 6068 (a).

church; he was a president of the Glendale Bar Association; he has been a judge pro tem for the Glendale municipal and superior courts; and he has been a past member of the Glendale Legal Aid and Referral Association.

Several attorneys and business people testified regarding respondent's honesty, integrity, and good character. Although not all the individuals who testified as to respondent's good moral character were aware of the specific charges against respondent, they were generally aware that respondent was involved in a matter with the State Bar. On cross-examination, however, several of these witnesses stated that they would change their opinion of respondent if the State Bar charges were true.

In aggravation, Judge Smith found that respondent's misconduct did not appear to be aberrational because of respondent's conduct in several lawsuits in federal court in Wisconsin. Judge Smith concluded that in these federal actions respondent engaged in other acts of misrepresentation to a court and filed baseless claims which demonstrated respondent's disrespect of the court.

DISCUSSION

Respondent argues on review that he is not culpable of violating section 6068 (d) because he did not intentionally mislead the MSC judge; that he is not culpable of violating section 6106 because the plaintiffs suffered no injury or loss and in fact eventually received $800,000 in settlement; and that he is not culpable of violating section 6068 (b) because if he had been disrespectful to a court, "there would not have been a finding that moral turpitude was absent." Essentially, respondent argues that the proceeding should be dismissed.

1. Culpability

A. Section 6068 (d) and Rule 5-200(B)

Respondent asserts that he did not intentionally mislead the MSC judge in that he was not an attorney of record in the case and he appeared and furnished information voluntarily at the MSC; that there was "nothing to be gained by volunteering or not volunteering the fact of Craddock's death" as everyone knew that he had died because the death had been published in the probate proceeding; that Craddock's death was not material to the MSC because the focus was the dollar amount that the case could be settled for, not whether Craddock was liable; that respondent was never directly asked if Craddock had died; that the MSC judge was not misled; that although respondent did not volunteer information regarding Craddock's death, his answers were truthful; and that his evasive answers to the court's inquiries were not intended to conceal Craddock's death, rather, they were intended to protect his client's confidential communications.

We find no merit to any of respondent's contentions. **[1]** As indicated by OCTC in its brief, there is no requirement in either section 6068 (d) or rule 5-200(B), or the cases interpreting them, that only attorneys of record are subject to the requirements of these ethical provisions. Attorneys are required to refrain from deceptive acts without qualification. (*Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 315; *Di Sabatino* v. *State Bar* (1980) 27 Cal.3d 159, 162; *McKinney* v. *State Bar* (1964) 62 Cal.2d 194, 196.) Thus, the fact that respondent was not an attorney of record and appeared voluntarily at the initial MSC is not relevant. Furthermore, respondent's appearance at the September 14 MSC was not voluntary as he was ordered to be there.

[2a] Although Craddock's death was a matter of public record because of the probate proceeding, the present record and the findings make clear that the MSC judge was not aware of the death. The cases cited by OCTC indicate that attorneys have been disciplined for misrepresenting material matters of public record. (*Bach* v. *State Bar* (1987) 43 Cal.3d 848, 855-856 [misrepresentation regarding the existence of a court order]; *Franklin* v. *State Bar* (1986) 41 Cal.3d 700, 709 [misrepresentation regarding the dismissal of a court case]; *Di Sabatino* v. *State Bar*, *supra*, 27 Cal.3d at p. 162 [failure to disclose prior motions].)

[2b] We agree with OCTC that Craddock's death was a material fact in the settlement negotia-

tions. Craddock's wishes regarding settlement were considered by respondent despite the fact that a conservator had been appointed. Respondent stated on numerous occasions at the settlement conferences that Craddock did not believe he was liable for the plaintiffs' injuries. In addition, respondent asserted in the settlement negotiations that not all of Craddock's assets were available to settle the matter because financial arrangements had to be made to care for Craddock for the remainder of his life. We also note that respondent had informed the MSC judge at the initial MSC that he represented the conservator. Respondent was no longer the attorney for the conservator at the September 14 MSC since Craddock had already died. Thus, Craddock's death was also material to the identity of the client respondent represented at the September 14 MSC.[6]

[3a] That respondent was not directly asked if Craddock was dead and that his answers to the judge's questions may have been facially truthful is not a defense as "It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline. [Citations.]" (*Di Sabatino* v. *State Bar, supra,* 27 Cal.3d at pp. 162-163.) Uncontroverted testimony from the MSC judge establishes that he was misled. Lastly, respondent testified at trial regarding his intent in answering the judge's questions. The hearing judge did not find that testimony credible and there is nothing in the record to indicate that we should disturb that credibility determination.

Even though rejecting respondent's assertions, we are required to conduct a de novo review of the record and reach our own conclusions. (Rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 75-76.) **[3b]** Information regarding Craddock's condition and his views about the case had previously been communicated to the MSC judge and the parties by respondent and therefore respondent's assertion that he was concerned about client confidentiality appears specious at best. Respondent's statements to the court and parties and his answers to the judge's initial questions at the September 14 MSC conveyed the impression that Craddock was alive and was exerting influence on respondent's ability to settle the case. That simply was not the case at the time of the September 14 MSC, as respondent well knew. We find no other reasonable inference to be drawn from respondent's statements and answers other than that he intended to conceal Craddock's death.[7] We therefore agree with the hearing judge that respondent violated section 6068 (d) and rule 5-200(B).

B. Section 6106

Respondent offers very little argument and no authority to support his contention that he is not culpable of violating section 6106. **[4]** Dishonest acts by an attorney are grounds for suspension or disbarment even if no harm results. (*Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1147.) Section 6106 applies to the misrepresentation and concealment of material facts. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 353, and cases cited therein.) **[5a]** An attorney has a duty never to seek to mislead a judge under section 6068 (d) and rule 5-200(B) and "Acting otherwise constitutes moral turpitude and warrants discipline." (*Bach* v. *State Bar, supra,* 43 Cal.3d at p. 855.)

Judge Smith declined to find respondent culpable of violating section 6106 because it would have been duplicative of the more specific violations he had found. Contrary to respondent's assertion, we view this conclusion to indicate that Judge Smith did find respondent's conduct to involve moral turpitude. In addition, OCTC cites several cases where violations of sections 6068 (d) and 6106 and former

6. Because Craddock was apparently also a percipient witness to the accident, the fact of his death might also have influenced the settlement negotiations had it been known by the judge and Digardi.

7. We do not find support in the record for the inferences regarding respondent's subjective state of mind found by Judge Smith. It is clear that respondent did not want to divulge Craddock's death, and it may have been for the reasons articulated by Judge Smith at pages 11-12 of his decision. Nevertheless, no clear and convincing evidence established respondent's subjective reasons for misleading the judge other than to conceal Craddock's death from the judge.

rule 7-105 (predecessor to rule 5-200; eff. Jan. 1, 1975; superseded May 27, 1989) were found on the same facts. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1089; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469-470; *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 489.) **[5b]** Based on the record and these cases, we agree with OCTC that respondent is culpable of violating section 6106.

[5c] Nevertheless, we note that the provisions of both section 6068 (d) and rule 5-200(B) that prohibit misleading a judge by false statement are identical and as indicated above the Supreme Court has held that such deception involves moral turpitude. (*Bach* v. *State Bar, supra,* 43 Cal.3d at p. 855.) The gravamen of respondent's misconduct is his intentional, material misrepresentation to the MSC judge. As the misconduct underlying the violations of sections 6068 (d) and 6106 and rule 5-200(B) is the same, we treat them as a single violation. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 149.)

[6] OCTC also argues on review, apparently for the first time, that respondent's failure to appear at the July 13 MSC as ordered is an additional basis for a section 6106 violation. An attorney's disobedience of a court order "involves moral turpitude for disciplinary purposes only if the attorney acted in either 'objective' or 'subjective' bad faith." (*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 951.) The notice to show cause does not allege that the failure to appear was in bad faith, although it does allege that respondent failed to appear as ordered at the July 13 MSC and generally alleges that respondent's actions violated section 6106. The hearing judge made no findings regarding respondent's objective or subjective bad faith in failing to obey the order to appear. Under the circumstances, we are not inclined to find respondent culpable of violating section 6106 based on this theory, especially since this misconduct is adequately addressed through the section 6068 (b) violation, which, as we hold below, is fully supported by the record.

C. Section 6068 (b)

As noted, we read the hearing judge's decision to indicate that he found that respondent's misconduct involved moral turpitude. In addition, we have independently reached the same conclusion. Therefore, we find no merit to respondent's contention that he is not culpable of violating section 6068 (b) on the ground that the hearing judge found moral turpitude "was absent."

[7] Respect due the courts as required by section 6068 (b) includes compliance with court orders absent a good faith belief in a legal right not to comply. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 237.) Respondent testified that he did not attend the July 13 MSC because he had a brief due in another case and because he did not believe he was required to attend as he was not the attorney of record. In our view, neither reason establishes a good faith belief in a legal right not to comply. Respondent was present when the MSC judge ordered him to appear on July 13 and respondent's testimony indicates he had the ability to appear on that date. If respondent believed that he should not have been required to attend, he had ample opportunity to raise that issue with the MSC judge. Respondent cannot simply ignore a court order to appear before a court because he believes his presence is unnecessary. (Cf. *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403-404.) We therefore conclude that respondent violated section 6068 (b) when he failed to appear as ordered at the July 13 MSC.

[8a] We do not, however, agree with the hearing judge that respondent demonstrated a disrespect for the court in violation of section 6068 (b) by failing to fully disclose Craddock's assets to Digardi. Neither the hearing judge nor OCTC cites any authority establishing that failing to disclose assets at a settlement conference, based on a promise, not an order, to do so, amounts to disrespect of the court. Furthermore, even if such conduct could amount to a violation of this section, the record lacks clear and convincing evidence in support thereof.

Craddock's financial affairs were anything but orderly. He had acquired some degree of wealth.

There were numerous parcels of real property, several bank accounts, and other assets. Craddock had very few written records regarding his property and he had not filed an income tax return since 1986. Shortly after agreeing to exchange information regarding Craddock's assets with Digardi, respondent asked the conservator, Baird, to locate and compile a list of the assets. Baird did so and respondent provided that list to Digardi about a week after the first MSC. Digardi's investigation apparently revealed additional assets and several letters were exchanged between respondent and Digardi regarding the additional assets. In response, respondent provided further information.

As respondent testified that he did not believe he should have to provide Digardi with asset information, he may have been a reluctant participant in that exchange process. Nevertheless, except for the proceeds of a settlement, we do not find clear and convincing evidence that respondent was aware of assets that were not disclosed.

A cash settlement resulted from a condemnation proceeding by the City of Los Angeles against one of Craddock's properties and respondent was listed as one of Craddock's attorneys in the settlement documents. However, testimony indicated that the money from that sale had been allocated for other purposes and therefore respondent believed that it was not available for settlement of the lawsuit. **[8b]** Thus, we do not find clear and convincing evidence supporting the conclusion that respondent failed to disclose known assets to the plaintiffs' attorney.

2. Aggravating Circumstances

OCTC argues that respondent should receive actual suspension because of respondent's misconduct here and in the Wisconsin federal court matter and his submission of a "frivolous brief on review" in the current proceeding. As indicated above, Judge Smith concluded in aggravation that respondent's misconduct did not appear to be aberrational because he committed similar misconduct in Wisconsin. On reconsideration, Judge Wesley discounted the weight to be accorded to the Wisconsin conduct because there were insufficient facts regarding the specifics of that conduct.

At oral argument we asked the parties to provide further briefing regarding the standard of proof applied in the Wisconsin matter and the effect of the district court's decision and order on the current disciplinary proceeding. OCTC asserts that the suspension order was based on clear and convincing evidence; that the doctrine of collateral estoppel does not apply in State Bar proceedings, but that the district court's ruling is entitled to a "strong presumption of validity"; and that the Wisconsin disciplinary order is entitled to "preclusive effect" in the present proceeding pursuant to section 6049.1 (a). Respondent asserts that collateral estoppel does not apply because the Wisconsin proceeding involved sanctions under rule 11 of the Federal Rules of Civil Procedure and was not a disciplinary proceeding; and that section 6049.1 (a) does not apply because there was no final judgment at the time of the State Bar trial as the matter was under appeal, and because no certified copy of the district court's order was introduced into evidence in the present matter.

We do not address the many issues raised above. **[9]** The State Bar did not proceed pursuant to the procedures set forth in section 6049.1, so the possible preclusive effect of out-of-state discipline by reason of that statute is not germane. **[10a]** Nor can we address collateral estoppel as we cannot determine from our record which issues were actually litigated in the Wisconsin district court matter. We therefore address the Wisconsin federal court matter just as we would any other potential factor in aggravation of the present misconduct.

[11a] We first note that OCTC must prove aggravating circumstances by clear and convincing evidence. (Std. 1.2(b), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (standard[s]).)

In the Wisconsin matters, respondent represented a trustee of a charitable trust in litigation involving the trustee's removal. Numerous lawsuits

were filed in both state and federal courts.[8] The three federal district court lawsuits were the subject of a consolidated appeal and the Court of Appeals criticized respondent for making arguments that were wholly without merit, for misrepresenting facts, and for relying on a case which had been overruled. (*John v. Barron* (7th Cir. 1990) 897 F.2d 1387, 1393-1394, cert. den. 498 U.S. 821.) The Court of Appeals also denied the opposing parties' motion for sanctions under rule 38 of the Federal Rules of Appellate Procedure and indicated that it was instead sending a copy of its opinion to the appropriate disciplinary committee of respondent's home state. (*Id.* at p. 1394.)

In a renewed motion for sanctions under rule 11 of the Federal Rules of Civil Procedure (rule 11) in March 1991, the federal district court permanently enjoined respondent's client from filing certain lawsuits; ordered respondent and the client to pay $25,000 for legal expenses incurred to defend the federal district court actions, and removed respondent's name from the roll of attorneys allowed to practice law before the United States District Court for the Eastern District of Wisconsin on the ground that respondent had been "contemptuous of the legal process" throughout all of the cases. Following a hearing in May 1991, the court modified its March 1991 order and removed respondent from the practice of law before that district until January 1, 1992.

A notice of appeal signed by respondent as attorney for the trustee was filed thereafter. The notice of appeal stated that the trustee appealed the March 1991 judgment and order along with the modification. That appeal was apparently pending at the time of the State Bar trial. At oral argument, we requested the parties provide us with additional information regarding the status of the appeal. Respondent submitted a copy of a judgment of the Court of Appeals. The judgment indicates that the appeal was dismissed "as moot."[9] Respondent asserts that the appeal was moot because his client, the trustee, had died and the trust had been dissolved. The deputy trial counsel does not contest either the authenticity of the copy of the judgment or respondent's explanation for the dismissal.

The record of the Wisconsin federal district court proceeding was not introduced into evidence in the current matter. Instead, OCTC introduced an uncertified copy of the March 1991 court order which suspended respondent along with an uncertified copy of the district court's decision in that matter. Respondent also introduced into evidence a copy of the district court's March 1991 order along with a copy of the June 1991 order modifying the suspension. Respondent has not challenged either at trial or on review the authenticity or content of the district court's orders and decision. Respondent also submitted a copy of a judgment of the Court of Appeals dismissing the appeal of the 1991 judgment and order. Thus, the orders are now final.[10]

The district court's March 1991 decision noted that the relief requested by the rule 11 motion was an injunction against the trustee preventing relitigation of the many cases, a request for attorney's fees, a request for a fine against respondent for his conduct in the lawsuits, and respondent's disbarment from practice before that district. All the relief requested was granted except for the fine.[11]

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8. There were five trial court actions (one in Wisconsin circuit court, one in California superior court, three in federal district court), five federal appeals to the Court of Appeals for the Seventh Circuit, one appeal to the Wisconsin Court of Appeals, one petition for review to the Wisconsin Supreme Court, and two petitions for certiorari to the United States Supreme Court. All the actions were aimed at restoring the trustee to a position of control of the trust, seeking damages for the trustee's removal, and seeking repayment and injunctive relief for improper expenditures by the trust. All of the actions failed.

9. The notice of appeal has three case numbers listed. The copy of the judgment contains only one of the three case numbers. Neither party has explained this discrepancy. Nevertheless, in view of respondent's uncontroverted explanation of the ground for the dismissal, we assume that the Court of Appeals dismissed all three cases as respondent's client was the plaintiff in all three.

10. As indicated above, the notice of appeal introduced into evidence in the present proceeding indicates that the trustee appealed the judgment and order. Our record contains no evidence that respondent appealed his suspension.

11. The district court determined that the request for attorney's fees covered the issue of the fine. Also, the "disbarment" was modified as indicated above.

[11b] Rule 11 states that an "appropriate sanction" shall be imposed upon a finding that the rule was violated.[12] The official Advisory Committee Notes to rule 11 and authorities interpreting the rule make clear that attorney discipline is an available sanction. (*Thomas* v. *Capital Security Services, Inc.* (5th Cir. 1988) 836 F.2d 866, 878; see also Annot. (1989) 95 A.L.R.Fed. 107, 141, and cases cited therein.)

[11c] Respondent testified in the present case that he was represented by counsel at hearing on the rule 11 motion and that he was disciplined as a result of that matter. The district court's March 1991 order and decision state that the court was suspending respondent in accordance with rule 2.05 of the Local Rules of the United States District Court for the Eastern District of Wisconsin. That rule provided for the suspension of attorneys "Upon order of the court for cause . . . ."[13] Based on the foregoing, we conclude that the Wisconsin federal district court's action against respondent constituted discipline.

[10b, 11d] The district court's March 1991 decision contains findings of fact and conclusions of law only with regard to the request for the injunction. No factual findings were made regarding the request for respondent's disbarment and the district court did not articulate which facts, if any, from the decision that it relied on in disciplining respondent. The court simply concluded: "Throughout all of these cases, and the many appeals from adverse rulings, attorney Jeffers has been contemptuous of the legal process. He should not, at this time, be allowed to continue to practice in this court." Thus, we are unable to determine based on our record the factual underpinnings of the district court's action.

[11e] As we have previously stated: "To properly fulfill [the] purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) We are unable to examine the nature or chronology of respondent's Wisconsin conduct based on the current record. Absent that examination, we are unable to determine the impact that respondent's Wisconsin conduct should have on the current discipline recommendation. Accordingly, we cannot give any weight to the Wisconsin discipline as a factor in aggravation.

[12a] We also cannot give any weight as a factor in aggravation to respondent's conduct in the consolidated appeals. (*John* v. *Barron, supra,* 897 F.2d 1387.) The Seventh Circuit's opinion establishes only a small portion of the circumstances surrounding respondent's conduct in the appeals—that respondent failed to comply with rule 28(a) of the Federal Rules of Appellate Procedure. (*Id.* at pp. 1392-1393.) Respondent did not challenge the characterization of his brief as consisting only of one page unsupported of any authority except an incorrect reference to a Wisconsin statute. Nor did he challenge the Seventh Circuit's statement that he omitted any references to the record as required by that rule. Although the rule was not complied with, we do not have sufficient basis to determine whether respondent's conduct was an isolated act of negligence or a disciplinable offense.

[12b] In addition, the Seventh Circuit proceeding was in a civil matter with a different standard of proof. OCTC did not introduce *any* of the evidence regarding respondent's conduct that was before the Seventh Circuit Court of Appeals when it issued its opinion. We therefore are unfortunately unable to assess respondent's conduct independently under our clear and convincing standard of proof. (See *Maltaman* v. *State Bar, supra,* 43 Cal.3d at p. 947 ["While the civil findings bear a strong presumption of validity if supported by substantial evidence, we

12. Rule 11 provides that every pleading, motion, or other paper filed in a federal civil case must be signed by an attorney or pro se litigant and that such signature constitutes a certificate that the signer has read the document and after conducting a reasonable inquiry into the applicable law and facts, believes the document to have a valid factual and legal basis, and that it is not filed for any improper purpose. Rule 11 was amended in April 1993, effective in December 1993. Those amendments are not material to our discussion and our references are to the rule as amended in 1987.

13. Rule 2.05 was amended in January 1993. The amendments are not material to our discussion.

must nonetheless assess them independently under the more stringent standard of proof applicable to disciplinary proceedings. (Citations.)"].)[14]

[13] Finally, we find no merit to OCTC's contention that we should consider in aggravation respondent's "conduct in submitting a frivolous review brief" in this proceeding. In support of this argument OCTC cites *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647. There we held that an attorney's use of specious and unsupported arguments in an attempt to evade culpability in a disciplinary matter revealed that the attorney lacked appreciation both for his misconduct and for his obligations as an attorney and therefore constituted an aggravating factor in that matter. In the present proceeding, unlike in *Bach*, respondent's attorney filed the briefs in question. There is no evidence that respondent drafted or controlled the contents of the briefs.

3. Mitigating Circumstances

[14a] Respondent must prove mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) He asserts on review that he has 39 years of "unblemished service" as an attorney. As noted above, respondent was disciplined in Wisconsin federal court in 1991. Thus, respondent has failed to establish clearly and convincingly that he has 39 years of "unblemished" practice as an attorney.

[14b] Although the exact time period of the conduct in the Wisconsin federal court matter is not clear from the record, the lawsuits which gave rise to the discipline were apparently filed in 1987 and 1988. As respondent was admitted in 1954, he practiced law in excess of 30 years before the Wisconsin discipline matter. These many years of practice are appropriately considered as an important mitigating circumstance.

We also discount somewhat the mitigating weight to be accorded to respondent's character witnesses. These witnesses consisted of two attorneys who had known respondent for many years; one attorney who had worked with respondent on one case; respondent's wife, who was also an attorney; and two business people who had known respondent for many years. As indicated above, several of these witnesses indicated that their opinion of respondent's honesty and integrity would change if the State Bar charges were true. We do not find this evidence to be deserving of significant weight in mitigation as it is not an "extraordinary demonstration of good character . . . . attested to by a wide range of references in the legal and general communities . . . who are aware of the full extent of the member's misconduct." (Std. 1.2(e)(vi).)

4. Discipline

[15a] In this single-count matter, we have concluded that respondent is culpable of failing to appear as ordered on behalf of his client at a MSC, and of intentionally misleading the MSC judge regarding Craddock's status. This misconduct is serious for it "is clearly the kind that threatens the public and undermines its confidence in the legal profession." (*Bach* v. *State Bar*, *supra*, 43 Cal.3d at p. 857.) In mitigation, respondent practiced law for many years prior to his Wisconsin federal court discipline; and he has demonstrated his good character through his many civic and professional pro bono activities.

In *Di Sabatino* v. *State Bar*, *supra*, 27 Cal.3d 159, the attorney misled a bail commissioner by failing to disclose two other bail reduction motions. Di Sabatino had no prior discipline in six years of practice. The Court adopted the State Bar's recommended discipline and imposed a public reproval.

In *Drociak* v. *State Bar*, *supra*, 52 Cal.3d 1085, the attorney answered interrogatories directed to his client and attached the client's presigned verifications to the interrogatories, without first consulting with the client to assure that the answers were true. In aggravation, Drociak had other clients sign blank

14. It is troubling to this court that the Wisconsin matters were not presented properly because they appear to have involved extended conduct of a potentially far more serious nature than the State Bar's case-in-chief. Such conduct, if appropriately proved, would bear directly on respondent's current fitness to practice law.

verifications; his misconduct posed a threat of harm to the administration of justice; and he demonstrated no remorse for his misconduct. In mitigation, Drociak had 25 years of practice with no prior discipline; he believed his acts were in the best interests of his client; and there was no harm to his client. The Supreme Court adopted the State Bar's recommended discipline of one year stayed suspension with two years probation on conditions, including thirty days actual suspension.

In *Bach* v. *State Bar*, *supra*, 43 Cal.3d 848, the attorney intentionally misled a judge regarding the attorney's being advised or ordered to produce his client at a mediation hearing. Bach had a prior public reproval for communicating with an adverse party represented by counsel. No mitigation was found. Bach was suspended for one year, stayed, with three years probation on conditions, including sixty days actual suspension.

In *In the Matter of Farrell*, *supra*, 1 Cal. State Bar Ct. Rptr. 490, the attorney misrepresented to a judge that a witness was under subpoena, and failed to cooperate with the State Bar's investigation of the matter. In aggravation, Farrell had been previously disciplined for acquiring his client's property to secure payment of his fees and in payment of his fees without the proper ethical safeguards; for appearing without authority; for failing to return his client's file on request; and for abandoning a client. For this prior misconduct he had been suspended for two years, stayed, with two years probation on conditions, including ninety days actual suspension. In mitigation, we found that Farrell believed that the subpoena had been sent out for service but that he had no proof that it had been actually served. We recommended that he be suspended for two years, stayed, with three years probation on conditions, including six months actual suspension.[15]

The misconduct in the present case is similar to the misconduct in the above three cases. However, respondent's showing in mitigation is greater than the showing in the above cases. In addition, unlike *Bach* and *Farrell*, respondent does not have a record of prior cognizable discipline; and unlike *Drociak*, no other aggravating circumstances are present here. [15b] In view of respondent's many years of practice and the lack of proven aggravating factors, we conclude that the discipline recommended by Judge Wesley, which is greater than the discipline imposed in *Di Sabatino* but less than that imposed in *Drociak*, is appropriate here.

RECOMMENDATION

[15c] For the foregoing reasons, we recommend that respondent be suspended from the practice of law for a period of one year, that execution of that suspension be stayed, and that he be placed on probation for a period of two years on the conditions specified in Judge Smith's decision filed July 31, 1993, except that respondent not be actually suspended from the practice of law. 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 Bar 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, within said year. 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.

15. Our recommendation in *Farrell* was not acted upon by the Supreme Court as the case was dismissed (min. order filed July 31, 1991 (S021952)) because Farrell was disbarred in a different case. (Min. order filed June 26, 1991 (S012372).)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT R

A Member of the State Bar

No. 92-O-10339

Filed January 3, 1995

SUMMARY

After the filing of a disciplinary proceeding against him, respondent entered into an agreement in lieu of discipline (ALD) with the Office of the Chief Trial Counsel (OCTC). Pursuant to the agreement, OCTC moved to dismiss the proceeding. The hearing judge granted the motion, but provided in the order of dismissal that the proceeding could not be reopened unless OCTC first obtained a finding that respondent had violated the ALD. (Hon. David S. Wesley, Hearing Judge.)

OCTC sought review of the portion of the hearing judge's order placing a precondition on reopening the proceeding. The review department held that it had jurisdiction to review the order, and that since the condition placed in the dismissal order by the hearing judge was not agreed to by both parties, it could not bind OCTC in reopening the underlying disciplinary matter or relitigating it.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Del Cerro

For Respondent: R. Gerald Markle

HEADNOTES

[1 a, b] **101 Procedure—Jurisdiction**
117 Procedure—Dismissal
130 Procedure—Procedure on Review
132 Procedure—Agreements in Lieu of Discipline
135 Procedure—former Transitional Rules of Procedure
167 Abuse of Discretion

Review Department had jurisdiction under rule 113 of Transitional Rules of Procedure to review portion of order by hearing judge which, in dismissing disciplinary proceeding pursuant to agreement in lieu of discipline, placed conditions on reopening of underlying disciplinary matter. Scope of such review was to determine whether hearing judge abused discretion in including condition in agreement in lieu of discipline which had not been agreed to by parties.

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] 117 Procedure—Dismissal
132 Procedure—Agreements in Lieu of Discipline
167 Abuse of Discretion

An agreement in lieu of discipline is an agreement between the Office of the Chief Trial Counsel and the respondent to substitute terms and conditions in place of the disciplinary process, at least provisionally. Hearing judges have authority to dismiss or not dismiss disciplinary proceedings in light of such agreements, and may include conditions in dismissal order which are not contained in agreement if they are accepted by both parties, but judges do not have authority to modify such agreements without parties' consent or to append binding conditions or duties not agreed to by parties.

ADDITIONAL ANALYSIS

Other

110 Procedure—Consolidation/Severance
135.02 Procedure—Comparison to Former Transitional Rules of Procedure
151 Evidence—Stipulations
165 Adequacy of Hearing Decision
214.20 Section 6068(l)

OPINION

STOVITZ, J.:

This review raises two very limited but first-impression issues: 1) Do we have jurisdiction to entertain the request of the Office of the Chief Trial Counsel (OCTC) to review a portion of the order of the State Bar Court Hearing Department dismissing a disciplinary proceeding on OCTC's motion incident to an agreement in lieu of discipline (Bus. & Prof. Code, § 6092.5(i))[1] and 2) when ordering the disciplinary matter dismissed incident to the agreement in lieu of discipline, did the hearing judge have the power to bind the parties by placing a precondition on reopening the disciplinary proceeding not agreed to by both parties?

We hold that we have jurisdiction to review this proceeding. (Trans. Rules Proc. of State Bar, rules 2.25 and 113(d).) We also hold that since the condition placed in the dismissal order by the hearing judge was not agreed to by both parties, it cannot bind OCTC in reopening the matter or in relitigating it. However, in reopening or relitigating the matter, OCTC must comply with the terms of any governing statutes or procedural rules then in effect concerning agreements in lieu of discipline ("ALDs").

STATEMENT OF THE CASE.

Respondent R[2] was admitted to practice law in California in 1989 and he has not been previously disciplined. On May 12, 1993, OCTC filed a notice to show cause alleging that respondent committed certain professional misconduct. Respondent answered on June 2, 1993. Settlement negotiations followed which respondent characterized as very difficult and not in good faith. OCTC disputes respondent's characterization.

In March 1994 the parties reached an ALD. It was furnished to the hearing judge for in camera inspection and at our request, it was furnished to us for similar in camera inspection while we considered this matter.[3] As pertinent to the issues in this case, the ALD's provisions include that the stipulation as to facts and ALD, while confidential, "may be admitted as evidence without further foundation at any disciplinary hearing held in conjunction with Respondent's failure to comply with the conditions of this agreement." In the event that respondent complied fully with the ALD, it provided that the underlying matter would be closed and OCTC agreed that it would be precluded from reopening the underlying matter for any reason unless stated in the ALD. No exceptions to this were stated in the ALD. Finally, as pertinent here, the ALD stated that OCTC will move to dismiss the underlying proceeding "and without prejudice to refile [sic] should Respondent fail to comply with the terms and conditions of this agreement, any formal charges filed with the Court which form the basis of this agreement."

The hearing judge granted OCTC's motion to dismiss the underlying disciplinary proceeding in view of the ALD reached. In his order dismissing the disciplinary proceeding without prejudice, the judge cautioned respondent that violation of the ALD could subject him to discipline under section 6068 (l). The bearing judge also stated that there was a condition on OCTC's reopening of the underlying matter or bringing a new action regarding the facts and circumstances of the underlying matter. That precondition was that if OCTC believes that respondent did not comply with the terms and conditions of the ALD, OCTC must first bring a proceeding and obtain a finding that respondent violated the ALD before OCTC can reopen and relitigate any matter alleged in the underlying matter. The hearing judge stated no reasons for his precondition.

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

2. Since this proceeding did not result in the imposition of any public discipline, we follow our usual practice of not identifying the respondent in this published opinion. (See, e.g., *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1.) The proceeding is, however, public.

3. We consider the ALD *only* as to any language it may contain (see main text, *post*) bearing on the limited issues in dispute. The merits of the ALD are not in dispute. The parties have agreed that we may discuss in this published opinion the general provisions of the ALD contained on page 3 of that document.

OCTC unsuccessfully sought reconsideration and now seeks our review, contending that the hearing judge's precondition exceeded his authority.

DISCUSSION.

A. Jurisdiction.

[1a] At the outset, we stress that this review is limited only to that portion of the hearing judge's order of dismissal placing conditions on the reopening of the underlying disciplinary matter. We address the question of jurisdiction first. As the basis of our ability to review the hearing judge's order, OCTC relies on rule 113, Transitional Rules of Procedure of the State Bar; and, in the alternative, on rule 1400(e)(vii), Provisional Rules of Practice of the State Bar Court. Respondent assumes we have jurisdiction to review this matter and urges us to adopt the hearing judge's conditions on reopening of the dismissal. Based on application of rule 113, Transitional Rules of Procedure of the State Bar, we hold that we have jurisdiction to review the hearing judge's order.

Certain matters involving orders of dismissal are expressly reviewable by us. (E.g., *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163 [pretrial dismissal order based on failure of notice to show cause to state disciplinable offense reviewable under the provisions of Trans. Rules Proc. of State Bar, rule 554.1].) Although no provision of the rules of procedure expressly provides for our review at the request of OCTC of an order granting OCTC's motion to dismiss a proceeding incident to an ALD, we believe that this is an appropriate exercise of the application of rules 2.25 and 113(d) of the Transitional Rules of Procedure. Collectively, these authorities recognize the role of the Presiding Judge of the State Bar Court in supervising and providing for calendar management and the assignment and calendaring of all matters within the State Bar Court.[4] In her discretion, the Presiding Judge has referred this matter to the full review department for decision.

B. Propriety of the Judge's Precondition on Reopening.

[1b] We hold that the scope of the review we undertake from the hearing judge's dismissal order is to determine whether the hearing judge abused his discretion in including the conditions not agreed to by the parties. This is consistent with the nature of review we typically undertake in resolving other procedural matters. (See *In the Matter of Respondent L* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 454, 461, and cases cited.)

In *In the Matter of Respondent L, supra,* we held, in part, that the hearing judge failed to properly exercise the discretion vested in her. After enrolling an attorney inactive under section 6007 (b)(2), the hearing judge abated the underlying disciplinary proceeding without any discussion of appropriate factors surrounding that decision. We have a similar situation in the matter before us, in that the hearing judge has failed to indicate any reason for placing conditions on the reopening of the matter nor has he supplied any discussion of his decision to attach conditions to the reopening by OCTC of the underlying disciplinary proceeding. Before reaching our conclusion as to the hearing judge's exercise of discretion, we discuss ALDs.

ALDs came into the California attorney disciplinary system as a result of a package of several legislative reforms chaptered in 1986. The State Bar's discipline monitor (see § 6086.9) described ALDs in his Fifth Progress Report of September 1, 1989, as a process devised by OCTC to recognize the high cost of formal adjudicatory proceedings and the desirability of limiting such proceedings to serious offenses likely to result in "meaningful suspension or disbarment." The discipline monitor analogized the ALD somewhat to a criminal "diversion" scheme. As the monitor reported, OCTC believed that ALDs were within its inherent powers as disciplinary prosecutor. (Fifth Progress Report of State Bar Discipline Monitor (1989) pp. 46-49.)

4. Rule 300(a) of the Rules of Procedure of the State Bar of California, Title II, State Bar Court Proceedings, effective January 1, 1995 (hereafter "new rule(s)") also appears to authorize such a review; see also new rule 260(d).

The State Bar Act has two references to ALDs. The basic provision for them, section 6092.5 (i), is simple and broad. That section permits an ALD to be used in any subsequent proceeding without any limits: "In addition to any other duties specified by law, the disciplinary agency shall do all of the following: [¶] . . . . [¶] (i) Make agreements with respondents in lieu of disciplinary proceedings, regarding conditions of practice, further legal education, or other matters. These agreements may be used by the disciplinary agency in *any subsequent proceeding* involving the lawyer." (Emphasis added.)

The only other statutory provision regarding ALDs is section 6068 (l), referenced in the hearing judge's order of dismissal. That section makes it a duty of every member of the State Bar to keep all ALDs entered into. As pointed out in the ALD in this case, violation of that duty can be a basis for an independent disciplinary prosecution. (See § 6103.)

Under section 6086, the Board of Governors of the State Bar has long been empowered to adopt rules governing the procedures in disciplinary matters. At the time of the hearing judge's order of dismissal, no rules of procedure covered ALDs nor did rule 410, regarding dismissals, provide for the type of precondition here. The rules of procedure effective January 1, 1995, are consistent with the terms of the ALD here and do not by themselves authorize any precondition of the type ordered by the judge.[5]

We view an ALD as having some similarities to a stipulation as to facts and disposition. (Compare Trans. Rules Proc. of State Bar, rules 405-408.) It is clear under the just-cited "stipulation" rules that a hearing judge has the discretion to approve a stipulated disposition fair to both parties, but if the judge decides to reject the stipulation the parties are relieved of all its effects. (Rule 407(b), Trans. Rules Proc. of State Bar; cf. *In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 678.) **[2a]** The ALD is by its words an "agreement" between OCTC and respondent to substitute terms and conditions in place of the disciplinary process, at least on a provisional basis. With the one exception we outline, *post*, the hearing judge should regard an ALD as a bargained-for document embodying all terms and conditions governing it. While the judge has the authority to dismiss or not dismiss the formal proceeding, the judge should assume no authority to modify the ALD without the parties' consent or to append conditions or duties not agreed to by the parties.

[2b] The ALD submitted to us in camera has no conditions contemplating such a precondition as the hearing judge included. In our view, the hearing judge could have included a condition in the order dismissing the proceeding not contained in the agreement subject to acceptance by both parties. However, unless both parties agree to the additional condition, it may not be considered part of the ALD and enforced as such. In view of OCTC's timely objection to the condition inserted by the hearing judge, it did not agree to that condition and we hold that the hearing judge therefore exceeded his jurisdiction in making it a binding part of his final order.

As noted, in the ALD, OCTC has agreed to close this case if respondent complies with the terms and duties of the agreement. However, subject to the just-cited proviso of the ALD, and the one limit of new rule 262(f), section 6092.5 (i) gives OCTC broad authority to use ALDs in any future proceeding without precondition not agreed to by both parties and section 6068 (l) gives OCTC the added option of filing a new and separate disciplinary proceeding for failure of a member to keep such an agreement. Whoever is assigned to be the hearing judge has discretion in such new and separate disciplinary proceeding as to how that proceeding will be tried,

5. Effective January 1, 1995, new rule 262(f), governing dismissals of proceedings on account of ALDs, provides that such dismissals "shall be without prejudice, provided, however, that successful completion of the [ALD] shall bar subsequent prosecution of the respondent based on the misconduct charged in the dismissed proceeding." New rule 261(c) provides that after a dismissal without prejudice, the dismissed proceeding may be reopened by the filing of an amended notice of disciplinary charges, by appropriate motion, or by filing a new proceeding based on the same transaction or occurrence. Leave of court is required only if the reopening is more than two years after the dismissal, or, if the proceeding was dismissed incident to an ALD, if the term of the ALD has expired.

including severing the two proceedings (see new rule 109) and trying the ALD allegation first, if appropriate.

FORMAL DISPOSITION.

The hearing judge's order of dismissal without prejudice is adopted but without the precondition contained in that order on reopening or relitigating the underlying proceeding.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LILLIAN BROWN JOHNSON

A Member of the State Bar

No. 86-O-12794

Filed January 23, 1995; reconsideration denied, March 6, 1995

SUMMARY

Respondent exploited a vulnerable relative whom she represented in a personal injury action by improperly borrowing the bulk of the client's net settlement proceeds and not repaying the loan. The hearing judge found a number of aggravating circumstances and recommended that respondent receive five years stayed suspension and five years probation on conditions including restitution and two years actual suspension. (Hon. Christopher W. Smith, Hearing Judge.)

Respondent requested review, claiming that the hearing judge violated her right to due process by permitting the client's daughter to testify about her mother's personal injuries and by not permitting respondent to recall two of the State Bar's witnesses to the stand for further questioning. In addition, respondent challenged each of the hearing judge's culpability findings. The review department rejected respondent's claim of due process violations, but made modifications to the hearing judge's findings of fact and culpability conclusions. The review department also modified the hearing judge's discipline recommendation by adjusting the recommended amount of restitution and by extending the recommended actual suspension until respondent made restitution.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Dal Cerro

For Respondent: Lillian B. Johnson, in pro. per.

HEADNOTES

[1] **145 Evidence—Authentication**
162.11 Proof—State Bar's Burden—Clear and Convincing
Where State Bar failed to prove by clear and convincing evidence that respondent's client's signatures on loan agreement and release were forgeries, and evidence submitted did not undermine authenticity of loan agreement, State Bar Court resolved doubt in respondent's favor and found that loan was made.

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] **148 Evidence—Witnesses**
159 Evidence—Miscellaneous
162.11 Proof—State Bar's Burden—Clear and Convincing
162.90 Quantum of Proof—Miscellaneous
221.00 State Bar Act—Section 6106

Disbelief of a respondent's testimony does not create evidence to the contrary. Where respondent allegedly misrepresented to insurer that respondent's personal bank account was a client trust account, but only evidence to rebut respondent's testimony to contrary was notation in insurer's records, presence of such notation was not sufficient to establish that it resulted from misrepresentation by respondent, even where hearing judge found respondent not credible.

[3 a, b] **159 Evidence—Miscellaneous**
162.20 Proof—Respondent's Burden
221.00 State Bar Act—Section 6106
420.00 Misappropriation

Where client gave written authorization to respondent to apply portion of client's net settlement proceeds to outstanding legal fees client owed respondent on prior case, respondent was not required to prove existence of prior case to establish entitlement to funds applied to fees.

[4] **142 Evidence—Hearsay**
148 Evidence—Witnesses
159 Evidence—Miscellaneous

The testimony of an investigator is not the best evidence on the contents of court records. Testimony or sworn evidence from the court clerk responsible for the records is more germane and reliable.

[5] **141 Evidence—Relevance**
159 Evidence—Miscellaneous
162.20 Proof—Respondent's Burden

Hearing judges are accorded wide latitude to receive all relevant evidence, and relief from their decisions will not be granted on the basis of alleged error in admitting evidence unless actual prejudice is established.

[6 a, b] **120 Procedure—Conduct of Trial**
148 Evidence—Witnesses
167 Abuse of Discretion
192 Due Process/Procedural Rights

A party may not recall a witness who has been excused from giving further testimony without leave of court, which may be granted or withheld in the court's discretion. Hearing judge did not deny due process to respondent by denying respondent's motion to recall State Bar witness who had been excused from giving further testimony.

[7 a, b] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
148 Evidence—Witnesses
167 Abuse of Discretion
192 Due Process/Procedural Rights

Where State Bar witness had not been excused from giving further testimony, hearing judge erred in not permitting respondent to recall such witness for questioning about document respondent did not possess at time witness first testified. However, where such additional testimony was relevant

only to refute factual contention later abandoned by State Bar, hearing judge's error did not result in prejudice to respondent.

[8 a, b] **273.00 Rule 3-300 [former 5-101]**
Rule governing attorneys' business transactions with clients requires that terms and conditions of loan from client to attorney be fair and reasonable to client; that terms be explained in terms client understands; that client be advised to seek advice of independent counsel, and that client consent to transaction in writing. A violation of any portion of such rule is sufficient to constitute misconduct.

[9 a, b] **162.20 Proof—Respondent's Burden**
273.00 Rule 3-300 [former 5-101]
A loan from a client, like all attorney-client business transactions, is scrutinized for unfairness, and when such transactions are called into question, attorney has burden to prove that they were fair and reasonable to client. Where client's loan to attorney was unsecured in situation where security would ordinarily be considered essential, and where no periodic payments were provided for despite client's financial circumstances, such facts were evidence that terms and conditions of loan transaction were unfair to client.

[10] **273.00 Rule 3-300 [former 5-101]**
430.00 Breach of Fiduciary Duty
Client's written consent to loan transaction with respondent was not knowing consent, where respondent knew that client lacked capacity to give informed consent because of her poor health, frequent use of alcohol, lack of business experience, and limited education. Respondent was obligated to insure that terms and conditions of loan were fully known and understood by client, and was required not merely to inform client of her right to consult another attorney, but to advise client to do so.

[11] **221.00 State Bar Act—Section 6106**
273.00 Rule 3-300 [former 5-101]
420.00 Misappropriation
Fact that attorney obtained loan from client improperly, in violation of rule governing business transactions with clients, did not automatically convert attorney's acquisition of loan funds into misappropriation, and did not invalidate underlying loan transaction.

[12] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
582.10 Aggravation—Harm to Client—Found
Attorney's failure to repay loan from client did not constitute theft, but did aggravate harm already suffered by client.

[13] **221.00 State Bar Act—Section 6106**
273.00 Rule 3-300 [former 5-101]
430.00 Breach of Fiduciary Duty
551 Aggravation—Overreaching—Found
Where respondent, as attorney and close family member of client, exploited superior knowledge and position of trust to detriment of vulnerable client in obtaining loan from client with grossly unfair provisions, attorney's overreaching constituted act of moral turpitude.

[14] **280.00 Rule 4-100(A) [former 8-101(A)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Even though client had agreed to lend respondent all but a small amount of client's net settlement proceeds, character of such settlement proceeds remained mixed. Respondent's failure to place entire settlement proceeds into client trust account and to properly disburse small amount owed to client violated trust account rules.

[15] **130 Procedure—Procedure on Review**
159 Evidence—Miscellaneous
162.20 Proof—Respondent's Burden
765.51 Mitigation—Pro Bono Work—Declined to Find
Where respondent moved to augment record on review to include documentary evidence regarding respondent's pro bono activities, but respondent did not establish good cause why such evidence could not have been presented to hearing department, review department declined to consider such evidence.

[16] **551 Aggravation—Overreaching—Found**
691 Aggravation—Other—Found
795 Mitigation—Other—Declined to Find
Fact that respondent's misconduct involved client who was member of respondent's family was not mitigating but rather aggravating circumstance, since respondent's family ties to client made respondent more aware of client's vulnerabilities and trust client placed in respondent.

[17] **691 Aggravation—Other—Found**
Respondent's carelessness in losing control of four to five hundred case files when respondent's practice closed raised grave doubts about respondent's ability to protect client interests and constituted evidence in aggravation.

ADDITIONAL ANALYSIS

Culpability
Found
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)]
420.19 Misappropriation—Other Fact Patterns
Not Found
221.50 Section 6106
420.55 Misappropriation—Valid Claim to Funds
Aggravation
Found
521 Multiple Acts
591 Indifference
611 Lack of Candor—Bar
Mitigation
Found
710.10 No Prior Record
750.10 Rehabilitation

Found but Discounted

760.32 Personal/Financial Problems

Standards

822.31 Misappropriation—One Year Minimum
824.10 Commingling/Trust Account Violations
833.90 Moral Turpitude—Suspension
881.10 Business Transaction with Client—Suspension
881.30 Business Transaction with Client—Suspension

Discipline

1013.11 Stayed Suspension—5 Years
1015.08 Actual Suspension—2 Years
1017.11 Probation—5 Years

Probation Conditions

1021 Restitution
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

OPINION

PEARLMAN, P.J.:

This case involves an attorney who exploited a vulnerable, impecunious relative by improperly borrowing and not repaying the bulk of the proceeds of a personal injury settlement obtained by the attorney on her behalf. Respondent Lillian Brown Johnson has requested review of the decision of the hearing department, which recommended a five-year stayed suspension, a five-year probation term on conditions including $22,910 in restitution within two years, and actual suspension for two years and until she demonstrates her rehabilitation and fitness to practice. While we modify a few of the findings of the hearing judge, we agree that two years of actual suspension and restitution constitute fitting discipline for respondent's overreaching at the expense of her sister-in-law, now deceased,[1] a woman of limited income, in poor health, who lacked sophistication in business matters.

FACTUAL FINDINGS

A. Facts as Found and Supported by the Record

Margie L. Brown, sister-in-law of respondent, was seriously injured on March 13, 1982, when a hair spray product she used ignited while she was cooking, severely burning her. Ms. Brown's injuries required her hospitalization and prevented her from working as a part-time cleaning woman for approximately one month.

Ms. Brown retained respondent to file suit and seek other remedies on her behalf against World of Kurls, the manufacturer of the hair care product. Respondent maintained at the hearing that she had a written retainer agreement with Ms. Brown which provided for a contingent fee of 40 percent of any recovery in payment for respondent's fees if the case settled after a complaint was filed. Respondent was unable to produce a copy of this retainer agreement assertedly because of the loss of her files. (See fn. 2, *post.*) The hearing judge found that the contingent fee agreement was an oral one.

Respondent filed a lawsuit on Ms. Brown's behalf in the Superior Court of Los Angeles County on March 14, 1983. After answers were filed, the parties entered into settlement negotiations and in September 1986, respondent and counsel for the defendants agreed to settle Ms. Brown's case for $40,000.

The insurance company dispensing the settlement funds received a copy of a standard release form with the signature of Ms. Brown, witnessed by Earl Johnson, respondent's son. In turn, the insurance company agreed to the unusual arrangement of electronically transferring the settlement funds directly to an account maintained by respondent. That account, noted in the insurance company records as a trust account, was in fact a personal account maintained by respondent. On or about October 14, 1986, the insurance company transferred funds to respondent's personal bank account. The designated payees on this transfer were respondent and Ms. Brown. The lawsuit was dismissed on respondent's motion on October 27, 1986.

Under the oral retainer agreement, Ms. Brown would have been entitled to receive $24,000, less $200 in estimated court costs. Respondent admitted that *none* of the proceeds of the settlement went to Ms. Brown. According to respondent, Ms. Brown agreed to loan her *without security* $19,860 from the settlement proceeds, which respondent later used as a down payment on the purchase of a residence. In addition, Ms. Brown agreed to pay $3,250 for legal services provided by respondent in two prior legal matters; $140 represented cash respondent had allegedly advanced Ms. Brown prior to the settlement, and the remaining $750 was allegedly given to Ms. Brown in cash at the time the insurance release was executed.

In support of this accounting, respondent produced a copy of a promissory note dated September

1. The client, Margie L. Brown, died in January 1992, after the notice to show cause was filed.

26, 1986, executed by respondent in Ms. Brown's favor for $19,860 with 10 percent interest from January 2, 1987, payable on or before January 3, 1991. In addition, respondent produced a copy of an agreement dated September 19, 1986, signed by both respondent and Ms. Brown, in which Brown agreed to loan respondent approximately $20,000 at 10 percent interest for the purchase of real property. She agreed to pay legal fees for a prior criminal case of $2,500, and an additional $750 in fees for a damage claim filed against Ms. Brown,[2] out of the World of Kurls settlement.

Respondent testified that she negotiated for the loan with Ms. Brown from September 15 until the agreement was signed on September 19. Later in the hearing, she claimed that she had advised Ms. Brown that she could speak to another attorney concerning the loan transaction but did not have a written acknowledgment of this advice. Respondent testified that Ms. Brown was not interested in speaking to another attorney, was unconcerned that the loan was not secured, and was satisfied with a lump sum repayment of the loan without receiving periodic payments of principal or interest. Respondent admitted that she did not offer Ms. Brown a partial ownership interest or security interest in the real estate to be purchased with the loan proceeds. Respondent claimed Ms. Brown was willing to make the loan to respondent because Ms. Brown said she did not need the settlement proceeds immediately. Respondent also testified that she had $100,000 in accounts receivable from client fees which could have secured her loan repayment.

After presenting extensive evidence contesting the authenticity of the signatures on the loan agreement, the Office of the Chief Trial Counsel ("OCTC") withdrew from its position that the signatures on the loan agreement and the release were not executed by the same person. [1] After evaluating the evidence, the hearing judge concluded that OCTC failed to prove by clear and convincing evidence that the signatures of Brown on the release and on the agreement to loan respondent money were forgeries. The hearing judge also ruled that respondent had not established by a preponderance of evidence or otherwise that Ms. Brown had signed the release and the loan agreement. However, the hearing judge resolved the doubt about the validity of the documents in respondent's favor. (*Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 183; *Ballard* v. *State Bar* (1983) 35 Cal.3d 274, 291.) Upon our own independent review, we conclude that the evidence submitted does not undermine the authenticity of the loan agreement and therefore find a loan was made from Ms. Brown to respondent.

As to the cash payments made to Ms. Brown, respondent could not produce cash receipts or other evidence of these payments. She contended that the $140 payment was made in early September during the week that she was negotiating for the loan with Ms. Brown. The remaining $750 or so was her "cash out" of Ms. Brown at the time the release was signed, paid in cash from her office drawer.

The hearing judge concluded that these cash payments were never made. In support of this conclusion, the hearing judge outlined what he characterized as the "many suspicious and unexplained circumstances relating to Respondent's dealings with Brown." (Decision at p. 18.) He recounted respondent's varying versions of the time, place and amount of the cash payments. He noted that respondent claimed that she had made these cash distributions just prior to and after the settlement negotiations concluded, and that they were in amounts which served to exculpate respondent from charges that she misappropriated or mishandled entrusted funds. The cash distributions were not mentioned in the loan agreement or promissory note, nor were they corroborated by any other evidence. Finally, even if respondent's assertion that she advanced $140 to Ms.

2. Respondent produced 1984 correspondence with the Allstate Insurance Company to corroborate her work on the damage claim. Respondent had no documents regarding the alleged 1980 criminal matter in Compton Municipal Court. Respondent explained that when her law practice disintegrated in 1988, between 400 and 500 of her files were placed in storage and were sold when she could not make the storage payments. She submitted a certification from the Municipal Court, Compton Judicial District, which stated that the court was not in possession of documents related to the case name and docket number provided by respondent and set forth the document destruction schedule for the court.

Brown at the time she executed the promissory note is accepted as true, Ms. Brown's alleged plea for cash contradicts respondent's claim that Ms. Brown did not need the settlement funds immediately. We agree that respondent did not establish that she advanced any monies to Ms. Brown before the settlement proceeds were wired.

Respondent was unable to repay the loan in full to Ms. Brown when it came due. She claimed she gave Ms. Brown between $800 and $1,000 in cash before her law firm disintegrated in 1988. These payments were allegedly made during lunchtime visits with Ms. Brown after respondent had made morning court appearances. Respondent could not produce any receipts. The hearing judge concluded that the evidence was insufficient to show that respondent repaid any funds to Ms. Brown. We agree.

Respondent also failed to make her mortgage payments on the house purchased with the funds provided by Ms. Brown and the house was lost to foreclosure in 1989. After Ms. Brown died, respondent made no effort to locate the heirs or make any payments on the loan.

The hearing judge concluded that respondent had violated Business and Professions Code section 6106[3] by misappropriating the entire settlement under egregious circumstances and misrepresenting to the insurance company that it was to wire funds to her trust account when it was in fact her personal account. He determined that she had violated former rule 8-101[4] in having the settlement funds wired to her personal account. He also found that she had entered into a business transaction with a client without complying with the requirements of former rule 5-101. Finding that respondent lacked candor toward the court, was indifferent to rectifying the harm caused by her misconduct, caused significant harm to her client and had little mitigating evidence beyond the lack of a prior record, the hearing judge recommended a five-year stayed suspension, a five-year probation term, and actual suspension for two years and until respondent demonstrated her rehabilitation at a hearing pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V ("stds.").) He also recommended that respondent be required as a probation condition to make restitution of $22,910 plus interest to Ms. Brown's estate or heirs within two years.

B. Modifications to Factual Findings

We have two modifications to the facts as found by the hearing judge. [2] Respondent testified that when she negotiated for a wire transfer of the settlement funds, she did not represent to the insurance company that the funds would be wired to a trust account. While the hearing judge did not find respondent credible in most respects, the only evidence to rebut her testimony was a notation in the insurance company records that the account was a trust account. Disbelieving respondent does not create evidence to the contrary. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.) The notation may reflect the insurance company employee's own assumption about the nature of the account, since in the normal course of business, such a transaction would involve a trust rather than a personal account. However it alone does not establish that it resulted from a misrepresentation by respondent to the company. Therefore we modify the factual findings and conclusions to conclude that there is no clear and convincing evidence that respondent misled the insurance company about the nature of the bank account.

[3a] As to the attorney's fees authorized under the agreement for prior legal work, the hearing judge concluded that the $2,500 set off for attorney's fees allegedly performed for a criminal case in 1980 was improper because respondent did not prove that the criminal case ever existed. The hearing judge did not consider respondent's evidence sufficient to establish that the criminal case ever existed. The State Bar investigator who did a criminal records search in the

3. Except as noted, all further references to sections are to the Business and Professions Code.

4. All references in this opinion to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

Municipal Court in Compton failed to uncover any criminal court file relating to Ms. Brown.

Considering the age of the criminal case (1980), it is not surprising that the State Bar was unable to locate a record concerning the criminal matter when it sent its investigator to the Compton Municipal Court. [4] However, the testimony of an investigator is far from the best evidence on the contents of court records. Testimony or sworn evidence from the court clerk responsible for the records is more germane and reliable on this issue. Here, the court clerk's certification of document destruction (see fn. 2, *ante*) casts doubt that the municipal court had retained any case files more than 10 years old.

[3b] Nevertheless, Ms. Brown agreed in the loan agreement to pay for legal fees for prior cases out of the settlement funds. The lack of corroborative evidence as to the criminal case is therefore immaterial. Respondent was entitled under the agreement to take her attorney's fees for these prior cases and we so find.

DISCUSSION

A. Due Process Claims

As a preliminary matter, respondent argues the decision violates due process on two grounds. First, respondent contends that testimony by Ms. Brown's daughter, Sandra Brown, describing her mother's injuries from the accident which sparked the lawsuit against World of Kurls, prejudiced the hearing judge. Respondent argues that the testimony was introduced to inflame the emotions of the hearing judge and it improperly influenced his ultimate decision.

In response, OCTC cites to our analysis in *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469. **[5]** Hearing judges are accorded wide latitude to receive all relevant evidence and actual prejudice must be established before a party is entitled to relief. OCTC argues that respondent has not demonstrated any prejudice resulting from the testimony.

[6a, 7a] From an independent review of the record, we do not find that the hearing judge was prejudiced by Sandra Brown's testimony concerning her mother's injuries.

In addition, respondent claims she was denied due process because she was not permitted to recall and examine OCTC witnesses Lucerne Middlebrook and Carolyn Porter. At the completion of Ms. Porter's testimony on April 29, 1993, respondent asked the hearing judge to place Ms. Porter on call and the hearing judge so ordered. A similar request was made to the judge after the close of Mr. Middlebrook's testimony but that request was denied and the witness was excused. In both instances, the alternative of having respondent subpoena these witnesses was discussed. At a later point in the trial, respondent moved to have Ms. Porter and Mr. Middlebrook recalled to the stand. The hearing judge denied both motions; in the first instance, because Mr. Middlebrook had been excused, and regarding the second witness, because respondent had failed to subpoena Ms. Porter when respondent learned prior to that day's hearing that OCTC could not produce Ms. Porter.

[6b] OCTC argues that the hearing judge excused Mr. Middlebrook after his testimony and thus there is no procedural error. That is consistent with Evidence Code section 778, which provides that, "After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."

[7b] However, Ms. Porter was placed "on call" and not excused from giving further testimony in the matter. Respondent's purpose for recalling Ms. Porter was to examine her concerning a power of attorney allegedly executed by Ms. Brown in 1991, a document which respondent did not possess at the time Ms. Porter originally testified. The additional testimony was relevant only to authenticate the signature as Ms. Brown's and did not relate to the validity of the transactions at issue in the case. OCTC has abandoned its argument that the signatures on the documents in question were forgeries. Therefore, while respondent was entitled to have Ms. Porter recalled, there is no prejudice resulting from the judge's decision not to order the witness recalled.

B. Improper Business Transactions—Rule 5-101

Respondent challenges all the culpability findings, contending that they are not supported by sufficient credible evidence. She does not address specifically the facts underlying the violation of former rule 5-101.

[8a] The rule required that the terms and conditions of the loan had to be fair and reasonable to Ms. Brown, that they be explained in terms that she understood, that she be advised by respondent to seek the advice of independent counsel concerning the terms of the loan, and that Ms. Brown consent to the transaction in writing. **[9a]** A loan from a client to an attorney, like any attorney-client business transaction, is "scrutinized with the utmost strictness for any unfairness." (*Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 314, citing *Beery* v. *State Bar* (1987) 43 Cal.3d 802, 812-813.) The burden is on the attorney to demonstrate that the dealings with the client were fair and reasonable. (*Hunniecutt* v. *State Bar* (1988) 44 Cal.3d 362, 372-373; *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 745.) **[8b]** A violation of any portion of rule 5-101 is sufficient to constitute misconduct. (*Read* v. *State Bar* (1991) 53 Cal.3d 394, 411.)

[9b] The terms and conditions of the loan were clearly unfair. This is a situation when security would ordinarily be considered essential to the client and thus an unsecured loan under these circumstances is an indication of unfairness. (*Hunniecutt* v. *State Bar, supra*, 44 Cal.3d at p. 373; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 164.) The loan did not provide for any payments other than a lump sum payment in January 1991, which was again unreasonable, considering the financial circumstances of the client. (See, e.g., *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 662.) Nor did respondent describe such possible terms as the assignment of a security interest or other lien against the real property which respondent acquired with the loan proceeds, as options that could have safeguarded Ms. Brown's interests.

[10] We agree with the hearing judge's conclusion that Ms. Brown's written consent to the transaction was not a knowing one because Ms. Brown was incapable of giving informed consent and her incapacity was known to respondent. Respondent was obligated to insure that the terms and conditions of the loan were fully known and understood by Ms. Brown. (*Hunniecutt* v. *State Bar, supra*, 44 Cal.3d at pp. 372-373, citing *Clancy* v. *State Bar* (1969) 71 Cal.2d 140, 146-147.) Ms. Brown's poor health, frequent use of alcohol, lack of sophistication in business matters, and limited education were all evident to respondent (her sister-in-law) and undermined respondent's claim that she had obtained Ms. Brown's informed consent to the loan. The hearing judge also disbelieved respondent when she claimed to have advised Ms. Brown to seek independent counsel. Respondent was obligated to go beyond informing Ms. Brown that she had a right to consult another attorney and was required to *advise* her to do so. (*Rose* v. *State Bar, supra*, 49 Cal.3d at p. 663.) Respondent was clearly overreaching.

We will also consider the conditions under which respondent secured the loan from Ms. Brown as grounds for discipline as an act of moral turpitude under section 6106.

C. Section 6106—Moral Turpitude

The hearing judge found that respondent violated section 6106 in five respects: (1) she misrepresented to the insurance company that the bank account for the wire transfer was a trust account; (2) she charged her client for legal fees in a criminal case which did not exist; (3) she misappropriated the proceeds of a loan to which she was not entitled; (4) she misappropriated the balance of settlement funds that she claimed to have paid out in cash to her client; and (5) she obtained the loan in a manner "so egregious and so abusive of her obviously vulnerable client as to constitute moral turpitude." (Decision at p. 16.) Respondent contests all five findings by the hearing judge. We have rejected the first two bases of culpability by our modifications to the judge's factual findings. After reviewing the Supreme Court's opinions in this area, we also reject the finding that respondent misappropriated the loan proceeds. We do find ample evidence for concluding that respondent's procurement of the loan and retention of the balance of the settlement funds constituted acts of moral turpitude and dishonesty.

[11] Both the hearing judge and OCTC conclude that the finding of improprieties committed by respondent in securing this loan means that respondent must have misappropriated the loan proceeds. There is no case law that an improper transaction under former rule 5-101 automatically converts the attorney's acquisition of the funds as part of the transaction into a misappropriation. OCTC compares it to the retention of client property under circumstances that were neither reasonable nor honest, citing *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 229-230. In *Harris*, the attorney borrowed computer equipment from the client and refused to return it upon the client's request, claiming it to be a part of her attorney's fees. She was found to have converted the equipment, in violation of section 6106. Here, respondent had a claim of right to the bulk of the funds under the loan agreement signed by the client. The fact that the negotiation and final terms of the loan breached respondent's duties did not invalidate the underlying transaction. [12] We find that respondent's failure to repay the loan does not constitute theft; rather, her default aggravated the harm already suffered by respondent's client.

Indeed, there are a number of cases in which an attorney violated rule 5-101 by improperly soliciting a loan or investment from a vulnerable client on the heels of the client's receipt of a large settlement where misappropriation was not found. (See *Rose* v. *State Bar*, *supra*, 49 Cal.3d at p. 663; *Hunniecutt* v. *State Bar*, *supra*, 44 Cal.3d at pp. 372-373; *Beery* v. *State Bar*, *supra*, 43 Cal.3d at pp. 811-812.) In all three cases, restitution was ordered to ameliorate the harm caused by the misconduct.

In *Rose*, the attorney persuaded a young widow with two young children to invest $70,000 in a franchise restaurant equipment business in which the attorney was also a shareholder. The Court found that the attorney had failed to disclose the substantial risks of such an investment to the client, a person with virtually no business experience and limited financial resources apart from the settlement funds, and failed to advise her to seek independent counsel. Finding additional misconduct in four other client matters involving improper solicitation, incompetent practice, and trust fund violations, as well as evidence of mitigation, the Supreme Court ordered a two-year actual suspension.

In *Hunniecutt*, the attorney persuaded the client to loan the entire $5,000 settlement from a personal injury action to the attorney to invest in a real estate venture and later converted the transaction into an unsecured loan. The Court discussed the special trust this client placed in the attorney as a result of the personal injury litigation and concluded that because of the unfairness of the business transaction, violations of rule 5-101 and section 6106 had occurred. Considering mitigation evidence, including efforts to repay the client and to alter his practice to avoid a recurrence, the Court ordered a 90-day actual suspension.

In *Beery*, the attorney persuaded a client who had suffered an injury leaving him paralyzed below the waist, and who was unsophisticated in financial matters, to invest $35,000 of the proceeds of his personal injury settlement in a satellite venture. The attorney did not disclose either his relationship with the satellite company or its financial condition, did not advise the client to seek independent advice concerning the investment, and defaulted on his personal guarantee to repay the loan. The Court found that it was not an arms-length business deal, material facts were concealed, and the attorney had abused the trust reposed in him by the client. The Court ordered a two-year actual suspension.

However offensive respondent's actions were, they did not transform an improper business transaction into a misappropriation. We find that respondent did not steal the majority of the settlement proceeds, contrary to section 6106, but obtained them pursuant to a loan transaction which otherwise violated respondent's duties to her client.

[13] Nevertheless, the misconduct here violated section 6106 as an act of moral turpitude on other grounds. As noted by the Court in the *Beery* case, "'The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is

in a superior position to exert unique influence over the dependent party.'" (*Beery* v. *State Bar*, *supra*, 43 Cal.3d at p. 813, quoting *Barbara A.* v. *John G.* (1983) 145 Cal.App.3d 369, 383.) The fairness and reasonableness of a business transaction between an attorney and client go to the core of whether such overreaching constitutes moral turpitude. (*Hunniecutt* v. *State Bar*, *supra*, 44 Cal.3d at p. 372.) As we stated earlier, the loan provisions were grossly unfair to Ms. Brown. As an attorney and a close family member, respondent exploited her superior knowledge and position of trust to the detriment of her vulnerable client and this clearly constituted an act of moral turpitude.

Respondent had no valid claim to the $700 which remained from the settlement, money which respondent claimed to have advanced to Ms. Brown out of her cash drawer. Respondent's misappropriation of those funds was an act of dishonesty and moral turpitude as well.

D. Commingling and
Prompt Payment—Rule 8-101

[14] Respondent contends that she did not violate former rule 8-101(A) in that all the funds had changed character from trust funds into personal funds prior to her receipt thereof. As a result of respondent's agreement with Ms. Brown, all but approximately $700 was attributable to attorney's fees owed to respondent, costs owed to her or the loan. Nevertheless, since there was a mixed character to the funds, respondent was obligated to place the settlement proceeds into her trust account and thereafter dispense the $700 owed to her client promptly. There is no doubt that Ms. Brown made a demand for funds. Respondent's failure to place the settlement proceeds in a trust account and to pay the remainder promptly to Ms. Brown violated the trust account rules.

RECOMMENDED DISCIPLINE

A. Mitigation and Aggravation

Respondent argued in mitigation her long record of practice without prior discipline (11 years prior to the misconduct in 1986), her close familial relationship with Ms. Brown, and the financial setbacks which she suffered as a result of the disintegration of her law firm in 1988. [15] She has also moved to augment the record on review to include evidence concerning her pro bono activities,[5] and argues that the lack of any additional charges of misconduct filed against her from the time of this incident to the present should be given some mitigating weight. Respondent claimed that she had not located a file which contained the documentation regarding her pro bono work until she was preparing for review proceedings. Since respondent has not established good cause wby the documentary evidence in her possession could not have been presented below, we decline to consider it. (See *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 686-687.)

Her years of practice without incident and the lack of any charges filed since this case are mitigating circumstances. Respondent's financial reversal could explain her inability to repay the loan or attempt any restitution to the heirs. However, since the reversal postdates the loan, it cannot be considered as mitigation of the misconduct itself. [16] The fact that respondent's misconduct involved a family member does not constitute a mitigating circumstance. In *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310, the attorney paid his own personal expenses, as well as those authorized by his client, a close personal friend, from the client's funds in trust, resulting in a misappropriation. The Court rejected the claim that the attorney's personal relationship with the client and the lack of any intent to harm the client

5. Respondent originally submitted this evidence in her post-oral argument brief filed on July 29, 1994. OCTC moved by motion filed September 1, 1994, to strike the additional evidence sought to be admitted. Respondent filed an opposition to the motion to strike on September 12, 1994, as well as a separate motion to augment the record on review. OCTC opposed the augmentation request in papers filed on September 20, 1994. Respondent filed a supplemental declaration in support of her augmentation motion on September 29, 1994, and OCTC filed its response on September 30, 1994. The case was submitted on September 30, 1994.

were mitigating. Here, respondent's family ties to her client, her sister-in-law, made respondent all the more aware of the client's vulnerabilities and the considerable trust the client placed in respondent. Rather than honoring that trust, respondent exploited it for her own benefit and to the harm and detriment of the client. The familial relationship here is not a mitigating circumstance; it is an aggravating one.

There is other aggravating evidence in this case. Respondent's misconduct involved multiple acts of wrongdoing, and significantly harmed her client. She showed indifference towards rectifying or atoning for her misconduct and has failed to make any attempt to repay the loan, or to contact the heirs. The hearing judge's decision is replete with examples of respondent's lack of candor at the hearing. [17] The carelessness with which respondent lost control of between four and five hundred case files when her practice closed raises grave doubts about her ability to protect the interests of other clients as well.

B. Discipline Recommendation

We consider the cases involving improper business transactions with clients to be of greatest relevance in fashioning a discipline recommendation. After reviewing the parties' briefs and the cases cited therein, the cases discussed in this opinion, the applicable standards,[6] and the aggravating and mitigating evidence, we adopt the substance of the hearing judge's recommendation for discipline, with two modifications to the probation conditions he proposed. We find that a five-year stayed suspension, a five-year probation term including restitution within two years, and actual suspension for two years and until respondent demonstrates her rehabilitation and fitness to practice is consistent with prior attorney discipline cases of gross overreaching amounting to moral turpitude, which also contain substantial aggravating circumstances and little evidence in mitigation. (See *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d 300 [two-year actual suspension for improper loan in violation of rule 5-101 coupled with dishonesty and intentional concealment of the loans from the probate court and opposing counsel]; *Beery* v. *State Bar*, *supra*, 43 Cal.3d 802 [two-year actual suspension for rule 5-101 and section 6106 violations, including concealing material facts from client regarding loan].)

The two modifications to the probation conditions are modifications of the restitution requirement. First, the restitution amount should be modified to require restitution of $20,550, plus 10 percent interest per annum from October 14, 1986, consistent with our finding that respondent was entitled to retain a portion of the settlement for prior legal services rendered. We also modify the terms of probation to recommend that respondent be ordered to remain on actual suspension for two years and until she provides proof of completed restitution to Ms. Brown's estate or heirs as prescribed by the hearing judge, as well as making the required showing pursuant to standard 1.4(c)(ii). We adopt the remainder of the hearing judge's discipline recommendation, as modified, including the requirements that respondent pass the California Professional Responsibility Examination prior to the expiration of her actual suspension; that she comply with the provisions of rule 955, California Rules of Court, and that she pay costs as ordered by the Supreme Court.

We concur:

NORIAN, J.
STOVITZ, J.

6. Under standard 2.3, discipline for acts of moral turpitude includes actual suspension or disbarment, depending on the extent of the harm to the victim, the magnitude of the act, and its relationship to the practice of law. Misappropriation of small amounts of entrusted funds or other violations of trust account rules requires a minimum three-month actual suspension, under standard 2.2. The recommended sanction under standard 2.8 for an improper business transaction with a client is suspension, unless the misconduct and harm are minimal.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN MICHAEL BROWN

A Member of the State Bar

No. 91-C-03459

Filed February 3, 1995

[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. 246 - 254 has been deleted from the *California State Bar Court Reporter*.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT S

A Member of the State Bar

Nos. 89-O-12629, 90-O-12608

Filed February 15, 1995

[Editor's note: State Bar Court Review Department opinion was vacated by the California Supreme Court and the case has been remanded to the Review Department for reconsideration (S046067; Dec. 16, 1995). The State Bar Court Review Department opinion previously published at pp. 255 - 260 has been deleted from the *California State Bar Court Reporter.*]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT EUGENE SMITH

A Member of the State Bar

No. 94-C-11035

Filed March 22, 1995

[Editor's note: The State Bar Court Review Department opinion previously published at pp. 261 - 265 has been deleted from the *California State Bar Court Reporter* by order of the State Bar Court Review Department (October 27, 1995).]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID M. HARNEY

A Member of the State Bar

No. 90-O-14277

Filed April 4, 1995; as corrected, April 10, 1995; reconsideration denied, May 30, 1995

SUMMARY

In representing the plaintiff in a medical negligence case, respondent was found to have collected a fee in excess of applicable statutory limits, in violation of the former Rule of Professional Conduct proscribing the collection of illegal fees. The hearing judge recommended discipline included stayed suspension, probation, a 30-day period of actual suspension, and restitution of the illegal portion of the fees. (Hon. Christopher W. Smith, Hearing Judge.)

Both parties requested review. The review department held that respondent not only collected an illegal fee sizably in excess of that permitted by settled law, but obtained the probate court's and his client's approval of the fee by failing, through recklessness or gross neglect, to reveal information concerning the statutory fee limit. The review department also found that respondent's refusal to return the illegal portion of the fees upon his client's request violated his professional duty to do so. The review department recommended a two-year stayed suspension and a two-year probation period, on conditions including six months of actual suspension, restitution of the illegal portion of the fees, and submission of respondent's fee agreements to the State Bar.

COUNSEL FOR PARTIES

For State Bar: Allen L. Blumenthal

For Respondent: Thomas Kallay

HEADNOTES

[1] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings

Review department took judicial notice of stipulation and Court of Appeal opinion in civil cases involving respondent that post-dated hearing department proceedings and concerned matters discussed at hearing. (Rule 1304, Prov. Rules of Practice.)

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

[2] 130 **Procedure—Procedure on Review**
135 **Procedure—Rules of Procedure**
135.01 **Procedure—Rules of Procedure**
Where case was briefed and argued prior to effective date of revised Rules of Procedure and Rules of Practice, review department applied former Transitional Rules of Procedure and Provisional Rules of Practice.

[3] 130 **Procedure—Procedure on Review**
136 **Procedure—Rules of Practice**
146 **Evidence—Judicial Notice**
Where respondent sought to place documents, some of which were not before hearing judge, in record on review by including them in appendix to brief, without filing motion with reasons why documents could not have been produced at hearing, and without indicating how documents would correct or complete record, review department declined to take judicial notice of documents. (Rule 1304, Prov. Rules of Practice.)

[4 a, b] 106.10 **Procedure—Pleadings—Sufficiency**
106.90 **Procedure—Pleadings—Other Issues**
117 **Procedure—Dismissal**
213.10 **State Bar Act—Section 6068(a)**
240.00 **State Bar Act—Section 6146**
241.00 **State Bar Act—Section 6147**
242.00 **State Bar Act—Section 6148**
Violation of State Bar Act section that is not, by its terms, disciplinable offense may be grounds for finding violation of statute requiring attorneys to uphold law. Where respondent was charged with violating statutory fee limitations and written fee agreement and disclosure requirements which are not, by their terms, disciplinable offenses, charge of violating statute requiring attorneys to uphold law was required as conduit to allege other violations, and such charge should not have been dismissed as unnecessary.

[5 a-d] 162.11 **Proof—State Bar's Burden—Clear and Convincing**
240.00 **State Bar Act—Section 6146**
Statute limiting contingent fees in medical negligence cases prohibits attorneys from either contracting for or collecting a contingent fee in excess of statutory limits. Where respondent had no written fee agreement, but agreed orally to accept fee to be awarded by court if result was successful, evidence was not clear and convincing that respondent had a contingent fee contract. However, once respondent received court-awarded fee after settlement of case, respondent collected a contingent fee within meaning of fee limit statute.

[6] 148 **Evidence—Witnesses**
159 **Evidence—Miscellaneous**
169 **Standard of Proof or Review—Miscellaneous**
Even though Evidence Code permits legal experts to testify regarding ultimate legal issues, such issues are ultimately for independent decision-making of State Bar Court and Supreme Court.

[7] 240.00 **State Bar Act—Section 6146**
When attorney contracts for contingent fee in medical negligence case, maximum collectible fee is set by statutory limits in effect at time contract was entered into.

[8 a, b] **213.10 State Bar Act—Section 6068(a)**
240.00 State Bar Act—Section 6146
290.00 Rule 4-200 [former 2-107]

Statutory limit on attorneys' contingent fees for representation of plaintiffs in medical negligence actions applies whether person represented is responsible adult, infant or person of unsound mind and regardless of whether recovery is by settlement, arbitration or judgment. Where respondent failed to reveal potential applicability of such statute to incompetent client's representative and superior court ruling on respondent's fee application, such conduct frustrated court's function in passing upon fee request and client's interest in receiving all of recovery to which she was entitled, and violated attorney's duty to uphold law and rule against charging or collecting illegal fees.

[9 a, b] **162.90 Quantum of Proof—Miscellaneous**
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings
204.90 Culpability—General Substantive Issues
240.00 State Bar Act—Section 6146

Clients may not waive statutory limit on contingent fees in medical negligence cases, and superior court award of such fees in excess of statutory limits is erroneous. Where attorney did not reveal material issue of potential applicability of such statutory fee limit to superior court in connection with approval of settlement and award of fees, such award did not constitute res judicata, because attorney and client were not adversaries in proceeding.

[10 a, b] **162.20 Proof—Respondent's Burden**
191 Effect/Relationship of Other Proceedings
240.00 State Bar Act—Section 6146

Where respondent's client's settlement had always been treated by civil court and by counsel in civil proceeding as having certain value, respondent's argument in disciplinary proceeding that settlement had different value for purpose of applying statutory contingent fee limits was without merit.

[11 a-c] **106.10 Procedure—Pleadings—Sufficiency**
106.90 Procedure—Pleadings—Other Issues
139 Procedure—Miscellaneous
213.10 State Bar Act—Section 6068(a)
241.00 State Bar Act—Section 6147
242.00 State Bar Act—Section 6148
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.00 Rule 3-500 (no former rule)
290.00 Rule 4-200 [former 2-107]

Statute requiring attorneys to uphold law is not always proper vehicle for charging violation of State Bar Act when statute is already covered as a disciplinable offense in another part of the Act. Because statutes requiring written attorney fee agreements containing certain information specify non-disciplinary remedies for attorneys' failure to comply with them, and because failure to comply with such statutes may be charged as violations of Rules of Professional Conduct regarding illegal fees, competence, and communication with clients, violation of such statutes is not disciplinable under statute requiring attorneys to uphold law.

[12 a, b] **106.10 Procedure—Pleadings—Sufficiency**
204.90 Culpability—General Substantive Issues
241.00 State Bar Act—Section 6147
242.00 State Bar Act—Section 6148
561 Aggravation—Uncharged Violations—Found
802.69 Standards—Appropriate Sanction—Generally

Conclusion that violations of statutes requiring written fee agreements and specified disclosures are not disciplinable offenses does not preclude consideration of attorney's failure to comply with such statutes as aggravating circumstance.

[13 a, b] **165 Adequacy of Hearing Decision**
204.90 Culpability—General Substantive Issues
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
715.10 Mitigation—Good Faith—Found
802.69 Standards—Appropriate Sanction—Generally

Once violation of ethical duties is found, hearing judge should not disregard culpability finding, but must examine surrounding circumstances and may consider either good or bad faith of respondent in mitigation or aggravation. Where respondent was found culpable of wilful failure to return illegal fees on demand, such culpability should have been considered in making discipline recommendation despite respondent's good faith belief in entitlement to funds, which was properly considered as mitigating factor.

[14 a, b] **148 Evidence—Witnesses**
164 Proof of Intent
165 Adequacy of Hearing Decision
166 Independent Review of Record
204.20 Culpability—Intent Requirement
213.20 State Bar Act—Section 6068(b)
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
240.00 State Bar Act—Section 6146
320.00 Rule 5-200 [former 7-105(1)]

Hearing judge's credibility findings based on respondent's demeanor while testifying are entitled to great weight. Where hearing judge found that respondent did not mislead court about applicability of statutory fee limitation because respondent had honest but unreasonable belief that statute did not apply, but review department concluded that respondent's failure to disclose fee limitation was unreasonable under circumstances, review department found that respondent violated duty not to mislead courts and committed act of dishonesty, but that such misconduct occurred through gross negligence rather than intentional dishonesty.

[15 a-c] **204.90 Culpability—General Substantive Issues**
213.20 State Bar Act—Section 6068(b)
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
240.00 State Bar Act—Section 6146
320.00 Rule 5-200 [former 7-105(1)]

An attorney's concealment of material facts is just as misleading as explicit false statements and constitutes misconduct warranting discipline. Where respondent had superior expertise regarding

statutory fee limits in medical negligence cases, respondent had duty both to court and client to disclose material fact that such statutory limit might apply in particular case, even if respondent thought he had reasonable grounds to distinguish case from ambit of statute. Respondent's grossly negligent failure to disclose such material fact violated his duties to respect courts, not to commit acts of dishonesty or moral turpitude, and not to mislead judges by artifice or false statements.

[16] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
162.20 Proof—Respondent's Burden
192 Due Process/Procedural Rights
193 Constitutional Issues

It is not clear that selective prosecution may be raised as defense in State Bar disciplinary proceedings. Even if such defense were available, it cannot be premised on asserted discrimination due to notoriety rather than on constitutionally prohibited basis such as race, gender, or exercise of constitutional rights. In absence of allegation of prohibited basis for prosecution, State Bar's failure to prove all charges was not sufficient to show invidiously discriminatory prosecution.

[17 a, b] **511 Aggravation—Prior Record—Found**
802.21 Standards—Definitions—Prior Record

Prior record of discipline is always aggravating factor, regardless of when discipline was imposed, but aggravating force may be diminished if present misconduct occurred during same period as prior misconduct. Where respondent's present misconduct, which was similar to misconduct found in his prior discipline proceeding, was committed after notice to show cause had been filed in prior proceeding, but before State Bar Court's decision was filed, filing of formal charges in prior proceeding gave respondent notice that State Bar considered his conduct ethically questionable. Therefore, respondent's prior record was aggravating evidence.

[18 a, b] **240.00 State Bar Act—Section 6146**
241.00 State Bar Act—Section 6147
582.10 Aggravation—Harm to Client—Found
586.11 Aggravation—Harm to Administration of Justice—Found

Respondent's failure to disclose potential applicability to client's case of statute limiting amount of attorney's fees caused significant harm to client and administration of justice. Failure to comply with statute requiring written fee agreement and disclosures also harmed client.

[19 a, b] **240.00 State Bar Act—Section 6146**
611 Aggravation—Lack of Candor—Bar—Found
621 Aggravation—Lack of Remorse—Found

In light of respondent's recognized expertise regarding statutory contingent fee limits in medical negligence cases, his persistent claim that he was not obligated to discuss potential applicability of every law in every book in his library with medical negligence client and superior court judge was frivolous and betrayed disdain for his client and trial court. Similarly, respondent's claim that he was victim of uncertain law regarding fee limitation statute demonstrated lack of candor with State Bar Court.

[20 a, b] **801.90 Standards—General Issues**
871 Standards—Unconscionable Fee—6 Months Minimum

Standard recommending six-month minimum actual suspension for charging unconscionable fee applies only to cases involving unconscionable fees, not illegal fees. However, where respondent received fee which, though not unconscionable, was sizably above statutory limits due to

respondent's abdication of his duties to his client and the court, it was difficult to justify less than minimum suspension proposed by such standards.

[21 a, b] **240.00 State Bar Act—Section 6146**
430.00 Breach of Fiduciary Duty
551 Aggravation—Overreaching—Found
582.10 Aggravation—Harm to Client—Found
601 Aggravation—Lack of Candor—Victim—Found

Respondent's duty to medical negligence client was not confined solely to obtaining successful recovery on client's claim. Respondent also had duty of utmost good faith and fidelity to client, which required him to advise client candidly of application of statutory limit on fee he could charge client. Where respondent overreached client by concealing such statute through recklessness or gross neglect, and collected excessive fee thereby, such conduct was patent breach of respondent's duty of good faith and fair dealing to client, and was very serious aggravating circumstance.

[22] **213.20 State Bar Act—Section 6068(b)**
213.40 State Bar Act—Section 6068(d)
240.00 State Bar Act—Section 6146
320.00 Rule 5-200 [former 7-105(1)]
582.10 Aggravation—Harm to Client—Found
715.50 Mitigation—Good Faith—Declined to Find

Respondent had duty of candor to superior court approving his fee. Respondent was entitled to urge any creative theory in good faith that statutory fee limitation might not apply to his case, but he could not simply conceal material fact that fee limitation statute might apply and profit sizably thereby at expense of his client.

[23 a-c] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
511 Aggravation—Prior Record—Found
621 Aggravation—Lack of Remorse—Found
822.53 Standards—Misappropriation—Declined to Apply
822.54 Standards—Commingling/Trust Account—Declined to Apply
824.10 Standards—Commingling/Trust Account—3 Months Minimum
871 Standards—Unconscionable Fee—6 Months Minimum

Where attorney is found culpable of intentional or dishonest withholding of funds due to client, issue on degree of discipline is whether mitigating circumstances outweigh general rule of disbarment for such offenses. Cases of misconduct involving funds improperly withheld for reasons other than dishonesty have typically resulted in varying degrees of actual suspension even when attorney had no prior discipline record. Where respondent, through gross neglect, withheld sizable amount of funds due to disabled client, had prior record of discipline for similar misconduct, and persisted in defending his collection of fees in excess of statutory limits despite adverse appellate decisions in suits against him by clients, concern for respondent's lack of insight into his misconduct and possible continued disregard for duty to clients of utmost good faith and fair dealing warranted six months actual suspension.

[24 a, b] **179 Discipline Conditions—Miscellaneous**
240.00 State Bar Act—Section 6146
241.00 State Bar Act—Section 6147

Where, after prior discipline in connection with violation of statutory contingent fee limit in medical negligence cases, respondent continued to assert that such fee limit did not apply to

particular case, it was appropriate to require as condition of disciplinary probation that respondent provide written retainer agreements to all medical negligence plaintiff clients not paying on hourly basis; that such agreements disclose statutory fee schedule; and that disclosures regarding fee limit be contained in such fee agreements and in declarations to be presented to judges approving respondent's petitions for attorney representation or attorney fees.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
213.21 Section 6068(b)
213.41 Section 6068(d)
221.12 Section 6106—Gross Negligence
240.01 Section 6146
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
290.01 Rule 4-200 (former 2-107)
320.01 Rule 5-200 [former 7-105(1)]

Not Found

213.15 Section 6068(a)
240.05 Section 6146
241.05 Section 6147
242.05 Section 6148

Mitigation

Found

740.10 Good Character

Found but Discounted

802.30 Purposes of Sanctions

Discipline

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

Probation Conditions

1021 Restitution
1029 Other Probation Conditions

OPINION

STOVITZ, J.:

We have been asked by both parties to review a disciplinary case in which respondent David M. Harney was found by a State Bar Court hearing judge to have, inter alia, collected an attorney fee which was $266,850 in *excess* of the statutory limits on contingent attorney fees for a medical negligence case. The heart of this case is not, as respondent would suggest, a principled disagreement over the validity or interpretation of the statutory limits. The constitutionality of the limits on attorney contingent fees in these cases was a settled issue at the time of respondent's misconduct. (*Roa* v. *Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920.) Our concern is with respondent's ethical duties to his client to reveal those mandatory limits in negotiating and collecting his fee. After considering the arguments of counsel and reviewing the record below, we conclude that respondent not only collected an illegal fee sizably in excess of that permitted by settled law, but obtained client and court consent thereto by recklessness or gross neglect, in failing to reveal to his client's conservator and the settlement judge material information concerning the statutory limits on attorney fees in medical negligence cases.

This case is about far more than an attorney simply collecting more fees than state law allowed. Rather, it reveals how an unsophisticated client, in this case an incompetent adult whose mother obtained respondent's services, can be taken advantage of by an attorney who fails to reveal material information in favoring his own interest over the client's interests in receiving all the recovery she is entitled by law to receive. This record and other appellate decisions arising out of respondent's conduct show that respondent has not gained any insight into his duty to protect his client's entitlement to her full share of the recovery vis-à-vis his own self-interest in maximizing his fee. Rather, because of respondent's intransigence, this client and at least three others have been forced to sue him in separate actions to establish his duty to follow state law.

Given respondent's long distinguished career, the necessity of this proceeding is regrettable. Nonetheless, under the circumstances, which include a public reproval in 1990 for similar misconduct, we agree with the State Bar that substantially greater discipline than the 30-day actual suspension recommended by the hearing judge is warranted as well as a requirement of compliance with rule 955 of the California Rules of Court. Had the concealment been found to be intentional, disbarment would not have been inappropriate for the amount of money his client was misled to pay as a fee. Based on our analysis of relevant case law and the standard for degree of discipline for unconscionable fees, we recommend a six-month actual suspension.

FACTS

Respondent is self-described as the top medical malpractice attorney and one of the top 10 trial attorneys in the United States today. Admitted to practice in California in 1948, he worked as a research attorney for the California Court of Appeal for 18 months, then entered private practice, representing primarily plaintiffs in product liability and medical negligence actions. He rose to prominence in the early 1960's with a series of product liability lawsuits against an automobile manufacturer. Respondent testified that he has taken over 100 medical negligence cases to verdict and 9 out of 10 of his medical negligence cases settle. He is the author of *Medical Malpractice* (2d ed. 1987), past president of the International Academy of Trial Lawyers, and a member of the Inner Circle of Advocates and the American Board of Trial Advocates.

Respondent testified before the California Legislature in 1975 during its committee hearings on the Medical Injury Compensation Reform Act

("MICRA"),[1] and has been a steadfast opponent of its provisions since its passage. Respondent and his office filed a number of amicus curiae briefs unsuccessfully challenging the constitutionality of the legislation, including in the following cases: *Waters* v. *Bourhis* (1985) 40 Cal.3d 424; *Fein* v. *Permanente Medical Group* (1985) 38 Cal.3d 137; *Roa* v. *Lodi Medical Group, Inc., supra*, 37 Cal.3d 920; and *American Bank & Trust Co.* v. *Community Hospital* (1984) 36 Cal.3d 359. Respondent has been a defendant in litigation brought by his clients contesting his fees in medical negligence actions after the passage of MICRA, resulting in two published opinions. (*Schultz* v. *Harney* (1994) 27 Cal.App.4th 1611, review den. Dec. 21, 1994; *Fineberg* v. *Harney & Moore* (1989) 207 Cal.App.3d 1049, review den. April 26, 1989.) The *Fineberg* case also held that a client could not waive the benefits of the attorney fee limits of MICRA.

One of respondent's medical negligence clients was Wendy Paulis. On November 4, 1986, at age 32, she underwent elective back surgery for an anterior cervical fusion at a hospital in San Bernardino County and never fully awoke from the operation. She remains in a semi-conscious state to date.

On December 30, 1986, Loretta Paulis,[2] Wendy's mother, met with respondent in his office to discuss a possible lawsuit against the hospital and Wendy's physicians. After discussing Wendy's injuries and the conditions of his possible representation, respondent said he would investigate the case, and then decide if he would accept it.

Respondent discussed the financial arrangements for his representation with Mrs. Paulis, and recounted it in a later deposition taken in civil litigation: "I didn't really propose anything. I was asked if there would be a fee that would be needed in advance, and I said that there would be no fee agreement whatsoever. The fee, if, as and when there would be a fee, would be determined by the Superior Court in San Bernardino County. I said that if there was no successful result, there would be no request for a fee. If there was a successful result, then the Court would determine what the fee would be."

No mention was made of the possible applicability of MICRA which by its terms applies to collection of fees as well as contracts for fees. (See fn. 1, *ante*.) By the time respondent accepted the case, the constitutionality of the attorney fee limits of MICRA had been settled for over a year as a result of a Supreme Court decision in which respondent had participated as amicus curiae. (*Roa* v. *Lodi Medical Group, supra*, 37 Cal.3d 920.)

Respondent investigated the background of the case and left a message with Mrs. Paulis in the early part of 1987 that he was willing to undertake the case. Mrs. Paulis sent him a note in February 1987 with the simple instruction, "You are authorized to proceed."

Respondent and his office prepared and filed on March 11, 1987, in San Bernardino County Superior Court, a medical negligence complaint on behalf of Wendy by her guardian ad litem, Mrs. Paulis, against the hospital and two physicians. In a separate action

1. Part of the Medical Injury Compensation Reform Act (MICRA) limited attorney fees (Bus. & Prof. Code, § 6146) in medical negligence cases. The statute applicable from 1975 until January 1, 1988, provided for fee limits as follows: "(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered. [¶] (3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered. [¶] (4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000). [¶] The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant or a person of unsound mind." (Former Bus. & Prof. Code, § 6146 (a) [1975 version].) As of January 1, 1988, the limits were raised to permit fees of 25 percent of amounts recovered between $100,000 and $600,000, and 15 percent of amounts recovered in excess of $600,000.

2. Mrs. Paulis died prior to the filing of the notice to show cause. After Mrs. Paulis's death, a dispute arose among Wendy's relatives about her estate and the San Bernardino County Public Guardian, Melody Scott, was made conservator of the estate of Wendy Paulis.

arranged by respondent but filed by another lawyer, Mrs. Paulis was appointed conservator of the person and estate of Wendy Paulis on April 29, 1987.

After extensive pretrial activities, including a number of settlement conferences before Superior Court Judge Don A. Turner, the case went to jury trial in the summer of 1988 before another judge. After jury selection and several days of trial, the trial judge suggested to the parties that settlement might again be explored before Judge Turner. In the prior discussions of settlement, respondent explained to Mrs. Paulis the method he expected to use for determining the attorney fees he was requesting. In his deposition in a later civil case, he stated: "My recollection is that I advised her that the policy of San Bernardino County was 25 percent in those cases that were settled regarding a minor incompetent [sic] more than two weeks before trial, and one-third in those cases where the case was settled within the two weeks or in trial. And I told her that I was not going to seek the higher fee. That's what I told her. She said fine."

Again, no mention was made of *any* potential applicability of MICRA although it applied to recovery by settlements *and* judgments as well as contingent fee agreements. The settlement was reached on July 19, 1988, and on that date, the petition by the guardian ad litem to compromise the contested claim was filed and heard by Judge Turner. The petition was prepared by an associate in respondent's office and respondent was the only attorney present before Judge Turner. The settlement agreement, which was affixed to the petition, stated the settlement value at $3.45 million. Respondent submitted costs of $65,000, and requested $846,250 for attorneys fees, exactly 25 percent of the $3.45 million settlement, minus costs.

After questioning Mrs. Paulis briefly concerning her understanding of the terms of the settlement, Judge Turner signed the order approving the compromise of claim. Respondent acknowledged at the discipline hearing that he at no time mentioned the possible application of the provisions of MICRA to either Mrs. Paulis or Judge Turner. According to respondent, he was not obliged to mention MICRA because he did not have a contingent fee agreement with Mrs. Paulis and these were court-ordered fees so MICRA did not apply. Notwithstanding Supreme Court precedent upholding the attorney fee provisions of MICRA, respondent also considered MICRA unconstitutional. Under the MICRA limits applicable to fees collected after January 1, 1988, respondent was entitled to a maximum fee of $579,400.

Judge Turner explained that the issue did not occur to him because ordinarily the 25 percent awarded for attorney fees under the county guidelines was lower than the maximum fees permitted under MICRA. He had never reviewed a settlement in which the amount of attorney fees awarded under the county's 25 percent policy exceeded the MICRA limits. Judge Turner testified that had he been aware of the discrepancy between the fees awarded under the policy and those permitted under MICRA, he would have set a hearing to determine if he had the jurisdiction to exceed the limits under MICRA and if so, whether there were facts in the case to justify the additional fees.

By letter dated June 6, 1989, attorney C. Patrick Mulligan advised respondent that Mrs. Paulis had retained him to represent Wendy and herself as guardian and requested that respondent refund to Wendy's estate the excess fees. On June 12, 1989, respondent rejected Mulligan's demand. As a result of conversations with the trial and settlement judges in the Paulis litigation, Mulligan eventually filed a formal complaint against respondent with the State Bar.[3]

PROCEDURAL MOTIONS

[1] The State Bar, represented by the Office of the Chief Trial Counsel, has asked us to take judicial notice of two matters: by written motion, a stipulation in the malpractice case against respondent (see

3. Mulligan also filed a civil suit against respondent and his law firm to recover the alleged excess fees. (*Paulis* v. *Harney* (Super. Ct. San Bernardino County, No. 250683).) After Mrs. Paulis's death, the San Bernardino Public Guardian, Melody Scott, instructed Mulligan to continue the lawsuit, and it remains pending.

fn. 3, *ante*), under rule 1304 of the Provisional Rules of Practice of the State Bar Court[4] **[2 - see fn. 4]**; and, by oral motion at argument on September 7, 1994, a Court of Appeal case filed on September 1, 1994, *Schultz* v. *Harney*, *supra*, 27 Cal.App.4th 1611. Respondent has not filed a response to the written motion. Since these documents post-date the hearing department proceedings and concern matters discussed at the hearing, we take judicial notice of them pursuant to section 452, subdivision (d) of the Evidence Code (notice of court records).

[3] Respondent has not filed a motion for us to take judicial notice or consider additional evidence, but has sought to place documents, some of which were not before the hearing judge, in the record by including them in an appendix to his opening brief. The State Bar has filed an objection and a motion to strike the appendix. The first eight items in the appendix are documents which are already a part of the record before us and it would be unnecessary for us to take judicial notice of them. The remaining five documents relate to a hearing department case which was pending at the time of respondent's request for review and which has since been dismissed without prejudice on motion of the State Bar. Respondent has not indicated how these documents will either correct the record below or fill in an otherwise incomplete record. (See rule 1304, Provisional Rules of Practice.) In the absence of a proper motion with reasons in an accompanying declaration why the documents could not have been produced at the hearing below, we decline to take judicial notice of these final five documents.

CULPABILITY FINDINGS

1. Section 6068 (a) Charges

[4a] At the outset, the hearing judge dismissed a number of alleged violations, among them, all alleged violations of Business and Professions Code section 6068 (a),[5] on the basis that they were unnecessary. We have held that some violations of the Business and Professions Code are disciplinable under section 6068 (a) as a violation of an attorney's duty to support the laws of California. (See *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 237 [§§ 6125 and 6126 (unauthorized practice of law) culpable under § 6068 (a)].) As we noted in analyzing the scope of section 6068 (a) in *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, when there is a violation of a section of the State Bar Act which is not, by its terms, a disciplinable offense, there may be grounds for finding a violation of section 6068 (a). (*Id.* at p. 487.)

[4b] The notice to show cause charged respondent with not complying with the fee limitations set forth in section 6146 and the requirements of a written fee agreement and written disclosures required under sections 6147 and 6148. Violation of these statutes is not by its terms a disciplinable offense. Accordingly, the State Bar was required to plead a violation of section 6068 (a) as a conduit for alleged violations of sections 6146, 6147 and 6148 and therefore, the section 6068 (a) charges should not have been dismissed.

2. Illegal Fees (Section 6146 and Rule 2-107(A))

The hearing judge found that respondent had a contingent fee agreement in a medical malpractice case subject to the limitations of section 6146, and he collected an illegal fee in excess of those limits and contrary to former rule 2-107(A).[6]

[5a] As we discussed *ante*, section 6146 prohibits an attorney from *either* contracting for *or* collecting a contingent fee in a medical negligence case in excess of statutory limits. We reject the testimony of

4. **[2]** This case was briefed and argued prior to the January 1, 1995, effective date of new Rules of Practice of the State Bar Court and Rules of Procedure of the State Bar. Accordingly, we apply the Provisional Rules of Practice of the State Bar Court and Transitional Rules of Procedure of the State Bar in effect prior to January 1, 1995. (See rule 1, Rules Proc. for State Bar Ct. Proceedings, eff. Jan. 1, 1995.)

5. Unless otherwise indicates, all references to section(s) are to the provisions of the Business and Professions Code.

6. Because the conduct at issue occurred prior to May 27, 1989, references to rules are to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989, unless otherwise indicated.

respondent's expert that respondent was innocent of misconduct.[7] **[6 - see fn. 7] [5b]** We conclude that respondent clearly *collected* an illegal fee exceeding MICRA limits by $266,850 but that the evidence is not clear and convincing that respondent *contracted for* an illegal fee.[8] **[7 - see fn. 8]** The hearing judge's finding that respondent had a contingent fee contract violating the MICRA limits is problematic.[9] **[5c]** Respondent had no written fee agreement in this case. Although that situation cannot aid him and it put him at odds with section 6147 (see *post*), the oral contract he created in early 1987 provided for him to receive only those fees which the superior court determined to award if there was a successful result. To be sure, respondent did agree that if his client did not prevail, he would seek no court-awarded fee. Yet in our view, the State Bar did not clearly and convincingly demonstrate a contingent fee agreement within the meaning of section 6146, since at the time of agreement the only evidence in the record showed that fees were to be set as the superior court determined.

[5d] However, once the case settled in 1988 and respondent received, upon his application, a fee of 25 percent of the recovery (the superior court's scheduled attorney fee for an incompetent's recovery) and respondent failed to inform the court or his client that MICRA limits could apply to this recovery, he clearly collected a contingent fee under section 6146. The fee he collected exceeded MICRA limits by $266,850.

[8a] As respondent surely knew from his intimate familiarity with this area of law, section 6146's prohibition against collecting a contingent fee in excess of stated limits was extremely broad. It applied to representation of *any* person in a medical negligence action for which a contingent fee is collected or contracted for, whether the person represented is a "responsible adult, an infant or a person of unsound mind" and regardless of whether the recovery is by "settlement, arbitration or judgment." Not only was respondent's collection of an illegal fee clear, but as we shall discuss, *post*, his failure to reveal the potential applicability of this law to his client's representative and the court frustrated the court's function in passing upon respondent's requested fee and the client's interest in receiving all of the recovery to which she was entitled.

Respondent has advanced two principal theories seeking to defeat the hearing judge's finding that he collected an illegal fee. We consider them in turn and we find them both without merit.

[9a] Respondent asserted both in his brief and at oral argument that the doctrine of res judicata bars

7. At the hearing below, Respondent presented the expert testimony of Professor Erwin Chemerinsky of the University of Southern California School of Law. Chemerinsky had taught a variety of courses, including constitutional law and professional responsibility. Chemerinsky opined that respondent's fee was not a contingency fee and that respondent did not commit any of the misconduct charged. **[6]** Chemerinsky's testimony concerned questions of law on the ultimate issues before the hearing judge. Although Chemerinsky could opine on ultimate issues (Evid. Code, § 805), those questions are ultimately for the independent decision-making of the State Bar Court and Supreme Court.

8. **[7]** The issue's practical significance is as to the amount of excess fee respondent received. If it were held that respondent charged a contingent fee, he received $466,100 in excess of MICRA limits because of a change in the MICRA limits effective January 1, 1988. (See also *Wienholz* v. *Kaiser Foundation Hospitals* (1989) 217 Cal.App.3d 1501, 1507-1508 [when attorney contracts for a contingent fee in a MICRA case, the maximum collectible fee is set by the version of MICRA in effect at the time the contract was entered].)

9. As support for his conclusion that respondent entered into a contingent fee agreement, the hearing judge cited a decision from a Florida intermediate appellate court, *Quanstrom* v. *Standard Guaranty Ins. Co.* (Fla. App. 1988) 519 So.2d 1135, 1136, mod. on other grounds *sub nom. Standard Guaranty Ins. Co.* v. *Quanstrom* (Fla. 1990) 555 So.2d 828. The *Quanstrom* court did not set forth the specific fee agreement in that case or the statutory language against which it measured the agreement. The Florida court's discussion suggests that the attorney's agreement was similar to the oral fee agreement respondent entered into here. In *Quanstrom*, the court concluded that the attorney's contract was a contingent fee agreement within the meaning of the Florida law at issue. The State Bar has relied on this case and two others from other states as supporting the hearing judge's conclusion. We do not consider these out-of-state decisions sufficient authority for us to conclude in this *disciplinary* case that respondent's oral agreement to take as fees whatever the court awarded was a contingent fee agreement subject to MICRA limits, especially given that the matter was not settled in California.

the conclusion that he collected an improper fee because the propriety of his fees has already been determined by the San Bernardino Superior Court. Respondent's claim is frivolous and its reiteration at oral argument even suggests bad faith on his part. A nearly identical claim was rejected in a civil case in which respondent was a defendant. (*Schultz* v. *Harney*, *supra*, 27 Cal.App.4th at pp. 1618-1620, filed six days prior to oral argument before us.) *Schultz*, citing, inter alia, *Roa* v. *Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d at pp. 925, 934, held that a superior court's award to respondent of a fee exceeding the MICRA limits was erroneous and that, on the authority of *Fineberg* v. *Harney & Moore*, *supra*, 207 Cal.App.3d at p. 1050, the client could not waive the MICRA fee limits.

[9b] In *Schultz*, the court also held that the doctrine of res judicata did not apply: "... Harney and Schultz were not adversaries in the proceedings to approve the settlement of Christopher's claims in the medical malpractice action. To the contrary, Harney was Schultz's attorney and fiduciary. The probate court's approval of Harney's fees, obtained in apparent defiance of a contrary statute and through a possible breach by Harney of his fiduciary responsibility, cannot serve as the basis of a res judicata bar in this action. Schultz is entitled to seek recovery of that portion of those fees which exceeded the statutory restrictions. [Citation.]" (*Schultz* v. *Harney*, *supra*, 27 Cal.App.4th at p. 1620.) We agree with the Court of Appeal in *Schultz* v. *Harney*, that respondent cannot claim any benefit of the doctrine of res judicata in the case before us since he failed to reveal to the superior court the material issue of the potential applicability of MICRA and allowed that court to award him a 25 percent fee without any awareness that MICRA might apply.

[10a] Respondent also contends that the settlement amount is larger than the $3.45 million on which respondent sought the award of attorney fees. He contends that his recovery ranged from $21.7 million, the arithmetic sum of all the payments to be made to Wendy over her projected lifetime, to a "present value" calculation made by respondent's expert economist, at between $4.2 and $4.5 million.[10] Respondent argues that under section 6146 (b), attorney's fees are to be calculated on the total value of the periodic payments based on the projected life expectancy of the plaintiff. Respondent ignores the essential point that Wendy's settlement was always treated by the civil court and counsel as one of $3.45 million. He admitted at the hearing that the settlement did not involve periodic payments, but was a "structured settlement" which included both lump sum payments and an annuity payable by the defendants in trust. Therefore, section 6146 (b) does not apply.

[10b] The settlement agreement prepared at respondent's direction and the judge's order approving it state the total value of the settlement as $3.45 million. Respondent acknowledged that he calculated his 25 percent fee he submitted for court approval on the $3.45 million figure and Judge Turner testified that he used the same figure to determine if respondent's fee was within the 25 percent probate policy. Respondent's newfound claims that the amount of settlement for attorney fee purposes exceeded $3.45 million are simply without merit. **[8b]** Rejecting respondent's defenses, we hold that he clearly and wilfully violated sections 6068 (a) and 6146, and rule 2-107.

3. Written Fee Agreement
(Sections 6147 and 6148)

The hearing judge dismissed charges under section 6147 and section 6148 because neither is a disciplinable offense per se. Both subsections 6147 (b) and 6148 (c) state, "Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." The hearing judge reasoned that because both statutes expressly provide that the client could opt to void the fee agreement if

10. Even if we accepted respondent's present valuation, which we do not, respondent still collected a fee in excess of the limits under section 6146.

an attorney violated either statute, no other remedy was available. The State Bar has not challenged this conclusion on review and, for obvious reasons, neither has respondent.

We have not found any legislative history that is definitive on whether the Legislature intended to make the remedy in section 6147 (b) an exclusive one.[11]

[11a] We have recognized that section 6068 (a) is not always the proper vehicle for charging a violation of the State Bar Act when the statute is already covered as a disciplinable offense in another part of the State Bar Act. Thus, in *In the Matter of Lilley, supra,* 1 Cal. State Bar Ct. Rptr. at p. 486, we found that a violation of section 6002.1 should be charged under section 6068 (j) rather than section 6068 (a). Nor are we obligated to find that a violation of every statute constitutes grounds for professional discipline. (See *In re Kelley* (1990) 52 Cal.3d 487, 496; *In re Rohan* (1978) 21 Cal.3d 195, 204.)

[11b] Both sections 6147 and 6148 set forth standards for attorneys regarding their professional responsibilities to their clients. Apart from the remedy set forth in the statutes, these would appear to be appropriate areas for attorney regulation. In fact, breach of these obligations under sections 6147 and 6148 could violate Rules of Professional Conduct, such as collection of an illegal fee (current rule 4-200(A)), failure to act competently (current rule 3-110), or failure to communicate significant information to the client (current rule 3-500). Nevertheless, the Supreme Court has indicated that duplicative allegations of misconduct serve little purpose. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

[11c, 12a] While we consider this to be a very close question, we find that these two statutes, sections 6147 and 6148, should not be considered disciplinable offenses under section 6068 (a).[12] We are influenced by three factors: (1) there is a remedy specified in sections 6147 and 6148 for a failure to comply with the provisions of the statutes; and (2) the

11. Assembly Bill 490, which included section 6147, did not discuss possible disciplinary sanctions for a violation. The Legislative Counsel's Digest only noted "[f]ailure to comply with these provisions would render the fee agreement voidable at the option of the client." (Legis. Counsel's Dig., Assem. Bill No. 490 (1981-82 Reg. Sess.).) The Senate Judiciary Committee's comment did not consider other remedies beyond the possible voiding of the contract. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 490 (1981-82 Reg. Sess.) as amended June 11, 1982.)

In 1986, the Legislature considered additional sections to the State Bar Act including section 6148. (Sen. Bill No. 1569 (1985-1986 Reg. Sess.).) The analysis of the bill by the Senate Committee on Judiciary specifically referred to another section of the bill, section 6090.5, as a disciplinable offense. The bill also added additional subdivisions to section 6068 as duties on attorneys, including requiring an attorney to comply with section 6002.1 (maintaining current address with State Bar). In contrast, the written fee agreement requirement was not discussed as a disciplinable offense or added as a duty under section 6068. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1569 (1985-1986 Reg. Sess.) as amended February 24, 1986.) Similarly, the digest by the Assembly Subcommittee on the Administration of Justice also described new section 6090.5 as a disciplinable offense, but did not categorize the new section 6148 as a disciplinable offense. (Assem. Subcom. on Admin. of Justice, Analysis of Sen. Bill No. 1569 (1985-1986 Reg. Sess.) as amended June 10, 1986.)

Assembly Bill No. 2643 (1985-1986 Reg. Sess.), a parallel bill then pending requiring written fee agreements, provided that when an attorney did not comply, he or she had the burden of proving that the client's version of the contract should not prevail, but did not discuss any other remedies, such as attorney discipline, either.

The State Bar did not initially support the addition of section 6148 and its board committees had adopted the policy that written fee requirements should not be a disciplinable offense. (State Bar Report of Ad Hoc Bd. of Gov. Com. regarding Sen. Bill No. 1569 [March 1986].) The State Bar later worked closely with Senator Presley, sponsor of Senate Bill No. 1569, to fashion the final bill. (See letter of Hon. Robert Presley, Summary of Provisions of SB 1543 and SB 1569 (1985-86 Reg. Sess.) (April 28, 1986).)

12. Nothing in our conclusion is intended to be inconsistent with two prior decisions which dealt with either or both of sections 6147 and 6148. In *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 11, we noted that one of the counts involved a violation of section 6068 (a) and 6147. However, the parties in *Collins* stipulated to those facts and conclusions. There was therefore no issue in dispute with regard to section 6147. In *In the Matter of Hanson* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 703, 714-715, although a violation of section 6148 was not charged, and we assigned no culpability to the surrounding conduct, we made Hanson's failure to comply with the provisions of that statute a basis for attending the State Bar's Ethics School. Given the prophylactic, remedial nature of conditions of probation, that recommendation does not conflict with our decision here.

conduct which underlies breach of an attorney's obligations under sections 6147 and 6148 may be charged as violations of the Rules of Professional Conduct. We also note that (3) the State Bar's Office of the Chief Trial Counsel, the entity responsible for prosecuting ethical malfeasance, has not challenged this interpretation of the statute. **[12b]** This does not preclude us from considering whether respondent's failure to prepare a written fee agreement is an aggravating circumstance in deciding the appropriate discipline. (See *post*.)

4. Failure to Refund Fee
(Rule 4-100(B)(4) and Section 6106)

[13a] The hearing judge determined that respondent had failed to return the illegal portion of the fees in response to Mulligan's demand in June 1989 and the refusal constituted a wilful violation of current rule 4-100(B)(4). He did not find that the failure to refund constituted an act of moral turpitude or dishonesty contrary to section 6106 because respondent held an honest but mistaken belief that he was entitled to the entire sum awarded. Further, the hearing judge did not consider the rule violation in making his discipline recommendation because of respondent's good faith belief in his entitlement to the funds. On review, the State Bar does not challenge the hearing judge's conclusion that retention of the funds did not violate section 6106 but submits that the hearing judge could not ignore culpability conclusions which are not duplicative of other findings.

[13b] Once a violation of ethical duties is found, a hearing judge must examine the circumstances surrounding the violation and consider either the good or bad faith of respondent in mitigation or aggravation. (Trans. Rules Proc. of State Bar, div. V, Standards for Attorney Sanctions for Professional Misconduct, stds. 1.2(e)(ii) and 1.2(b)(iii) ["std."].) The hearing judge should not have disregarded the culpability finding with respect to rule 4-100(B)(4); and for the same reasons, as we discuss below, should have also found a section 6106 violation based on gross neglect. It was within his discretion to mitigate the misconduct based on the same reasons he gave for not wanting to consider the violation.

5. Failure to Disclose MICRA to Client and Court
(Sections 6068 (b), 6068 (d), 6106; Rule 7-105)

[14a] Based on his assessment of respondent's credibility, the hearing judge concluded that respondent held an honest but unreasonable belief that section 6146 and the other MICRA requirements were not applicable to the Paulis case and as a result of this erroneous and unreasonable belief, he failed to disclose the MICRA limitations to Mrs. Paulis and to Judge Turner. The hearing judge found the remaining circumstantial evidence insufficient to find that respondent misled the court and his client, contrary to sections 6068 (b) (proper respect for courts), 6106 (act of dishonesty or moral turpitude), or 6068 (d) or former rule 7-105 (duty not to mislead judge by artifice or false statement). The State Bar does not contest the hearing judge's dismissal of the charge, but argues that doubts about respondent's good faith in not revealing the MICRA limitations should be considered as evidence in aggravation.

[14b] The hearing judge's credibility findings are entitled to great weight, given that he was in the best position to observe respondent's demeanor while testifying. (See *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1056.) However, under the facts in this case, including the materiality of MICRA and respondent's superior knowledge of MICRA issues, we find that respondent's failure to reveal the MICRA limitations was not reasonable under the circumstances and misled both the court and his client on a material matter to the detriment of his client and for respondent's own gain. Therefore, we find respondent violated these ethical requirements, although out of deference to the credibility findings of the hearing judge, we hold that respondent's violations occurred through gross neglect rather than intentional dishonesty.

Respondent's argument that he did not have the duty to disclose the possible application of a statute has been heard in other cases where similarly material information has been withheld. In *Di Sabatino* v. *State Bar* (1980) 27 Cal.3d 159, an attorney failed to disclose to a bail commissioner that he had made two other bail reduction motions that same day which had

been denied. The commissioner testified he would not have reduced bail if he had known of the earlier denials. The attorney contended that the commissioner knew or should have known that bail had been set or otherwise addressed earlier. The attorney asserted that he was under no duty to disclose the prior denials to the bail commissioner and that he would have disclosed the information had the commissioner asked him. Any failings on his part were the result of negligence.

The Supreme Court rejected these arguments. **[15a]** It held that the concealment of material facts was just as misleading as explicit false statements and constituted misconduct warranting discipline. It emphasized that the attorney had a duty to disclose fully and completely all relevant facts and circumstances regarding his request and was not relieved of that affirmative duty merely because the commissioner did not inquire about prior proceedings. The proximity of the prior denials to the bail reduction motion rebutted the attorney's contention that his actions were neither intentional nor willful. (*Di Sabatino* v. *State Bar*, *supra*, 27 Cal.3d at pp. 163-164.)

In *Arm* v. *State Bar* (1990) 50 Cal.3d 763, an attorney who was to begin a 60-day disciplinary suspension shortly, concealed it from a judge in discussions concerning an upcoming court appearance and compounded his misconduct by affirmatively representing that he might be available to appear on the first day of his suspension. The Supreme Court rejected the attorney's excuses that (1) since he was not required by his suspension order to advise his client or opposing counsel of the suspension under rule 955, California Rules of Court, it was proper to conceal it; (2) he was afraid that it would be used to his client's disadvantage by opposing counsel, and (3) the juvenile court would have made the same determination had it known of his suspension. The Court held that the attorney had a duty to disclose his forthcoming suspension and that it was a factor for the juvenile court judge, not the attorney, to weigh. The client's interest in continuing the attorney's representation through his suspension did not necessitate or justify concealing the suspension order. (*Id.* at pp. 775-776.)

In this case, Judge Turner testified both to the materiality of the information suppressed and the different course the judicial proceedings would have taken had the MICRA limitations been disclosed. The extremely large ($266,850 or 46 percent) difference between the fee permitted under MICRA versus that requested under a straight 25 percent rate, would have had a significant impact on the client's share of the recovery. **[15b]** Accepting that respondent may have believed he was acting properly, the circumstances support only the conclusion that respondent was grossly negligent in withholding from the court and his own client the potential applicability of the MICRA fee limits.

[15c] Respondent was obligated to justify his fee request under the law applicable to medical negligence cases. Respondent's prior litigation experience and unquestioned, superior expertise regarding the application of MICRA and his knowledge of the disciplinary proceeding then pending in the State Bar Court challenging his fees in a court-ordered settlement of a medical malpractice case were sufficient notice to respondent that the limitations of section 6146 were relevant to his fee request in this case.[13] Respondent cannot claim ignorance of the law, and cannot shift the responsibility for mentioning the possible application of MICRA from himself to the court. He had a duty both to the court

13. In the case holding section 6146 constitutional, *Roa* v. *Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d 920, the plaintiffs included a minor child and court approval was necessary for the settlement. There was no written fee agreement but an "understanding" that the attorney fees would be 25 percent of the net recovery, if successful. The trial court concluded that it was compelled to award attorney fees in accordance with section 6146 and rejected the plaintiffs' request for higher fees and their constitutional challenges to MICRA. The Supreme Court affirmed. Thereafter, the Court of Appeal ruled that a trial court did not have the power to order extraordinary attorney fees in excess of the MICRA limits. (*Hathaway* v. *Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247.) Respondent's arguments that his fee "understanding" did not come under MICRA and that the probate court guidelines overrode any MICRA limits were not, therefore, a reasonable interpretation of the state of the law as of July 1988.

and to his client to advise them that the MICRA limitations might be applicable to his fee request, especially since section 6146 (a) applied MICRA limits whether the patient was a responsible adult, an infant or a person of unsound mind. If he thought he had reasonable grounds to distinguish his situation from the ambit of the statute, he could have argued them to Judge Turner. Instead, he chose to keep material information from the court and his client. In effect, he placed his own interests in a large fee ahead of those of his client and misled the court. We find that by withholding this material information, respondent breached his duties to the court and his client and wilfully violated sections 6068 (b), 6068 (d), and 6106 and rule 7-105, through gross negligence.

6. Selective Prosecution

[16] Respondent argues that the State Bar has acted vindictively and unfairly in pursuing disciplinary actions against him. He charges that the State Bar has filed patently frivolous charges and has abused its discretion in carrying out its responsibilities. In rejecting a similar claim of selective prosecution last year in our decision in *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 107-108, we said in part: "It is by no means self-evident that selective prosecution may be raised as a defense in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 645, citing *Goldman* v. *State Bar* (1977) 20 Cal.3d 130, 140.) But even if selective prosecution were a valid defense in State Bar proceedings, respondent's claim could not succeed. Respondent cites no authority, nor are we aware of any, holding that a claim of selective prosecution may be premised on asserted discrimination due to notoriety rather than on a constitutionally prohibited basis such as race (see *People* v. *Harris* (1960) 182 Cal.App.2d Supp. 837), sex (see *People* v. *Municipal Court (Street)* (1979) 89 Cal.App.3d 739, 745), or the exercise of constitutional rights. (See, e.g., *People* v. *Serna* (1977) 71 Cal.App.3d 229, 233-235 [First Amendment rights]; *Murgia* v. *Municipal Court* [(1975)] 15 Cal.3d [286,] 301-303 [freedom of association in form of union membership].)" (Fn. omitted.) For the reasons we gave in *Riley*, we hold that respondent's claim is without merit. There is no allegation that the prosecution was based on, e.g., race, gender, or the exercise of constitutional rights. Respondent has not established that the State Bar's failure to prove all of its charges is sufficient to show an invidiously discriminatory prosecution. We conclude that respondent has not proved his claim of selective prosecution.

DISCIPLINE

1. Evidence in Mitigation and Aggravation

In mitigation, respondent presented a number of witnesses who testified to respondent's good character and long record of accomplishments. Transcripts of testimony from numerous appellate and trial judges offered in mitigation at a prior disciplinary proceeding were offered as well. Respondent is an acknowledged leader in the field of medical negligence and product liability litigation and is a member and honoree of a number of professional organizations. The hearing judge found him candid and cooperative with the State Bar and accorded mitigating weight to respondent's very long record of practice without discipline, prior to his 1990 public reproval.

The hearing judge identified two factors in aggravation: harm to respondent's client and the public, and respondent's prior record of discipline. He discounted the significance of the harm to the client by contrasting the amount of the excess fee, $466,100, or $266,850 by our findings, to the size of the overall recovery for the client, $3.45 million. He declined to find respondent's prior record of discipline to be aggravating because the reproval was issued in January 1990, after respondent had collected the unlawful fee in this case.

[17a] Challenging the hearing judge's determination not to consider respondent's prior disciplinary record, the State Bar cites to our decision in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. In *Sklar*, citing Supreme Court decisions, we observed that a prior record of discipline is a proper factor in aggravation, regardless of when the discipline was imposed. (*Id.* at p. 618.) If the instant misconduct occurred in the same time period as the

prior discipline, then the aggravating force of the prior record may be diminished. (*Id.* at p. 619.)

Respondent was publicly reproved for collecting $108,333 in fees in excess of MICRA limitations on a 1982 settlement, in violation of sections 6068 (a) and 6146, and former rule 2-107(A). Respondent entered into a contingent fee agreement with Richard and Martha Koskoff on or about May 23, 1980, to represent them and their infant son in a medical malpractice action for a fee of 25 percent of any recovery. The case settled for $1 million, including $250,000 in attorneys fees for respondent, and the settlement was approved by a superior court judge. In April 1985, shortly after the Supreme Court decision in *Roa* v. *Lodi Medical Group, Inc., supra*, 37 Cal.3d 920, the Koskoffs requested a refund of the difference between the maximum fee under MICRA ($141,667) and the fee respondent received. Respondent countered that it was a court-awarded fee not subject to MICRA. The Koskoffs filed suit against respondent and also complained to the State Bar. The formal charges in the Koskoff matter were filed in the State Bar Court on March 10, 1988, and the hearing referee's decision was filed on April 20, 1989. The public reproval was effective March 19, 1990.

[17b] Respondent's misconduct in the present case occurred between the filing of the formal charges in the Koskoff case and the hearing referee's decision in April 1989. Similar misconduct was involved in both. With the filing of the formal charges in the Koskoff case, respondent had notice that the State Bar considered his collection of fees in court-awarded settlements in excess of MICRA limits to be ethically questionable. Therefore, we consider respondent's prior record of discipline to be aggravating evidence.

[18a] We also consider the harm to the client and the administration of justice to be significant. (Std. 1.2(b)(iv).) Certainly, the large difference between the fee respondent received and the fee he was entitled to collect gave him an interest adverse to that of his client. Disclosure of the MICRA limits could have deprived him of a larger fee to which he believed he was entitled. **[19a]** In light of his recognized expertise, his persistent claim that he was not obligated to discuss every law in every book in his extensive law library with his client and the judge regarding their possible application in the Paulis case is frivolous and betrays disdain for his client and the trial court.

This case makes real the unlikely risk that the Supreme Court noted 10 years ago in *Waters* v. *Bourhis, supra*, 40 Cal.3d at p. 438, fn. 13, that attorneys would act against client interests in disregarding the limits of MICRA: "The risk that section 6146 will be undermined in this fashion, however, assumes that plaintiffs' attorneys will routinely act against their own clients' interests, interposing frivolous or extremely weak non-MICRA theories simply to increase their own contingency fees at the expense of their clients. Although we assume that plaintiffs' attorneys will be quite innovative in attempting to devise non-MICRA theories when they believe in good faith that such innovation will work to their clients' benefit, we cannot properly assume that they will adopt such tactics when it is simply in their own interest and contrary to their clients' interest, for such conduct would violate their professional obligations to their clients."

[18b] Respondent's failure to comply with the disclosure and writing requirements of section 6147 also resulted in harm to his client. The statute was designed to further disclosure of this important information to the client *in writing* to avoid the very problems presented in this case.

[19b] We also conclude that respondent's persistent attempts, as late as oral argument before us, to portray himself as the victim of uncertain MICRA law is also aggravating as a demonstration of lack of candor in view of his superior knowledge of that legal subject.

2. Comparable Case Law

There is one illegal fee case on which the Supreme Court has written. In *Coviello* v. *State Bar* (1953) 41 Cal.2d 273, in an industrial accident case, the attorney was limited by statute to a $75 fee awarded as part of a compromised claim of $765 before the Industrial Accident Commission. Pursuant to his fee agreement with the client, the attorney retained an additional $170 from the settlement above the fee authorized. The Court found the collection of

the fees in excess of those permitted by law warranted discipline. Because the attorney had no prior record of discipline, he received a 30-day actual suspension.

The State Bar cites to a number of cases dealing with the charging and collection of unconscionable fees. Under rule 4-200, the unconscionability of a fee is to be determined based on a number of factors. **[20a]** Applying a significant factor, the fee which respondent collected did not appear to be out of proportion to the value of services rendered; and in *In the Matter of Riley*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 117, fn. 28, we noted that standard 2.7's proposal of a six-month minimum actual suspension applied only to unconscionable fees under former rule 2-700 and not illegal fees. Although this is not an unconscionable fee case under rule 4-200, the Supreme Court has expressed concern over attorney conduct when focus on fee collection overcomes attention to professional responsibilities to one's client. In *Bushman* v. *State Bar* (1974) 11 Cal.3d 558, 564, a case involving, inter alia, the charging of an unconscionable fee to an impecunious client, the Court observed that "the right to practice law 'is not a license to mulct the unfortunate.'" (See also *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, 449 [in a case involving, inter alia, the use of a confession of judgment to collect unearned fees from one's own client, the Court observed that "Surely the legal profession is more than a mere 'money getting trade' . . . ."].)

[21a] The gravamen of this case is not simply respondent's collection of an illegal fee for his representation of Wendy. Rather, this case is about respondent's clear overreaching of his own client by concealing by recklessness or gross neglect from her representative and from the court a material fact and profiting handsomely as a result. Respondent apparently believed that his duty to his client was confined solely to obtaining a successful recovery for her. While that was most important to his client, his duty did not end there as the Supreme Court made clear a decade ago in *Waters* v. *Bourhis*, *supra*, 40 Cal.3d at p. 438, fn. 13, a case with which respondent, as amicus curiae, was intimately familiar. As attorney for Wendy, respondent had a duty of utmost good faith and fidelity to her. (See, e.g., *Greenbaum* v. *State Bar* (1976) 15 Cal.3d 893, 903; *Cutler* v. *State Bar* (1969) 71 Cal.2d 241, 251.) As the Court stated in *Hulland* v. *State Bar*, *supra*, 8 Cal.3d at p. 448, "When an attorney, in his zeal to insure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client. [Citations.]"

[21b] Respondent's duties required him to advise Wendy's representative candidly of the application of the MICRA fee limits which had been well settled in litigation by that time. Given respondent's very expertise, a client would understandably look to him not only for the most diligent substantive representation but to protect the client's interests in ensuring that all of the recovery which was the client's share went to the client. Respondent's collection of $266,850 more than he was entitled to receive as his attorney fees under a statute designed to benefit his severely disabled client, was a patent breach of his duty of good faith and fair dealing to his client and a very serious aggravating circumstance, notwithstanding that under prior law the fee might have been collectible.

[22] Respondent also had a duty of candor to the superior court. (E.g., § 6068 (d); rule 5-200; former rule 7-105.) Although respondent was entitled to urge any creative theory in good faith that the MICRA limits might not apply to this case, he could not simply conceal from the court a material fact and profit sizably thereby at the expense of his client.

The State Bar contends that the hearing judge's 30-day actual suspension recommendation is well supported by the standards and case law; and, if anything, is lenient. However, the State Bar does not suggest a particular degree of discipline which we should recommend.

There are past decisions which can serve as guidelines for individual aspects of respondent's misconduct. However, we find no similar decision presenting the totality of factors here. We are aware that past cases of simple charging or collecting of illegal fees in excess of MICRA limits are unreported but have generally resulted in public reproval, the result reached in respondent's 1990 discipline. **[20b]** We acknowledge that this is not an unconscionable

fee case, but respondent's abdication of duties to his client and the court resulting in his receipt of a fee sizably above legal limits makes it difficult to justify less than the minimum six-month actual suspension proposed by standard 2.7 even without regard to the factors below.

[23a] A critical aspect of this case is respondent's withholding, through gross neglect, of a sizable amount of funds due his disabled client. Had respondent been found culpable of intentional or dishonest withholding of funds, the issue on degree of discipline would be whether mitigating circumstances would outweigh the general rule of disbarment for such offense. (See *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37.) Cases of misconduct involving funds improperly held for reasons other than dishonesty have typically resulted in actual suspension for varying degrees even when the attorney had no prior record of discipline. (See *Kelly* v. *State Bar* (1991) 53 Cal.3d 509 [two matters involving relatively small sums not involving dishonesty or intent to harm clients; no prior record of discipline in 13 years of practice; three-year suspension stayed on condition of 120 days actual suspension]; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609 [two matters, one involving misappropriation due to gross neglect, the other involving acquisition of an interest adverse to a client prohibited by former rule 5-101; several mitigating factors considered, including improvement of office practices; three-year suspension stayed on conditions of actual suspension for one year].)

Ultimately, the appropriate degree of discipline to recommend rests on a balanced consideration of all relevant factors. (See, e.g., *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 35; *In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 676.) Attorney discipline is imposed not as punishment but to protect the public, preserve public confidence in the courts and legal profession and maintain the integrity of the legal profession. (See std. 1.3; see also, e.g., *In re Kelley, supra*, (1990) 52 Cal.3d at p. 493; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 157.)

[23b] One of the factors recognized by the Supreme Court in assessing the appropriate degree of discipline is the extent to which the attorney has achieved appropriate insight into his misconduct. (*Conroy* v. *State Bar* (1990) 51 Cal.3d 799, 806; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 317; *Carter* v. *State Bar* (1988) 44 Cal.3d 1091, 1100.) Regrettably, it appears from this record as well as from the appellate decisions we have judicially noticed, that respondent has been sued four times by clients based on his collection of fees in excess of MICRA limits. Both appellate decisions in these cases of which we are aware were adverse to respondent and yet he persists in defending his actions. We have grave concern that unless significant discipline is imposed, he will continue to ignore the law and his duties to his clients of utmost good faith and fair dealing and repeat his misconduct.

We also consider that the conduct which culminated in respondent's serious misconduct, including failure to reveal the limitations of MICRA to the court and his client, undoubtedly had its origin in respondent's passionate belief that MICRA unfairly limited the fees of members of the State Bar when practicing in the field of medical negligence. Nevertheless, as one of the most experienced practitioners in this field, whose career at the bar spanned 40 years, respondent had no excuse for allowing his intense dislike of MICRA to blind him to his obligations to client and court several years after the courts had resolved basic MICRA fee limit issues against respondent's position. Indeed, because of his stature as a professional, his conduct should have been an ethical model to others. Sadly, it was not. **[23c]** Meaningful suspension, including six months actual suspension and compliance with rule 955, is appropriate to adequately protect the public and maintain public confidence in the legal profession.

3. Recommended Discipline

We therefore recommend that respondent be suspended from the practice of law for two years, that the suspension be stayed, and that he be placed on probation for two years on conditions, including six months actual suspension.

In his prior disciplinary case, the hearing referee recommended that respondent be given a two-year stayed suspension, and placed on probation for two years subject to probation conditions, including res-

titution. The level of discipline was reduced by the former volunteer review department to a public reproval and the restitution conditions were altered, but the remaining conditions recommended by the hearing referee were imposed as part of respondent's public reproval. [24a] Respondent was required to revise his form retainer agreement for medical negligence cases to show no fees in excess of those permitted by section 6146 and present to the State Bar's Office of the Chief Trial Counsel for prior review and approval all executed retainer agreements for medical negligence cases. We believe in light of this case and respondent's continued assertion that section 6146 did not apply to his fees in the Paulis litigation, that this additional condition should be applied to this case as well.

[24b] Accordingly it is recommended that as a condition of his probation, respondent shall provide written retainer agreements to all of respondent's medical negligence plaintiff clients who are not paying respondent on an hourly basis, which agreements shall disclose the fee schedule of section 6146 and state that this fee schedule is the maximum that respondent may charge and that the client and respondent may negotiate a lower rate. (§ 6147 (a)(5).) In the cases of minors and incompetents, a declaration making the same disclosures shall be presented to the judge of the appropriate probate court at the same time that petitions for attorney representation or attorney fees are presented for approval. Respondent shall report his compliance with the foregoing in each quarterly report respondent is required to submit to the State Bar's probation department.

We adopt the remaining conditions of probation recommended by the hearing judge below, including, within one year from the date of the Supreme Court's disciplinary order in this matter, restitution to the conservator of the estate of Wendy Paulis (or the Client Security Fund, if it has paid the conservator) of $266,850, plus interest thereon at the rate of 10 percent per annum from July 8, 1989, until paid. Consistent with our recommended period of actual suspension, we also recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order. Finally, we recommend that costs be awarded to the State Bar pursuant to section 6086.10 and that such costs be added to and become part of the membership fee of respondent for the calendar year following the effective date of the Supreme Court order.

We concur:

PEARLMAN, P.J.
GEE, 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

PATRICIA A. LYNCH

A Member of the State Bar

Nos. 90-O-16608, 92-N-12478

Filed April 24, 1995

SUMMARY

As a result of respondent's felony conviction for cocaine possession she was placed on interim suspension and ordered to comply with rule 955 of the California Rules of Court. In this consolidated proceeding, respondent was found to have failed to comply with rule 955, and, in a second matter, to have deposited personal funds in her client trust account in violation of the rule of professional conduct regulating such accounts. Serious aggravating circumstances, including acts of dishonesty to courts and the unlicensed practice of law, surrounded her misconduct. The hearing judge recommended disbarment. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review. The review department adopted most of the hearing judge's determinations, but rejected the findings that respondent's lack of a prior disciplinary record was a strong mitigating circumstance and that her steps toward recovery from alcoholism and drug addiction were factors in mitigation. Given the misconduct, the presence of serious aggravating circumstances, and the absence of strong mitigating circumstances, the review department concluded that Supreme Court precedent required respondent's disbarment.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Patricia A. Lynch, in pro. per.

HEADNOTES

[1 a-c] **130 Procedure—Procedure on Review**
162.20 Proof—Respondent's Burden
725.32 Mitigation—Disability/Illness—Found but Discounted
Rehabilitation from alcoholism or drug addiction is a mitigating circumstance only if the substance abuse caused the attorney's misconduct. Where respondent failed to present clear and convincing evidence of a causal nexus between her substance abuse and her misconduct, the review department

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

denied her request for a remand to the hearing department to provide evidence of her continued sobriety, and did not consider her steps toward recovery a mitigating circumstance.

[2 a, b] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
136 Procedure—Rules of Practice

Augmentation of the record on review is appropriate only if the record is incorrect or incomplete. Where respondent failed to take advantage of the ample opportunity she had at trial to seek to show that her misconduct resulted from her alcoholism, the review department denied her request to augment the record with declarations about her recovery from alcoholism as the record was neither incorrect nor incomplete. However, where respondent challenged the hearing judge's finding that respondent made a deliberate misrepresentation at a pretrial conference, the review department granted the State Bar's request to augment the record with the transcript of the conference as the record was incomplete without the transcript. (Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 306(e)(3); former Provisional Rules of Practice of State Bar, rule 1304.)

[3] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
146 Evidence—Judicial Notice
194 Statutes Outside State Bar Act
725.32 Mitigation—Disability/Illness—Found but Discounted

The review department denied respondent's request for judicial notice of general facts about alcoholism and declined to consider several character references stressing respondent's recovery from alcoholism on the aggregate grounds that respondent had not shown at the disciplinary hearing that her alcoholism caused her misconduct, that she failed to show why she should be excused from not having presented the proffered evidence at the disciplinary hearing, and that she failed to show that the specific matters which she wanted to be judicially noticed were proper subjects of judicial notice. (Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 306(c); former Trans. Rules Proc. of State Bar, rule 556; Evid. Code, § 452, subd. (h).)

[4 a, b] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act
231.00 State Bar Act—Section 6126
561 Aggravation—Uncharged Violations—Found

Where respondent stated at oral argument that she did not object to judicial notice of her conviction for the unlicensed practice of law and admitted that she had improperly practiced law, the review department augmented the record on review to note the record of her conviction and considered the unlicensed practice as an aggravating circumstance. (Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 306(c); former Trans. Rules Proc. of State Bar, rule 556; Evid. Code, § 452, subd. (d)(1).)

[5 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.90 Procedure—Pleadings—Other Issues
563.10 Aggravation—Uncharged Violations—Found but Discounted
1911.10 Rule 955—Initiation of Proceeding
1913.22 Rule 955—Delay—Giving Notice

Where a proceeding under rule 955 of the California Rules of Court was started by an order of referral rather than the issuance of formal charges, culpability could be based on all evidence introduced. Thus, where the evidence demonstrated that respondent failed to give timely notices of her suspension to her clients, opposing counsel, and courts in which her clients' cases were pending, she wilfully violated rule 955, subdivision (a), and the review department considered that violation as substantive and not just an aggravating circumstance as found by the hearing judge.

[6] **595.90 Aggravation—Indifference—Declined to Find**
1913.29 Rule 955—Delay—Generally

Where respondent's untimely compliance with rule 955 of the California Rules of Court formed a basis for her culpability for violating the rule, and delay in complying with the rule was also found to be an aggravating circumstance because it reflected respondent's indifference toward rectification of her misconduct, the latter finding was duplicative.

[7 a-e] **541 Aggravation—Bad Faith, Dishonesty—Found**
1549 Conviction Matters—Interim Suspension—Miscellaneous
1913.90 Rule 955—Other Substantive Issues

Where respondent misrepresented facts regarding her interim suspension to superior court; deliberately sought to mislead State Bar Court Review Department regarding facts supporting motion for modification of interim suspension order; and intentionally tried to deceive State Bar Court hearing judge regarding correctness of transcript offered as evidence by State Bar, respondent's acts of dishonesty to courts constituted aggravating circumstances surrounding her failure to comply with rule 955 of the California Rules of Court in connection with interim suspension.

[8] **710.33 Mitigation—No Prior Record—Found but Discounted**

Respondent's unblemished practice of law for slightly less than eight years and four months prior to the start of her misconduct was a mitigating circumstance, but did not deserve significant weight.

[9] **795 Mitigation—Other—Declined to Find**

The occurrence of misconduct during a short time can be a mitigating circumstance. However, where respondent's acts of wrongdoing, including misrepresentation to hearing judge in disciplinary proceeding, spanned more than three years, her claim to such mitigation was without merit.

[10 a, b] **807 Standards—Prior Record Not Required**
1913.70 Rule 955—Lesser Sanction than Disbarment

Absent strong mitigating circumstances, a violation of rule 955 of the California Rules of Court warrants disbarment. Thus, where serious and extensive aggravating circumstances outweighed strongly very modest mitigating circumstances, disbarment was appropriate despite respondent's lack of any prior disciplinary record.

ADDITIONAL ANALYSIS

Culpability
- **Found**
  - 280.01 Rule 4-100(A) [former 8-101(A)]

Aggravation
- **Found**
  - 582.10 Harm to Client

Standards
- 802.30 Purposes of Sanctions
- 824.59 Commingling/Trust Account Violations

Discipline
- 1541.10 Conviction Matters—Interim Suspension—Ordered
- 1542 Conviction Matters—Interim Suspension—Stayed
- 1915.10 Rule 955
- 1921 Disbarment

Other
- 1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ, J.:

Respondent, Patricia A. Lynch, has sought review of a decision recommending disbarment. We agree with the hearing judge's recommendation.

Respondent deposited personal funds in her client trust accounts and wilfully violated rule 955 of the California Rules of Court (rule 955). Clear aggravating circumstances, especially repeated dishonesty to courts and the unlicensed practice of law, surrounded her wilful violation of rule 955. Given her misconduct, the presence of serious aggravating circumstances, and the absence of strong mitigating circumstances, Supreme Court precedent requires her disbarment.

I. PROCEDURAL HISTORY

In October 1991, the State Bar's Office of the Chief Trial Counsel (State Bar) filed a notice to show cause against respondent in case number 90-O-16608.

In November 1991, exercising powers delegated by the Supreme Court pursuant to rule 951 of the California Rules of Court, we issued an order reciting respondent's felony conviction of cocaine possession, and we placed her on interim suspension until the final disposition of the criminal proceeding. (See Bus. & Prof. Code, § 6102 (a).) We required her to comply with subdivisions (a) and (c) of rule 955 within 30 days and 40 days, respectively, after the effective date of the order.[1] As a result of a petition by respondent, we postponed the effective date from November 29, 1991, to January 20, 1992.

In April 1992, we filed an order initiating case number 92-N-12478. Citing respondent's apparent failure to comply with subdivision (c) of rule 955, we referred to the hearing department the determination of whether she had wilfully failed to comply with our rule 955 orders and, if so, the recommendation of discipline.

Cases numbers 90-O-16608 and 92-N-12478 were consolidated with three other proceedings. At a pretrial conference, the hearing judge stated that she would try the first two cases and determine the order of trial for the other proceedings.

In July 1993, cases numbers 90-O-16608 and 92-N-12478 came to trial. By then, respondent had stipulated to culpability in both cases. Concluding that disbarment was the appropriate discipline, the hearing judge severed and abated the other three proceedings and issued her decision in October 1993. Respondent filed a reconsideration motion, which the hearing judge granted in part, but denied with regard to the disbarment recommendation. Respondent then requested that we review the hearing judge's decision.

II. AUGMENTATION OF THE RECORD AND JUDICIAL NOTICE OF FACTS

At the time of oral argument, the following were pending: (1) respondent's petition for remand or, in the alternative, request for augmentation of the record; (2) the State Bar's request for augmentation of the record; and (3) respondent's letter with attached documents.

[1a] Respondent argues for remand on the grounds that she now has been sober for a much longer period than she had been at the time of the disciplinary hearing and that her continuing sobriety makes disbarment inappropriate. We decline to remand. As the hearing judge found, respondent failed to present clear and convincing evidence of a causal nexus between her alcoholism and her misconduct. (Cf. *Harford* v. *State Bar* (1990) 52 Cal.3d 93, 101 [rehabilitation from alcoholism a mitigating circum-

1. In part, subdivision (a) of rule 955 required respondent to notify all clients and opposing counsel of her suspension and file copies of the notices with courts before which her cases were pending. Subdivision (c) required her to file an affidavit within the time specified by the State Bar Court showing that she had fully complied with all provisions of the interim suspension order.

stance only if it contributed to misconduct]; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 595.)[2] Although commendable, her apparent sobriety is not a sufficient reason to remand this matter.

[2a] Alternatively, respondent requests augmentation of the record with declarations from several persons about her recovery from alcoholism. We deny the request. Augmentation is appropriate only if the record is incorrect or incomplete. (Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 306(e)(3); former Provisional Rules of Practice of State Bar Court, rule 1304; see, e.g., *In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 669.) Because respondent failed to take advantage of the ample opportunity she had below to seek to show that her misconduct resulted from alcoholism, the record is neither incorrect nor incomplete.

[2b] The State Bar requests augmentation of the record with the transcript of a pretrial conference held on June 28, 1983. We grant the request. Because respondent is challenging the hearing judge's finding that respondent made a deliberate misrepresentation at this conference, the record would be incomplete without the transcript.

[3] Shortly before oral argument, respondent filed a letter with over 100 pages of attached documents, including a memorandum of points and authorities, a request for judicial notice of general facts about alcoholism, several character references stressing respondent's recovery from alcoholism, and extensive extracts from a book on alcoholism. We strike the unauthorized memorandum of points and authorities on three aggregate grounds: (1) respondent's failure to prove that alcoholism caused her misconduct; (2) her failure to show why she should be excused from not having presented the proffered evidence below, and (3) her failure to show that the specific matters which she wants to be noticed judicially are proper subjects of judicial notice. (See Evid. Code, § 452, subd. (h) [permissive notice of facts or propositions which are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy]; cf. *Barreiro v. State Bar* (1970) 2 Cal.3d 912, 925 [evidence required if there is any doubt whatever about matters sought to be noticed judicially under Evid. Code, § 451, subd. (f), as facts or propositions of generalized knowledge which are so universally known that they cannot reasonably be subject to dispute].) Accordingly, we deny the request for judicial notice and decline to consider the character references and book extracts.

[4a] At oral argument, we asked respondent whether we might take judicial notice of her conviction for the unlicensed practice of law, which resulted in State Bar Court case number 93-C-11514. She had no objection and admitted that she had improperly practiced law. Thus, we augment the record to note the record of her conviction. (See Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 306(c) [permissible augmentation of the record with judicially noticeable facts]; former Trans. Rules Proc. of State Bar, rule 556 [rules of evidence in civil cases generally applicable to State Bar proceedings]; Evid. Code, § 452, subd. (d)(1) [permissive judicial notice of the records of any California court]; *In the Matter of Twitty, supra,* 2 Cal. State Bar Ct. Rptr. at p. 669.)

III. DISCUSSION

We have independently reviewed the record. (See Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 305(a); former Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9, and cases cited therein.) Except as indicated, we adopt the hearing judge's findings of fact and conclusions of law.

2. The hearing judge stated below that for respondent to establish alcoholism as a mitigating circumstance, she had to prove that she suffered from alcoholism at the time of her misconduct, that alcoholism caused her misconduct, and that she had undergone a sustained period of recovery from alcoholism. Despite these proof requirements, respondent drew no specific causal connections between her alcoholism and her acts of wrongdoing. Instead, she merely asserted the belief that her alcoholism "impacted on" such acts and was "a reason" for them. Such vague assertions deserve little evidentiary weight. (See *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187-1188.)

A. Findings of Fact and Conclusions of Culpability

1. Case number 90-O-16608

Between April and July 1990, respondent repeatedly deposited personal funds in her client trust accounts. Rule 4-100(A) of the Rules of Professional Conduct prohibits such deposits. (See *Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 22-23 [violation of corresponding provisions in former rule 8-101(A) of the Rules of Professional Conduct].) Respondent stipulated, and the hearing judge concluded, that respondent wilfully violated rule 4-100(A). We agree.

2. Case number 92-N-12478

We ordered respondent to file an affidavit of compliance with rule 955 by February 29, 1992. Respondent did not submit this affidavit by the deadline. As noted *ante*, subdivision (c) of rule 955 requires the timely filing of a compliance affidavit. Respondent stipulated, and the hearing judge concluded, that she wilfully violated subdivision (c) of rule 955. We uphold the hearing judge's conclusion.

B. Aggravating Circumstances

The State Bar must prove aggravating circumstances in a disciplinary proceeding by clear and convincing evidence. (Rules Proc. of State Bar (eff. Jan. 1, 1995), Title IV, Standards for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b); former Trans. Rules Proc. of State Bar, div. V, Standards for Atty. Sanctions for Prof. Misconduct, std. 1.2(b); *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 148.)

1. Violation of rule 955(a) of the California Rules of Court

[5a] We ordered respondent to give notices of her interim suspension to her clients, opposing counsel, and courts in which her clients' cases were pending. Respondent knew that these notices were due, but did not provide them by the deadline of February 19, 1992. As noted *ante*, subdivision (a) of rule 955 requires such notification. The hearing judge found that respondent's wilful failure to comply with subdivision (a) of rule 955 was an aggravating circumstance. (See Bus. & Prof. Code, §§ 6102 (a), 6126 (c); std. 1.2(b)(iii).) On this record, we hold that this evidence warrants the conclusion that respondent wilfully violated rule 955, subdivision (a). Her violation was substantive and not just an aggravating circumstance.[3] **[5b - see fn. 3]** As we discussed, *ante*, her own stipulation shows her culpability of violation of subdivision (c) of rule 955 as well.

2. Indifference toward rectifying misconduct

[6] The deadlines for compliance with subdivisions (a) and (c) of rule 955 were, respectively, February 19, 1992, and February 29, 1992. Respondent did not comply with the requirements of rule 955 until July 1992. The hearing judge found that this delay reflected indifference toward rectifying respondent's misconduct and constituted an aggravating circumstance. (See std. 1.2(b)(v).) We do not adopt this finding as it is duplicative of respondent's substantive culpability of rule 955, subdivision (c).

3. Dishonesty to courts

[7a] We agree with the hearing judge's conclusion that acts of dishonesty to courts surrounded respondent's misconduct and are aggravating circumstances. (See std. 1.2(b)(iii).)

Respondent appeared four times before the Los Angeles Superior Court in the case of *People* v. *Lopez* (*Lopez*) when she was under interim suspension. Opposing counsel in *Lopez* discovered respondent's interim suspension and informed the *Lopez* court on March 3, 1992. Respondent first asserted that her interim suspension had been modified to allow her to represent Lopez. She later asserted that she had sought modification to represent Lopez

3. [5b] Since this rule 955 proceeding was started by order of referral rather than issuance of formal charges, culpability can be based on all evidence introduced. (Cf. *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688-689 [conviction referral matter].)

and had reached a stipulation with the State Bar for a retroactive order allowing her to represent Lopez. When confronted with the effective order of interim suspension, respondent asserted that another order was supposed to be issued.

[7b] These assertions were knowingly false. Respondent had filed three petitions between November 1991 and February 1992 to vacate or stay her interim suspension. In allowing her to undertake limited representation of two clients and otherwise denying her petitions, we stated that any other practice of law would violate the interim suspension order. Respondent had neither sought nor received permission to represent Lopez. She had reached no stipulation with the State Bar about a retroactive stay. No petition or order about *Lopez* was pending. She knew these facts when she made her assertions to the contrary to the *Lopez* court.

Respondent claims to have had a good faith belief that she would obtain permission to represent Lopez and to have been ignorant of State Bar Court procedures. The record undermines these claims. Her three prior petitions reflect her knowledge of both her interim suspension and our procedures.

[7c] In July 1992, respondent submitted statements from clients in support of a request to us to modify the interim suspension order. They included an undated statement in which Lopez contended that it was vital for respondent to continue to represent him and that disclosure of her interim suspension would prejudice his case.

[7d] The submission of Lopez's statement was a deliberate attempt to mislead us. At the time of the submission, respondent knew that she had been removed from the *Lopez* case, that new counsel had been appointed, and that Lopez had pleaded guilty. Although respondent expresses disagreement on review with the hearing judge's findings of dishonesty, she conspicuously fails to address her submission to us of Lopez's statement.

At a pretrial conference in the hearing department in the present proceeding on June 28, 1993, respondent claimed that the transcript of the *Lopez* proceedings on March 3, 1992, had been corrected after she had filed objections to its accuracy and that the copy of the transcript offered by the State Bar was incorrect. She had not, however, petitioned the *Lopez* court to change the transcript, and the transcript had not been corrected. Further, the opposing counsel in *Lopez* offered credible testimony that the transcript offered by the State Bar was accurate.

[7e] Respondent intentionally tried to deceive the hearing judge. She knew that she had not petitioned the *Lopez* court to correct the transcript and that no corrections had been made. Despite her expressed disagreement with the hearing judge's findings of dishonesty, she fails to discuss her comments at the pretrial conference on June 28, 1993.

4. Harm to a client

Respondent harmed a client by her unexcused failure to appear at an arbitration scheduled before the date of her interim suspension. This failure resulted in a default award against the client. The hearing judge found, and respondent concedes, that such harm constitutes an aggravating circumstance. We agree. (See std. 1.2(b)(iv).)

5. Unlicensed practice of law

[4b] Respondent admits that she appeared four times in *Lopez* when she was under interim suspension. As mentioned *ante*, she did not object to judicial notice being taken of her conviction for the unlicensed practice of law in the *Lopez* matter under Business and Professions Code section 6126. The hearing judge found, and respondent concedes, that this ethical violation is an aggravating circumstance. We agree. (See std. 1.2(b)(iii).)

C. Mitigating Circumstances

An attorney culpable of misconduct in a disciplinary proceeding must prove mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).)

1. Lack of a prior disciplinary record

Respondent was admitted to practice law on December 14, 1981. Observing, on reconsideration,

that more than ten years of discipline-free practice elapsed until respondent's interim suspension on January 20, 1992, the hearing judge found respondent's lack of a prior disciplinary record to be a strong and compelling mitigating circumstance. Yet it did not cause the hearing judge to recommend a sanction less than disbarment. We agree with the latter assessment, concluding that respondent's practice experience without prior discipline is not entitled to much weight, under guiding decisions.

Respondent began misusing her trust account on April 4, 1990. [8] Thus, slightly less than eight years and four months passed between respondent's admission to the bar and the start of her misconduct. This period of unblemished practice is a mitigating circumstance, but does not deserve significant weight. (See std. 1.2(e)(i); *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 658 [seven and one-half years without prior discipline insufficient for mitigation]; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 [eight years of unblemished practice not a significant mitigating circumstance]; but see *Hawes* v. *State Bar*, *supra*, 51 Cal.3d at p. 596 [more than ten years of discipline-free practice entitled to significant mitigation].)

2. Recovery from alcoholism and drug addiction

[1b] As factors in mitigation, the hearing judge described respondent's steps toward recovery from alcoholism and drug addiction. Nevertheless, despite empathy with respondent's plight and hope for her continued recovery, the hearing judge concluded that disbarment was necessary.

[1c] Like the hearing judge, we commend respondent's steps toward recovery from alcoholism and drug addiction. Also, we recognize the possibility that alcoholism and drug addiction may have played some role in her misconduct. Yet as indicated *ante*, and as the hearing judge found, respondent did not prove that her wrongdoing resulted from alcoholism or drug addiction, although she had ample opportunity to present such proof below. In the absence of clear and convincing evidence which causally connects her alcoholism or drug addiction with her specific acts of misconduct, her steps toward recovery do not constitute a mitigating circumstance. (See std. 1.2(e)(iv) and cases cited, *ante*.)

3. Period of misconduct

[9] Respondent's claim that she is entitled to mitigation because all her misconduct occurred within a period of less than two years is without merit. Although the occurrence of misconduct during a short time can be a mitigating circumstance (see, e.g., *Frazer* v. *State Bar* (1987) 43 Cal.3d 564, 578 [many acts of wrongdoing during a period of roughly one year]; *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 13 [few acts of wrongdoing during a period of less than one year]), respondent's misconduct lasted for more than a short time. From her initial trust account violation in April 1990 to her misrepresentations to the hearing judge in late June 1993, respondent's acts of wrongdoing collectively spanned more than a three-year period.

D. Discipline

The hearing judge recommended disbarment. Stressing her own testimony and her apparent recovery from alcoholism, respondent seeks some unspecified discipline short of disbarment. The State Bar supports the disbarment recommendation.

We look initially to the standards for guidance in determining the appropriate discipline. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Twitty*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 676.) Under standard 1.3, the primary purposes of discipline are 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. Standard 2.2(b) prescribes a sanction of actual suspension for at least three months, regardless of mitigating circumstances, if an attorney has committed a trust account violation which did not result in wilful misappropriation.

The standards do not address the proper discipline for violating rule 955. Subdivision (d) of rule 955, however, provides for the disbarment or suspension of a suspended attorney who wilfully violates rule 955.

In determining the proper discipline, we must consider all relevant factors. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 35; *In the Matter of Twitty*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 676.) Further, we must recommend discipline which is consistent with the discipline imposed in similar proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Twitty*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 676.)

[10a] Respondent's aggravated rule 955 violation is far more serious than her minor trust account violation. "[D]isbarment is generally the appropriate sanction for a willful violation of rule 955." (*Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131; see also *Lydon* v. *State Bar*, *supra*, 45 Cal.3d at pp. 1186-1188; *Powers* v. *State Bar* (1988) 44 Cal.3d 337, 341-342; *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 599-601; *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439, 442-444.) Absent strong mitigating circumstances, a rule 955 violation warrants disbarment. (See *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 498, and cases cited therein.) As we have discussed *ante*, in this case the serious and extensive aggravating circumstances outweigh strongly the very modest mitigation.

[10b] Although respondent lacks a prior disciplinary record, the absence of such a record does not preclude disbarment for grave misconduct. (See *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, 1071-1073; see also *Borré* v. *State Bar* (1991) 52 Cal.3d 1047, 1053 [lack of prior disciplinary record does not preclude substantial discipline for serious misconduct].) In the current proceeding, disbarment is necessary to protect the public, courts, and legal profession; to maintain high professional standards; and to preserve public confidence in the legal profession. (Cf. *Bercovich* v. *State Bar*, *supra*, 50 Cal.3d at pp. 131-133; *Lydon* v. *State Bar*, *supra*, 45 Cal.3d at pp. 1186-1188.)

IV. RECOMMENDATION

We recommend that respondent be disbarred and that the State Bar be awarded costs under Business and Professions Code section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GEORGE HENRY HULTMAN, II

A Member of the State Bar

No. 91-O-07738

Filed April 28, 1995

SUMMARY

Respondent, as trustee of a testamentary trust, made two loans to himself, which amounted to most of the corpus of the trust, without complying with the Rule of Professional Conduct which prohibits an attorney from improperly obtaining an interest in a client's property and/or entering into a business transaction with a client. One of the loans was unsecured and both loans provided for payment of interest only with no due date for payment of the principal. In aggravation, the hearing judge found respondent culpable of recklessly failing to perform services competently in his handling of the trust which led to the submission of a false accounting to the probate court. The hearing judge recommended that respondent be suspended from the practice of law for one year, that such suspension be stayed, and that he be placed on two years probation on conditions, with no actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

The State Bar requested review, arguing that respondent should be found culpable of committing acts of moral turpitude because of his self-dealing as trustee and because of the submission of the false accounting to the probate court, and that the discipline should be increased to six months actual suspension. The review department adopted the hearing judge's factual findings and culpability conclusions, except for the conclusion that respondent was not culpable of any acts of moral turpitude. The review department found that respondent through gross neglect filed a false pleading with a court and therefore was culpable of moral turpitude. Based on the seriousness of the misconduct, which included repeated improper self-dealing by a fiduciary and grossly inadequate record keeping, and comparable case law, the review department increased the recommended discipline to three years stayed suspension, three years probation, and 60 days actual suspension.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Lindsay Kohut Slatter

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] **106.30 Procedure—Pleadings—Duplicative Charges**
194 Statutes Outside State Bar Act
213.10 State Bar Act—Section 6068(a)
273.00 Rule 3-300 [former 5-101]
1099 Substantive Issues re Discipline—Miscellaneous

Where respondent violated rule of professional conduct which prohibits an attorney from improperly obtaining an interest in a client's property and/or entering into a business transaction with a client, and that misconduct was the same misconduct underlying the charge that respondent violated statutory duty to uphold law on account of his violation of provisions of the Probate Code which prohibit self-dealing by trustees, and where discipline did not depend on whether respondent violated both rule and statute, statutory violation was cumulative and review department did not address it.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
130 Procedure—Procedure on Review
221.00 State Bar Act—Section 6106
430.00 Breach of Fiduciary Duty

Where the notice to show cause did not charge respondent with committing acts of moral turpitude on account of a violation of fiduciary duty, but did charge respondent with making a misrepresentation to a court, and the hearing judge and the parties understood that the charged moral turpitude violation was based on the misrepresentation, the review department declined the State Bar's request, made for the first time on review, that it find moral turpitude based on respondent's breach of fiduciary duty.

[3 a-d] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106

Where notice to show cause charged respondent with making a misrepresentation to a court by filing an erroneous pleading, and where respondent consistently asserted that he did not intend to deceive the court and that the erroneous pleading resulted from his inadvertence, but where filing of misleading pleading did not result from single isolated instance of negligence, but from grossly negligent handling of entire matter to which pleading related, respondent could be found culpable of an act of moral turpitude due to his gross neglect in filing the pleading.

[4 a, b] **204.90 Culpability—General Substantive Issues**
273.00 Rule 3-300 [former 5-101]
430.00 Breach of Fiduciary Duty

Non-clients may be treated as an attorney's clients for purposes of discipline where the attorney assumes a fiduciary relationship with the non-clients. Thus, where respondent was the trustee of a testamentary trust, and thus assumed a fiduciary relationship with the beneficiaries of that trust, the rule regulating attorneys' business transactions with their clients applied to respondent's dealings with the trust, as if the trust beneficiaries were respondent's clients.

[5] **273.00 Rule 3-300 [former 5-101]**

Where respondent, as trustee of a testamentary trust, loaned himself money from the trust, and one of the loans was unsecured and the loans lacked a due date for repayment of the principal, the loans were not fair and reasonable to the beneficiaries, and respondent thereby violated the rule against improper business transactions with clients.

[6 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
221.00 State Bar Act—Section 6106
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
563.90 Aggravation—Uncharged Violations—Found but Discounted

Where respondent's entire course of conduct in handling his duties as the trustee of a testamentary trust amounted to a reckless failure to perform services competently, but the review department considered much of the same misconduct in reaching its conclusion that respondent committed moral turpitude through gross negligence in handling his duties as trustee, the failure to perform competently was given minimal weight as an aggravating circumstance in determining the appropriate discipline to recommend.

[7 a-d] **221.00 State Bar Act—Section 6106**
273.00 Rule 3-300 [former 5-101]
715.30 Mitigation—Good Faith—Found but Discounted
881.30 Standards—Business Transaction with Client—Suspension
1091 Substantive Issues re Discipline—Proportionality

Improper business transactions with clients have resulted in discipline ranging from reproval to suspension. Where, despite respondent's asserted intent to advance interests of beneficiaries of trust of which respondent was trustee, respondent realized significant benefits from improper loans from trust to himself, and where respondent also was grossly negligent in handling his duties as trustee, in view of the seriousness of respondent's misconduct, and comparable case law, the review department recommended three years stayed suspension, three years probation, and 60 days actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

221.12 Section 6106—Gross Negligence
273.01 Rule 3-300 [former 5-101]

Not Found

213.15 Section 6068(a)
221.50 Section 6106
273.05 Rule 3-300 [former 5-101]

Mitigation

Found

710.10 No Prior Record
735.10 Candor—Bar
740.10 Good Character
745.10 Remorse/Restitution

Standards

881.10 Business Transaction with Client—Suspension

Discipline

1013.09 Stayed Suspension—3 Years
1015.02 Actual Suspension—2 Months
1017.09 Probation—3 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge that respondent, George Henry Hultman, II, be suspended from the practice of law for one year, that such suspension be stayed, and that he be placed on two years probation on conditions, with no actual suspension. The recommendation is based on respondent's misconduct as trustee of a testamentary trust in making two loans to himself, which amounted to most of the corpus of the trust, without complying with rule 3-300 of the Rules of Professional Conduct of the State Bar of California.[1] One of the loans was unsecured and both loans provided for payment of interest only with no due date for payment of the principal. The hearing judge found that respondent violated rule 3-300, but did not commit acts of moral turpitude in violation of section 6106 of the Business and Professions Code.[2] As an alternative basis for culpability, the hearing judge found that respondent violated section 6068 (a) based on respondent's violation of Probate Code sections 16002 and 16004.[3] In aggravation, the hearing judge found respondent culpable of an uncharged violation of rule 3-110(A) in that respondent recklessly failed to perform services competently in his handling of the trust which led to the submission of a false accounting to the superior court.[4] The hearing judge also found compelling mitigation, including respondent's many years of practice without prior discipline.

The State Bar's Office of the Chief Trial Counsel (State Bar) requested review, arguing that we should find respondent culpable of committing acts of moral turpitude in violation of section 6106 because respondent's self-dealing as trustee amounted to a breach of fiduciary duty and because respondent submitted a false accounting to the superior court. On that basis, the State Bar argues that we should increase the recommended discipline to six months actual suspension.

Respondent argues in reply that we should decrease the discipline to a reproval. According to respondent, the State Bar did not charge him with an act of moral turpitude for breaching his fiduciary duty as trustee, and in any event no moral turpitude was present in respondent's dealings as trustee or in the submission of the accounting. Respondent argues that he had good, albeit misguided, intentions, and, by making the loans to himself, he was only trying to obtain higher interest rates for the beneficiaries.

We have independently reviewed the record in this matter and conclude that the hearing judge's factual findings and culpability conclusions are supported by the record, except for her conclusion that respondent is not culpable of any acts of moral turpitude. We find that respondent through gross neglect filed a false pleading with a court and therefore is culpable of moral turpitude. Based on the seriousness of the misconduct, which included re-

1. All references to rules herein, unless otherwise stated, are to the Rules of Professional Conduct of the State Bar of California that were in effect from May 27, 1989, to September 13, 1992. Rule 3-300 of those rules provided in substance that an attorney shall not enter into a business transaction with a client or knowingly acquire an interest adverse to a client unless the transaction or acquisition is fair and reasonable to the client, is fully disclosed to the client, the client is advised in writing that the client may seek the advise of an independent lawyer of the client's choice and is given a reasonable opportunity to do so, and the client thereafter consents in writing to the transaction or acquisition. The current rule 3-300 is unchanged.

2. All further references to sections are to the Business and Professions Code, unless otherwise noted. Section 6106 provides that an attorney's commission of any act involving moral turpitude, dishonesty, or corruption, whether committed in the course of the practice of law or otherwise, constitutes cause for suspension or disbarment.

3. Section 6068 (a) provides in relevant part that an attorney has a duty to support the laws of this state. Probate Code section 16002 provides in relevant part that a trustee has a duty to administer the trust solely in the interest of the beneficiaries. Probate Code section 16004 provides in relevant part that a trustee has a duty not to use or deal with trust property for the trustee's own profit or for any purpose unconnected with the trust, and not to take part in any transaction in which the trustee has an interest adverse to the beneficiary.

4. Rule 3-110(A) provided that an attorney shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently. The current rule 3-110(A) is unchanged in this regard.

peated improper self-dealing by a fiduciary and grossly inadequate record keeping that prevents accurate accounting to this day, and comparable case law, we conclude that three years stayed suspension with three years probation and a sixty-day period of actual suspension is warranted.

FACTS AND FINDINGS

We adopt the following findings of fact from the record and the hearing judge's findings. Respondent was admitted to the practice of law in California in 1977 and has no prior discipline. Before January 1984, Leonard Crutcher (Crutcher) employed respondent to prepare a will and trust on his behalf. In January 1984, respondent drafted and Crutcher signed the will and trust. At the time he prepared the will and trust, respondent had previously handled about two or three probates and had prepared some wills.

In his will, Crutcher nominated the individual partners of respondent's then existing law firm (respondent and another attorney) as executors of the will and the law firm as trustee of the trust. The will provided for two minor bequests to Crutcher's two children with the remainder paid to respondent's law firm in trust. The beneficiaries of the trust were Crutcher's four minor grandchildren. The trust was to terminate when the youngest of the grandchildren reached the age of 21, with the corpus paid to the grandchildren at that time in equal shares. The trust also gave the trustee broad powers to invest, manage, and control the trust property.

In September 1987, Crutcher died. In January 1988, the court appointed respondent executor of the estate. Respondent also served as attorney for the executor. In June 1989, the court signed an order which provided for the final distribution of the estate, with most of the estate paid to respondent "as Trustee." At that time the estate consisted of cash in the amount of $32,343. In September 1991, respondent filed a pleading with the court entitled "Corrected Receipt," in which he acknowledged receiving the property of the estate in June 1989.

Prior to making any investments, respondent consulted three lawyer friends who had previously served as trustees concerning proper investments for a trust.[5] Respondent's goal was to invest the assets of the trust in order to increase the value of the principal for the beneficiaries. Respondent learned that his friends often made secured and unsecured loans to private persons at about 10 to 12 percent interest. Respondent did no further investigation or legal research.

In 1990, respondent made several loans as trustee to an unrelated entity, the estate of Kamalian. Those loans were repaid but the hearing judge was not able to determine from respondent's records whether the trust received all of the interest that was due on the loans.

In August 1990, respondent and his wife borrowed $25,000 from the trust for their personal use. This loan was memorialized by a promissory note which provided for payment of interest at 10 percent per year in installments of interest only at $250 per month. The promissory note did not specify a date for repayment of the principal. The loan was secured by a deed of trust on respondent's house.

At the time, respondent's house had three other encumbrances. The first trust deed secured a $245,000 loan; a second trust deed secured a $15,000 loan; and a third trust deed secured a $5,000 loan. In June 1991, respondent further encumbered his house with a fifth trust deed securing a $22,000 loan. These other loans were not borrowed from the trust. In 1990, respondent believed the market value of his house was approximately $400,000 to $420,000 based on sales of comparable homes in his neighborhood. At the time he borrowed the $25,000, he believed his house provided adequate security for the loan. In 1992, respondent refinanced his house and the appraised value was $430,000.

In 1990, banks charged interest rates at the prime rate of about 8 percent plus 1 to 3 percentage points for unsecured loans; banks generally charged

5. Two of these friends apparently dealt with their parents' money.

16 percent interest for "ready reserve accounts"; and for credit cards, interest rates were 18 percent to 20 percent. In 1990 the Crutcher trust funds were earning 5 percent interest in the savings account in which they were deposited.

Notwithstanding his agreement to pay the trust $250 per month, respondent paid only $208.66 per month from September 1990 through February 1992, except during November 1990 when respondent made no payment. Respondent believed that his secretary probably filled in the $250 amount on the promissory note, which respondent signed but did not review. Respondent gave no explanation why he did not pay the full $250 in interest as set forth in the promissory note.

In September 1990, respondent borrowed $5,000 from the trust for his personal use. The loan was evidenced by a promissory note which provided for interest at 10 percent per year, with interest only payable in monthly installments of $41.66. The promissory note did not specify a date for repayment of the principal. The parties stipulated that the $5,000 loan was unsecured. The promissory note indicated that the loan was secured by a deed of trust. Respondent made all of the interest payments required by the promissory note except for the November 1990 payment. In May 1992, respondent repaid the $5,000.

Around February 1992, respondent decided to refinance his house. He decided not to repay the August 1990 loan from the trust out of the proceeds of his refinance loan. In February 1992, respondent signed a new promissory note for $25,000 payable to the Crutcher estate. The February 1992 note was secured by a deed of trust on rental property which respondent partly owned. The terms of this new note provided for 10 percent interest per year, with interest-only monthly payments of $208.66, and with no due date for the payment of the principal. Respondent made all the interest payments required by the note and in January 1993, he paid the principal.[6]

The parties stipulated that in July 1991, respondent made an unsecured loan from the trust to his friend and business associate, Steve Loiselle, in the amount of $1,600 at 10 percent per year. The check to Loiselle bears a notation that it was a 30-day loan. However, the July 1991 promissory note provided for payment of the principal and interest in a lump sum by August 1992. The promissory note also provided that it was secured by a deed of trust. In August 1991, respondent caused to be deposited a check for $1,700 from Loiselle. The check was dishonored as insufficiently funded, and the Crutcher estate account was debited $14 in overdraft charges. In March 1992, a check from Loiselle for $500 was deposited, and was subsequently dishonored which caused the estate account to be debited $504. In May 1992, $1,236 was deposited into the estate account, and respondent marked the promissory note from Loiselle as "Paid in Full." There is no other documentary evidence in the record to indicate whether the remainder of the $1,600 was ever paid, or whether any interest was paid on the loan, or whether the estate bank account was ever reimbursed for the bank charges attributable to the dishonored checks.

In September 1990, respondent loaned his sister, Julie Williams, $1,500 from the trust. In October 1990, Williams paid $800 of that loan. In February 1991, respondent loaned Williams a further $800 from the trust, and in August 1991, he loaned her a further $300 from the trust. These loans were unsecured but were evidenced by promissory notes which indicated that they were secured by a deed of trust. The promissory notes also provided for payment of interest at a rate of 10 percent per year.[7] In May 1992, $2,046 was deposited into the estate account on

6. Respondent testified that the February 1992 note canceled the August 1990 note but that he could not recall taking any specific action to cancel the earlier note. He also testified that he transferred security for the $25,000 loan to the rental property. The record contains no other evidence indicating that the August 1990 note was canceled or indicating that the trust deed securing the August 1990 loan was reconveyed.

7. The parties stipulated that the September 1990 loan was in the amount of $700. The promissory note for that loan was for $700 and was dated September 28, 1990. However, bank records introduced into evidence by respondent contain a copy of a check dated September 28, 1990, in the amount of $1,500 written to Williams with the notation that it was for a loan at 10 percent interest. The record does not explain this variance. Also, the promissory note for the August 1991 loan was dated July 15, 1991, but the check written to Williams for this loan was dated August 12, 1991.

behalf of Williams and all of her notes were marked "Paid in Full." There is no evidence in the record indicating whether the total amount of interest which should have been earned was paid.[8]

In August 1991, respondent filed with the court a document entitled "First and Current Account and Report of Trustee and Petition for Fees," and he sent a notice of hearing on the petition and the petition to the beneficiaries of the trust.[9] An accounting prepared by a certified public accountant was attached to this document. The accounting was based on respondent's entire file regarding the estate/trust. Since the accountant was not performing an audit, he did not look for, or ask respondent for, confirming documentation regarding the loans. When respondent received the accounting, he failed to examine it in any detail, except to check the figures. Respondent did not notice that his $5,000 loan and the $1,500 and $800 loans to Williams were reported in the accounting as secured loans. Respondent knew at all times that the three loans were unsecured.

Attached to the accounting respondent filed with the court is a verification signed by respondent. In his verification, respondent declared under penalty of perjury that he had read the petition and the matters stated in the accounting were true "of my own knowledge." Respondent testified that he did not read through the accounting "carefully or otherwise"; that he just "glanced" at the schedules attached to the petition; and that he did not "look at each and every line of the schedules" but focused primarily on the numbers.

In September 1991, two of the beneficiaries of the trust filed objections to the petition on the ground that respondent, as trustee, engaged in numerous acts of self-dealing. The record does not reflect the court's ruling on the objections.

Respondent did not disclose the terms of any of the loans to either the beneficiaries of the trust or the court at the time the loans were made. Respondent did not advise the beneficiaries of their right to seek the advice of independent counsel. Respondent did not seek the prior consent of either the beneficiaries or the court to enter into the loan transactions. Respondent believed at all times that he had sufficient credit and assets to repay his obligations, including the sums owed to the trust. Respondent had never experienced financial problems, never filed for bankruptcy and never been unable to meet his obligations.

The single-count notice to show cause (notice) in this matter alleged that respondent did not comply with the requirements of rule 3-300 with regard to the loans to himself and the loans to Loiselle and Williams, and that respondent misrepresented to the court in the accounting that the $5,000 loan to himself and the $1,500 and $800 loans to Williams were secured. The notice generally alleged that respondent violated sections 6068 (a) and 6106 and rule 3-300. The notice also alleged that respondent violated section 6068 (a) by violating certain specified provisions of the Probate Code which prohibit self-dealing by trustees.

At trial, the hearing judge dismissed the rule 3-300 charges regarding the Loiselle and Williams loans on the ground that the State Bar failed to prove that respondent's conduct in making those loans was improper under the rule. However, the hearing judge concluded that respondent violated rule 3-300 in making the loans to himself without complying with the rule. Specifically, she found that the $25,000 loan was not fair and reasonable because there was no due date for payment of the principal and because respondent had the unilateral ability to change the terms of the loan. The hearing judge found that the

8. The hearing judge also found that despite the parties' stipulation to the contrary, the Williams loans did specify a time for repayment of both principal and interest, and that those loans were not repaid within the time specified in the promissory notes. The note for the $300 loan seems to provide for a lump sum payment of principal and interest in July 1992. The other notes do not provide a due date for repayment.

9. The parties stipulated that a "First and Current Account and Report of Trustee and Petition for Fees" was filed or attempted to be filed in July 1991, and the hearing judge so found. The hearing judge also found that a similar document was filed in August 1991. The only document in the record with a file-stamp on it is the August petition. Respondent testified that the court's staff attorney told him that it was not necessary to file such a document and the matter was taken off calendar. In any event, the hearing judge found that both documents indicated that the loans were secured.

$5,000 loan was not fair and reasonable because it was not secured and because there was no due date for payment of the principal. For both loans, the hearing judge found that there was no full disclosure, no advice to seek independent counsel, and no consent from the beneficiaries or the court.

The hearing judge also concluded that respondent violated section 6068 (a) by violating the specified provisions of the Probate Code. However, she stated that this violation was an alternative basis for culpability and was cumulative to the rule 3-300 violation.

The hearing judge did not find respondent culpable of violating section 6106 because she found that there was no dishonesty or gross negligence in the filing of the accounting. She concluded that respondent did not intend to deceive the court and that this single instance did not amount to gross negligence.

In mitigation, the hearing judge found that respondent had 13 years of blemish-free practice; that respondent had made restitution of the $5,000 loan before the notice to show cause in this matter was filed; that respondent had made restitution of the $25,000 loan, which even though not made until after the notice to show cause was filed, was still deserving of some weight in mitigation;[10] that respondent had demonstrated his good character through the testimony of seven character witnesses and through his community service; that respondent was remorseful; and that respondent was candid and cooperative in the disciplinary proceeding. The hearing judge rejected a finding in mitigation of no harm to the persons who were the objects of respondent's misconduct because she could not determine, based on the incomplete financial records, whether the beneficiaries received all of the interest due on the loans.

In aggravation, the hearing judge concluded that respondent violated rule 3-110(A). She found that respondent's entire course of conduct in handling the trust amounted to a reckless failure to perform services competently, which led inevitably to the filing of the false accounting.

DISCUSSION

The State Bar argues on review that we should increase the discipline to six months actual suspension because respondent is culpable of acts of moral turpitude in breaching his fiduciary duty as trustee by making the loan transactions and in submitting the false accounting to the court. The State Bar also argues that case law supports imposing a period of actual suspension even if no acts of moral turpitude are found. Respondent argues in reply that we should modify slightly the findings of fact, and that we should decrease the discipline to a reproval because the breach of fiduciary duty as a moral turpitude violation was not charged in the notice to show cause and, in any event, no moral turpitude was present in respondent's dealings as trustee or in his submission of the accounting. Respondent asserts that he had good intentions and was only trying to benefit the beneficiaries.

Before we address other issues, we note that the State Bar has not sought review of the hearing judge's dismissal of the charges regarding the Loiselle and Williams loans. In view of the broad discretion that was given to respondent as trustee to invest the trust property, the lack of evidence regarding the specifics of the these loans, and the charges in the notice to show cause, we agree with the hearing judge.

[1] We also agree with the hearing judge that the section 6068 (a) violation is cumulative to the rule 3-300 violation. The misconduct underlying both violations, respondent's self-dealing as trustee, is the same. As the discipline in this case does not depend on whether respondent violated both the rule and the statute, we need not and do not address the section 6068 (a) violation. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 ["[L]ittle, if any, purpose is served by duplicative allegations of misconduct. If, as in this case, misconduct violates a specific Rule of Profes-

10. The notice to show cause was filed in December 1992 and as indicated above, the loan was repaid in January 1993.

sional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103."].)

1. Modifications to factual findings

We reject respondent's request to modify the findings of fact. Respondent argues that we should find that the trust received the "substantial" benefit of all the loan transactions. The findings make clear that the trust received interest on the loans and we find no reason to modify the hearing judge's finding that the record does not establish whether the estate received all the interest that it was due. In any event, the trust should have received the entire benefit of the loan transactions, not just the "substantial" benefit.

Next, respondent argues that we should find that he made handwritten notations on documents he provided to the accountant which indicated that not all the loans were secured. Respondent testified to making notations that could arguably so indicate. However, the gravamen of this aspect of respondent's misconduct is his gross neglect of his duties in handling the estate. The notations "loan" and "loan secured by D/T" handwritten on bank statements next to entries of checks drawn on the estate account only further demonstrate respondent's gross neglect in this regard.

Finally, respondent argues that we should find that he had three other sources for the loans and therefore he is entitled to a finding that he was not attempting to gain an advantage over the beneficiaries by making the loans to himself. That respondent may have had other sources for the loans is not material to our inquiry as he borrowed the money from the trust and not from the other sources. In addition, the conclusion respondent requests we draw from this finding, that he was not attempting to take advantage of his position as trustee, is questionable at best. The advantages of loaning oneself money as opposed to obtaining a loan from another source are obvious. Indeed, one of those advantages, respondent's unilateral ability to modify the terms of the loans, manifested itself in this case.

2. Breach of fiduciary duty/moral turpitude

[2] We agree with respondent that a section 6106 violation on account of a breach of fiduciary duty was not charged in the notice. The notice sets out several paragraphs of factual allegations and then generally alleges that by virtue of those facts, respondent violated sections 6068 (a) and 6106 and rule 3-300. The notice does not allege that respondent had a fiduciary duty but does allege that respondent made a misrepresentation to the court. The hearing judge and the parties seem to have understood that the charged section 6106 violation was based on the misrepresentation to the court, not a breach of fiduciary duty. The case was tried accordingly. Finally, in a post-trial brief, the only basis for a section 6106 violation argued by the deputy trial counsel was the misrepresentation to the court in the filing of the accounting. We therefore do not accede to the State Bar's request, made for the first time on review, that we find moral turpitude based on respondent's breach of fiduciary duty.

3. Misrepresentation

The State Bar asserts that in filing the accounting, respondent was grossly negligent and therefore he is culpable of an act of moral turpitude. Essentially, the State Bar argues that respondent had an obligation to check the document for accuracy before filing it, and his failure to do so amounted to gross negligence and therefore moral turpitude. Respondent argues in reply that his failure to proofread the document was simple negligence, not gross negligence, and that simple negligence in making a representation does not amount to moral turpitude. The hearing judge found that in filing the accounting, respondent did not intend to deceive the court, that he was not intentionally dishonest, and that this one instance of failing to proofread did not amount to gross negligence. However, in aggravation, the hearing judge concluded that respondent recklessly failed to perform services competently in violation of rule 3-110(A), which led inevitably to the filing of the untruthful accounting.

[3a] We first note that the notice to show cause in this matter charged that respondent misrepresented to the court that three of the loans were secured. In *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, the attorney was charged with "intentionally and falsely" causing a pleading to be filed which stated that no part of a court-ordered fee had been paid, when part of that fee had in fact been paid. (*Id.* at p.

850.) In defense of that charge Vaughn asserted that he did not know he had received the money. To prove his lack of knowledge, Vaughn testified that his lax office procedures and chaotic record keeping prevented him from learning of the receipt of the money. (*Id.* at pp. 855-857.) The Court concluded that Vaughn did not have actual knowledge of his receipt of the fee but that he was nevertheless culpable of moral turpitude because of his gross negligence in supervising his practice. (*Id.* at pp. 857, 859.)

[3b] Similarly in the present case, respondent asserted before, at, and after trial, and on review, that he did not intend to deceive the court and that the erroneous accounting resulted from his inadvertence in failing to carefully review the document before filing. Thus, respondent defended against the charge by attempting to prove that he was merely negligent. Consequently, as in *Vaughn*, the issue of respondent's neglect in filing the document was fully litigated.

[3c] We disagree with the hearing judge and respondent that the events which led up to the filing of the accounting involved only a single instance of failing to proofread the document before it was filed. It has long been held that an attorney must keep proper books and records in the performance of the attorney's duties. (*Clark* v. *State Bar* (1952) 39 Cal.2d 161, 174 [applying this duty to an attorney acting as a guardian].) "'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 part of their duty which accompanies the relation of attorney and client. The failure to keep proper books . . . is in itself a suspicious circumstance.'" (*Ibid.*, quoting *Matter of O'Neill* (N.Y. 1930) 228 App. Div. 518, 520.)

Not only was there a lack of proper books and records in the present case, but the records that were kept were, in many cases, erroneous and misleading. The August 1990 promissory note for the $25,000 loan respondent made to himself indicates that the interest payment was $250 per month. Respondent believed that his secretary put that amount on the note, which he signed apparently without reading. Respondent paid interest of $208.66 per month on this note.

For the September 1990 note for the $5,000 loan to himself, respondent used a pre-printed promissory note for a secured loan even though the loan was unsecured. Respondent did not pay attention to the title or terms of the note and apparently did not read it before signing because he did not intend the loan to be secured.

Respondent also used pre-printed promissory note forms for secured loans for the Loiselle and Williams loans, which were unsecured loans. Again, respondent apparently did not read these documents before they were signed. In addition, there is no documentation in the record showing that the full amount of the principal from the Loiselle loans was ever repaid, or showing that the estate received all the interest that was due on the Loiselle and Williams loans, or showing that the bank charges for the bad checks from the Loiselle loans were ever repaid. Furthermore, the promissory notes for the Williams loans differ in amounts and dates from the bank records evidencing those loans.

The accounting for the Kamalian estate loan submitted to the court indicates that $29,100 was repaid for this loan, yet the bank records indicate that $29,900 was deposited into the estate account. The accounting also does not indicate the interest paid on this loan, yet the bank records in evidence indicate that interest was paid. The hearing judge was not able to determine whether all the interest on these loans was paid based on respondent's records of these transactions.

As respondent did not keep proper books and records regarding the loan transactions, he did not provide the accountant with adequate information from which an accounting could be prepared. Consequently, the accountant prepared an erroneous accounting. Respondent did not adequately supervise the preparation of the accounting and therefore he did not catch the errors. In addition, respondent did not carefully read the accounting before filing, although he swore under penalty of perjury that he had and that the matters stated in it were true of his own knowledge.

[3d] In view of the above, we conclude that the filing of the misleading accounting did not result from a single isolated instance. Rather, it was the direct result of respondent's grossly negligent handling of the estate. While we defer to the hearing judge's credibility determination that respondent did not intend to deceive the court, we find that respondent was grossly negligent in filing the accounting and therefore he is culpable of an act of moral turpitude in violation of section 6106. (Cf. *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91.)

4. Rule 3-300 violation

[4a] The parties and the hearing judge devoted a significant amount of time to the issue of whether rule 3-300 applied to an attorney acting as a trustee of a testamentary trust. The hearing judge concluded that it did. Respondent is not contesting that conclusion on review. We agree with the hearing judge.

[4b] "When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct." (*Clark* v. *State Bar, supra*, 39 Cal.2d at p. 166.) Here, respondent assumed fiduciary duties toward the beneficiaries when he became trustee of the trust. (See Prob. Code, §§ 16002, 16004.) Thus, even though the beneficiaries were not his "clients" (*In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, 478 [neither the estate nor its beneficiaries are clients of attorney acting as executor for purposes of summary disbarment statute]), respondent may be disciplined as if they were his "clients" as the result of his fiduciary relationship with them.[11] (See *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979 [non-client treated as a "client" for purposes of discipline where attorney assumed fiduciary relationship with the non-client].)

[5] We also agree with the hearing judge that the loans were not fair and reasonable to the beneficiaries because the $5,000 loan was unsecured and because of the lack of a due date for repayment of the loans. "[T]he 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.) Here, the safety of the funds was of the highest importance as the beneficiaries were minor children. In addition, with no due date, even after distribution of the corpus, the beneficiaries could very well have had to honor the terms of the notes regardless of the prevailing economic conditions.

We also note that even if we, for the sake of argument, credit respondent's asserted motive (that he sought to maximize benefits to the estate), he failed to show that the terms of the loan transactions that he obtained from the trust were as advantageous to the trust as similar transactions. Indeed, he obtained 12 percent interest on a $25,000 secured loan to the Kamalian estate but only 10 percent interest on his own $25,000 secured loan.

5. Discipline

[6a] As noted above, in aggravation the hearing judge found that respondent's entire course of conduct in handling the trust amounted to a reckless failure to perform services competently, which led inevitably to the filing of the false accounting. Specifically, the hearing judge found that respondent used pre-printed promissory note forms without carefully reading them, he made unsecured loans to his sister and friend without reasonable inquiry into whether such action met the standard of care for trustees, he did not carefully document the loan transactions, and he failed to supervise the accountant's work in preparing the accounting. Respondent also was seriously uninformed regarding the legal requirements of acting as a trustee. He testified that he was not aware that trustees were prohibited by the Probate Code from self-dealing.

11. The hearing judge found that at the time of the misconduct, respondent was acting as the executor, attorney for the executor, and trustee. We note that the estate had been distributed to respondent as trustee by the time of the misconduct. Nevertheless, we need not reach the issue of whether respondent was acting in all of the above capacities because we hold that he may be disciplined even if he was acting only as the trustee at the time of the misconduct.

[6b] We agree with the hearing judge that the above establishes a reckless failure to perform services competently in that respondent's failure to ascertain the duties of a trustee was conduct evidencing a reckless disregard. (Cf. *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 102.) However, as noted above, we have considered much of this same misconduct in reaching our conclusion that respondent was grossly negligent in filing the accounting. We therefore give minimal weight to respondent's reckless failure to perform services competently as an aggravating circumstance in determining the appropriate discipline to recommend. (*Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155.)

[7a] Turning to the degree of discipline in this case, the Supreme Court has noted that violations of former rule 5-101, the predecessor to rule 3-300, have resulted in a wide range of discipline, from a reproval to two years actual suspension. (*Hunniecutt* v. *State Bar*, *supra*, 44 Cal.3d at p. 373.) Standard 2.8 of the Standards for Attorney Sanctions for Professional Misconduct (Rules Proc. of State Bar (eff. Jan. 1, 1995), Title IV) is consistent, providing that a violation of the rule "shall result in suspension unless the extent of the member's misconduct and the harm to the client are minimal, in which case, the degree of discipline shall be reproval."

[7b] In urging a reduction in the degree of discipline, respondent argues that he was attempting to advance the beneficiaries' interests in making the loans and that he did not intend to take advantage of them. He compares his case with *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, and *Ames* v. *State Bar* (1973) 8 Cal.3d 910. *Connor* v. *State Bar* involved an attorney who acquired title to his clients' property without complying with former rule 5-101 in order to help the client avoid foreclosure. No aggravating circumstances were articulated. Based on the mitigating circumstances, including Connor's 16 years of unblemished practice, and the fact that the client consented to the transaction, the Court imposed a public reproval.

Ames v. *State Bar* involved attorneys who, while representing holders of a junior encumbrance on real property involved in litigation, purchased the senior encumbrance in order to allow the clients more time to raise money to prevent foreclosure by the senior encumbrance. No aggravating circumstances were discussed. Based on the mitigation, which included no prior discipline, the attorneys acting in what they thought were the best interests of the clients, no intent to deceive or defraud, and client consent, the Court imposed a private reproval.

[7c] The lack of consent in the present case alone distinguishes it from the above cases. In addition, we do not find respondent's dealings as trustee as benign and altruistic as he portrays them. Despite his asserted intentions, respondent availed himself of unlimited and unrestricted access to the estate's funds. He drafted the loan terms so that he was never obligated to repay the principal. He loaned himself money from the trust on an unsecured basis. He repaid the loans in amounts that differed from their terms. Finally, when it suited him, he unilaterally modified the terms of the loans, and did so even after the beneficiaries objected to his numerous acts of self-dealing. Although he may have intended to benefit the trust, he realized significant benefits from the transactions.

Other cases in which the transaction in question was found not to be fair and reasonable have resulted in actual suspension. In *Hunniecutt* v. *State Bar*, *supra*, 44 Cal.3d 362, the attorney convinced a client to invest the proceeds of a personal injury judgment, which the attorney had negotiated on her behalf, in a real estate venture. The investment was at first secure but after a few months was converted to an unsecured loan. The loan was found to be not fair and reasonable because it was unsecured. The attorney suffered large losses in the real estate venture and was unable to repay the money. The attorney was also found culpable of abandoning clients in two unrelated matters. Several mitigating circumstances were considered, including a lack of prior discipline. The Supreme Court suspended Hunniecutt for three years, stayed, with three years probation on conditions, including ninety days actual suspension.

In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, the attorney loaned $100,000 to a client without complying with former

rule 5-101. Part of the loan represented legal fees the client owed Lane. The client executed a promissory note for the loan and a confession of judgment on the note. In later actions, Lane sued the client, represented the client, or was a codefendant with the client, and thereby committed numerous violations of the rules governing conflicts of interest. We held that Lane's use of a confession of judgment to secure the fees he was owed made the transaction not fair and reasonable to the client. (*Id.* at p. 745.) We found Lane's many years of blemish-free practice a significant mitigating circumstance, as well as the fact that Lane's initial motives were to help the client. We recommended that Lane be suspended for three years, stayed, with three years probation on conditions, including sixty days actual suspension. (*Id.* at pp. 750-751.)

The misconduct in another case, *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, is similar to respondent's misconduct. Schneider, acting as trustee of two living trusts he had drafted, made loans to entities in which he had an interest without complying with former rule 5-101. However, the Court found that the loans were adequately secured or were not at risk. The misconduct also included an intentional misrepresentation to the trustor regarding the status of the loan proceeds. Although one of the loans was not paid until after a civil suit was filed, both loans were repaid with interest before the notice to show cause in the disciplinary case was filed. Finding a great deal of mitigation, including thirteen years of blemish-free practice, extensive community service, personal and financial problems, and admission of wrongdoing, the Court imposed three years stayed suspension, three years probation, and thirty days actual suspension.

The seriousness of respondent's misconduct is similar to the seriousness of the misconduct in the above cases. However, most of the money loaned in the present case was secured and the unsecured loan was apparently not at risk as respondent had the ability to repay it. Respondent also repaid the loans with interest. Thus, the harm to the trust was significantly less than the harm involved in *Hunniecutt*. Also, the petition which included the accounting was taken off calendar and therefore was not relied on by the court.[12]

[7d] Nevertheless, the misconduct here was serious and extensive, involving repeated self-dealing by a fiduciary. In addition, as a result of respondent's grossly negligent record keeping, an accurate accounting of the transactions in question may never be made. Furthermore, there are fewer mitigating circumstances present here than in *Schneider*. On balance, we therefore conclude that comparable case law and the purposes of attorney discipline indicate that a three-year probationary period and a sixty-day period of actual suspension, which is less than the discipline imposed in *Hunniecutt* and greater than that imposed in *Schneider*, is appropriate.

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 that respondent be actually suspended from the practice of law for a period of sixty days. We also recommend that respondent 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, to be added to respondent's annual State Bar membership fee for the next calendar year after the effective date of the Supreme Court's order.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

12. However, the accounting was served on the beneficiaries and therefore they may have been misled.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JACK ROBERT RECH

A Member of the State Bar

No. 91-C-00633

Filed May 9, 1995

SUMMARY

Respondent was convicted of conspiracy to impair the collection of federal income taxes (18 U.S.C. § 371), which resulted from his role in permitting his client to shield drug proceeds through investments in two real estate ventures involving respondent. Taking into account mitigating circumstances, the hearing judge pro tempore recommended a five-year stayed suspension and a five-year probation, conditioned on actual suspension for three years and until respondent proves rehabilitation. (Hon. Michael E. Wine, Hearing Judge Pro Tempore.)

The State Bar requested review. The review department concluded that the mitigation was not of the weight accorded by the hearing judge and that respondent's extremely serious misconduct involving repeated acts of moral turpitude over a period of several years warranted disbarment.

COUNSEL FOR PARTIES

For State Bar: Teresa J. Schmid

For Respondent: Lindsay Kohut Slatter

HEADNOTES

[1] 1516 **Conviction Matters—Nature of Conviction—Tax Laws**
For State Bar purposes, the crime of conspiracy to impair the collection of federal income taxes (18 U.S.C. § 371) may or may not involve moral turpitude, depending on the facts and circumstances surrounding the conviction.

[2 a, b] 135.87 **Revised Rules of Procedure—Reinstatement**
1541.10 **Conviction Matters—Interim Suspension—Ordered**
1549 **Conviction Matters—Interim Suspension—Miscellaneous**
2502 **Reinstatement—Waiting Period**
The earliest time that respondent can petition for reinstatement if he is disbarred is five years after the effective date of his interim suspension. (Rules Proc. for State Bar Ct. Proceedings (eff. Jan.

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.

1, 1995), rule 662(b).) Where the order placing respondent on interim suspension provided that he had to stop providing legal services for any paying clients by one date, but could perform legal services for preexisting pro bono clients until a later date, the earlier date was the effective date of the interim suspension because by obtaining an exception for completion of the pro bono cases, respondent acted for the benefit of his pro bono clients, the courts in which their cases were pending, and the justice system, conduct which would be discouraged if he was denied credit for the entire time he was prohibited from earning his living from the practice of law by reason of the interim suspension order resulting from his felony conviction.

[3 a, b] **1516 Conviction Matters—Nature of Conviction—Tax Laws**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
1528 Conviction Matters—Moral Turpitude—Definition

An act of moral turpitude is an act contrary to honesty and good morals. Respondent's conviction for conspiracy to impair the collection of federal income taxes (18 U.S.C. § 371) involved acts of moral turpitude where he concealed the true ownership of property in order to prevent its forfeiture because of illegal drug trading, concealed a former client's history of drug charges when bringing the former client into a real estate venture with another partner, used a real estate venture to launder cash which he knew came from illegal drug sales, several times hid cash from illegal drug sales for the former client, made intentional misrepresentations which he knew could endanger the lives of others, and made a loan to the former client to help finance the former client's illegal drug trade.

[4] **543.90 Aggravation—Bad Faith, Dishonesty—Found but Discounted**

Where respondent's criminal conduct involved concealment, which was considered as a factor establishing respondent's culpability for acts of moral turpitude, it was duplicative to consider such concealment an aggravating factor.

[5] **710.33 Mitigation—No Prior Record—Found but Discounted**

The absence of a prior disciplinary record over many years of practice is a mitigating circumstance. Where respondent had practiced law discipline-free for about eight years prior to the start of his misconduct, such a period of unblemished practice was a mitigating factor, but did not merit significant weight.

[6] **795 Mitigation—Other—Declined to Find**

Where respondent committed a number of acts of moral turpitude over a period lasting about four years, such misconduct was not aberrational.

[7] **725.59 Mitigation—Disability/Illness—Declined to Find**

Where the record failed to show that respondent suffered from extreme emotional difficulties which caused respondent's misconduct, it was inappropriate to make a finding in mitigation based on emotional difficulties.

[8] **750.32 Mitigation—Rehabilitation—Found but Discounted**

The passage of considerable time since misconduct and proof of subsequent rehabilitation constitute a mitigating circumstance. Where respondent practiced law without disciplinary problems for more than four years after the end of his misconduct and then held a responsible job with a mortgage lending business for more than two years, such conduct was clearly to respondent's credit, but did not establish full rehabilitation from a very serious criminal record.

[9 a, b] **802.30 Standards—Purposes of Sanctions**
1516 Conviction Matters—Nature of Conviction—Tax Laws
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment

Disbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude. Although respondent presented substantial mitigation, it was not compelling in light of respondent's extremely serious misconduct over a several-year period. 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 necessitated disbarment for respondent's extensive participation in criminal activities involving repeated acts of moral turpitude.

ADDITIONAL ANALYSIS

Aggravation
- **Found**
  - 521 Multiple Acts
- **Declined to Find**
  - 545 Bad Faith, Dishonesty
  - 565 Uncharged Violations

Mitigation
- **Found**
  - 735.10 Candor—Bar
  - 740.10 Good Character
  - 765.10 Pro Bono Work
  - 791 Other
- **Found but Discounted**
  - 745.32 Remorse/Restitution
- **Declined to Find**
  - 745.52 Remorse/Restitution

Discipline
- 1610 Disbarment

Other
- 178.10 Costs—Imposed

OPINION

PEARLMAN, P.J.:

The State Bar's Office of the Chief Trial Counsel (State Bar) seeks the disbarment of respondent, Jack Robert Rech, for his admitted felonious role in permitting his client to shield drug proceeds through investments in two real estate ventures involving respondent. The hearing judge pro tempore took into account mitigating circumstances in recommending a five-year stayed suspension and a five-year probation, conditioned on actual suspension for three years and until respondent proves rehabilitation. We conclude that the mitigation was not of the weight accorded by the hearing judge and that respondent committed acts of moral turpitude warranting disbarment.

I. PROCEDURAL HISTORY

On May 17, 1991, we issued an order placing respondent on interim suspension as of June 15, 1991, for violation of 18 United States Code, section 371 (conspiracy to impair the collection of income taxes) and referred the matter to the hearing department for a disciplinary recommendation.[1] **[1 - see fn. 1]**

Early in 1993, the State Bar and respondent executed a partial stipulation. They agreed that the facts and circumstances surrounding respondent's conviction involved moral turpitude, but they left open the issue of discipline. Seven days of hearings later took place.

In February 1994, the hearing judge filed a decision recommending a five-year stayed suspension and a five-year probation, conditioned on actual suspension for three years and until respondent complies with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. (Rules Proc. of State Bar (eff. Jan. 1, 1995), Title IV.) The hearing judge also recommended that respondent receive credit for the time which he had already spent on interim suspension. Orders of clarification followed in April and May 1994. Pursuant to these orders, respondent was to receive credit for the entire period of interim suspension from June 15, 1991, onwards.[2] **[2 a, b - see fn. 2]**

On May 12, 1994, the State Bar filed a request for review seeking respondent's disbarment.

II. FACTS

Respondent became a member of the State Bar of California in December 1974.

In 1980 or 1981, Arturo Arocha retained respondent to defend him against charges of possession of cocaine for sale and conspiracy to sell cocaine.

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1. **[1]** The original order classified the crime as one inherently involving moral turpitude. On June 14, 1991, we corrected the earlier order to state that respondent had been convicted of a felony which may or may not involve moral turpitude. We instructed the hearing department to determine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline and, if so, to recommend appropriate discipline. Also, to avoid prejudice to preexisting pro bono clients, we allowed respondent to continue to perform legal services through December 14, 1991, only for such clients.

2. **[2a]** The parties have both briefed the issue of how much credit respondent should receive toward a period of actual suspension as a result of his interim suspension. Although we recommend disbarment instead of suspension, the issue is appropriate for us to address because the earliest time when applicant may seek reinstatement is five years after the effective date of his interim suspension. (See Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 662(b); see also former Trans. Rules Proc. of State Bar, rule 662.)

[2b] The State Bar argues that we should consider December 14, 1991, the effective date of the interim suspension order. Respondent disagrees, arguing that he has been completely barred from the practice of his profession as a livelihood from June 15, 1991, through the present. We conclude that June 15, 1991, is the effective date of his interim suspension. On that date, he had to cease providing legal services for any paying clients. We only allowed him to continue representing his pro bono clients through December 14, 1991, to avoid prejudice to such clients. By obtaining an exception for completion of the pro bono cases, respondent acted for the benefit of his pro bono clients, the courts in which their cases were pending, and the justice system, conduct which would be discouraged if we were to deny him credit for the entire time he was prohibited from earning his living from the practice of law by reason of the interim suspension order resulting from his felony conviction.

Respondent was able to get the charges against Arocha reduced to accessory after the fact. By pleading guilty to the reduced charge, Arocha avoided imprisonment.

Respondent became friends with Arocha. In late 1982 or early 1983, respondent financed Arocha's acquisition of a house in Alamo Heights. Although Arocha owned the Alamo Heights property, respondent held title to it because he wanted to distance himself from Arocha's drug deals and feared a possible forfeiture of the property if its true ownership became known. Respondent gave Arocha an unrecorded deed to the property to use if anything happened to respondent. Although respondent kept a file on the Alamo Heights property, he decided not to put information about his arrangement with Arocha in the file because he feared that federal authorities might take the file.

In August 1983, respondent entered into a venture to build and sell a house in Rancho California. His original partner was Ronald Clem, a former police officer. In November 1983, respondent brought Arocha in as a partner to provide additional funds for the Rancho California venture. Respondent did not disclose to Clem that he had defended Arocha in a drug case. When Arocha made payments of $8,000 to $10,000 in cash to subcontractors, Clem suspected that the cash came from illegal drug sales. In late 1983 or early 1984, Clem expressed this suspicion to respondent, who agreed to handle further payments from Arocha for the venture. When Clem later learned from another source about respondent's representation of Arocha in a drug case, Clem refused to participate in any further projects with Arocha.

Arocha told respondent that the cash for the Rancho California venture came from the sales of properties belonging to his mother-in-law. As respondent stipulated, however, clear and convincing evidence in the State Bar proceeding showed that respondent knew the cash came from illegal drug sales. Respondent could have bought out Arocha's interest in the Rancho California venture, but did not sever ties with Arocha despite respondent's knowledge of the illegal source of Arocha's contributions to the venture.

About four times during the construction of the Rancho California house, Arocha brought $10,000 in cash to respondent for him to keep for a few days. Respondent hid this cash at home. Once, Arocha brought a bag containing $75,000 to $200,000 in cash for respondent to keep. Respondent's wife discovered the cash and asked respondent to remove it from the house. Respondent telephoned Arocha, who picked up the cash the next morning.

In November 1984, Arocha threatened to kill Clem and his family if Clem interfered with Arocha's drug sales. Clem believed the threat and moved his family to Montana for safety. When Clem told respondent about the threat, respondent nevertheless suggested that Clem remain in California for several months and complete some work on a new real estate venture which they had begun. Clem subsequently joined his family in Montana.

Arocha did not threaten respondent in the way he threatened Clem. Arocha stated, however, that if a person interfered with him, he would retaliate against the person and the person's family. In July 1985, Arocha was arrested on drug charges. He asked respondent to represent him. Respondent refused, but lent him $10,000 to retain an attorney.

In late 1985 or early 1986, respondent telephoned Clem in Montana. Respondent said that Arocha was eager to get Arocha's money out of the Rancho California property and that respondent was concerned about his own safety. Also, respondent informed Clem that respondent was falsely telling Arocha that Clem was preventing the sale of the Rancho California property.

Federal authorities offered Arocha leniency for working as an undercover agent and wearing a wire to transmit conversations. Between October 1986 and January 1987, Arocha tried to persuade respondent to invest in drug deals. Respondent initially refused, but did not terminate contact with Arocha. Respondent later agreed to become involved in Arocha's illegal drug business. He loaned $30,000 to Arocha which Arocha claimed was necessary to satisfy another investor in a drug deal. Arocha was supposed to repay the $30,000 to respondent plus

$5,000 in interest. Respondent knew that this interest was expected to come from the illegal sale of drugs.

Federal authorities arrested respondent. In April 1988, he pled guilty to conspiracy to impair the collection of income taxes from Arocha and others in violation of 18 United States Code, section 371. He was sentenced to prison for five years, four and one-half of which were suspended. Also, he was required to serve a five-year probation, to pay a $100,000 fine, and to perform 2,000 hours of community service. He spent six months in a halfway house and performed 2,200 to 2,400 hours of public service. In March 1991, he was discharged from probation.

III. DISCUSSION

We must independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing decision. (Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 305(a); former Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9.) In a disciplinary proceeding, the State Bar must establish culpability and aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar (eff. Jan. 1, 1995), Title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b); former Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b); *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239.) An attorney culpable of misconduct must prove mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).)

A. Acts of Moral Turpitude

[3a] An act of moral turpitude is an act contrary to honesty and good morals. (*Kitsis* v. *State Bar* (1979) 23 Cal.3d 857, 865; *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 187.) Respondent stipulated that the facts and circumstances surrounding his conviction involved moral turpitude.

[3b] We conclude that respondent committed the following acts of moral turpitude: (1) concealing the true ownership of the Alamo Heights property in order to prevent a forfeiture because of Arocha's illegal drug trade, (2) concealing Arocha's history of drug charges from Clem, (3) laundering through the Rancho California venture about $100,000 in cash which he knew came from illegal drug sales, (4) several instances of hiding cash from illegal drug sales for Arocha, (5) intentionally misrepresenting to Arocha that Clem was preventing the sale of the Rancho California property when he knew that such misrepresentations could endanger the lives of Clem and his family, and (6) making a loan to Arocha to help finance Arocha's illegal drug trade.

B. Aggravating Circumstances

[4] The hearing judge found two aggravating factors: multiple acts of wrongdoing (see std. 1.2(b)(ii)) and concealment (see std. 1.2(b)(iii)).[3] The record amply supports the former finding, but we consider the latter finding duplicative. Having stressed the concealment which characterized respondent's acts of moral turpitude, we do not consider it again as an aggravating factor. (See *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 11.)

C. Mitigating Circumstances

We find that the record clearly and convincingly establishes several mitigating factors found by the hearing judge: candor and cooperation with the State Bar (see std. 1.2(e)(v)), favorable character testimony by a wide range of references (see std. 1.2(e)(vi)), and pro bono work (see *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 665 & fn. 14; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar

3. Former rule 5-101 of the Rules of Professional Conduct of the State Bar sets forth requirements for entering into a business transaction with a client. Although the State Bar alleges that respondent violated former rule 5-101 when he entered into the Alamo Heights transaction with Arocha, the record lacks clear and convincing evidence of such a violation. Accordingly, we do not consider this alleged uncharged misconduct as an additional aggravating factor.

Ct. Rptr. 716, 729). Also, we adopt the hearing judge's determination that respondent has expressed remorse, although we give it limited weight in mitigation.[4] (Cf. *In re Aquino* (1989) 49 Cal.3d 1122, 1132-1133; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

[5] Under standard 1.2(e)(i), the absence of a prior disciplinary record over many years of practice is a mitigating circumstance. The hearing judge found that respondent's misconduct began at the end of 1983 and that respondent deserves some credit for the preceding nine years of discipline-free practice. Respondent's misconduct, however, started in late 1982 or early 1983, when he concealed the true ownership of the Alamo Heights property in order to prevent a forfeiture because of Arocha's illegal drug trade. Thus, at the start of his misconduct, respondent had practiced law for about eight years. Such a period of unblemished practice is a mitigating factor, but does not merit significant weight. (See *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 658 [seven and one-half years without prior discipline insufficient for mitigation]; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 [eight years of unblemished practice not a significant mitigating circumstance]; but see *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 596 [more than ten years of discipline-free practice entitled to significant mitigation].)

Standard 1.2(e)(iv) provides that it is a mitigating circumstance if the attorney suffered extreme emotional difficulties at the time of misconduct, if expert testimony establishes that these difficulties were directly responsible for the misconduct, and if the attorney proves that he or she no longer suffers from the difficulties. Relying on the psychological evidence concerning respondent adduced through testimony by psychologists and respondent himself, respondent's personal and professional history, and respondent's demeanor and remorse, the hearing judge found that respondent's misconduct was aberrational and that respondent had established a mitigating circumstance under standard 1.2(e)(iv).

Although respondent agrees with the finding that his misconduct was aberrational, he disagrees with the finding that the record establishes mitigation under standard 1.2(e)(iv) because the psychological testimony was not offered to show extreme emotional difficulty or antisocial tendencies which caused his misconduct. He stresses that the psychological evidence was offered only to show the aberrational nature of his misconduct, to corroborate other evidence about his moral character and remorse, and to help demonstrate his rehabilitation.

[6] We disagree with the finding that respondent's misconduct was aberrational because he committed a number of acts of moral turpitude over a period lasting about four years. (See *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.) [7] Also, we agree with respondent that the finding in mitigation under standard 1.2(e)(iv) was inappropriate because the record fails to show that he suffered from extreme emotional difficulties which caused his misconduct. We also agree with respondent that the psychological evidence corroborates other favorable character testimony and helps show his remorse, but we find it insufficient to prove current rehabilitation from the very serious misconduct in which he engaged over several years.

[8] We also give less weight to the hearing judge's finding that respondent has met the requirements of standard 1.2(e)(viii), which provides that the passage of considerable time since misconduct and proof of subsequent rehabilitation constitute a mitigating circumstance. We agree that the continued pendency of criminal proceedings does not preclude the finding of mitigating circumstances in evidence of post-misconduct rehabilitation. (See,

4. We do not find that respondent promptly took objective steps spontaneously demonstrating remorse as called for by standard 1.2(e)(vii), but we do take into account the factors in mitigation cited by the hearing judge (i.e., respondent's guilty plea to criminal charges, stipulation to moral turpitude, and pro bono work beyond the amount which he had to perform on criminal probation).

e.g., *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106.) Here, the hearing judge stressed that respondent practiced law without disciplinary problems for more than four years after the end of his misconduct and has held a responsible job with a mortgage lending business since late 1992. While this conduct is clearly to his credit, respondent had the burden of proving his rehabilitation from a very serious criminal record. (Cf. *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939 ["It is not enough that petitioner kept out of trouble while being watched on [criminal] probation; he must affirmatively demonstrate over a prolonged period his sincere regret and rehabilitation."].)

D. Discipline

The hearing judge recommended a five-year stayed suspension and a five-year probation, conditioned on actual suspension for three years and until respondent proves rehabilitation under standard 1.4(c)(ii). The State Bar seeks disbarment, whereas respondent supports the hearing judge's disciplinary recommendation.

In determining the appropriate discipline, we look first to the standards for guidance. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Twitty* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 664, 676.) Under standard 1.3, the primary purposes of discipline are to protect the public, courts, and legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession. Standard 3.2 calls for the disbarment of an attorney who has committed a crime involving moral turpitude unless the most compelling mitigating circumstances clearly predominate.

We must recommend discipline which is consistent with the discipline imposed in similar proceedings. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Twitty, supra,* 2 Cal. State Bar Ct. Rptr. at p. 676.) **[9a]** "'[D]isbarments, and not suspensions, have been the rule rather than the exception in cases of serious crimes involving moral turpitude ....'" (*In re Crooks* (1990) 51 Cal.3d 1090, 1101 [attorney convicted of conspiracy to defraud the United States (18 U.S.C. § 371) based on tax shelter scheme], quoting *In re Bogart* (1973) 9 Cal.3d 743, 748.) We find instructive other conviction-based cases in which the Supreme Court has disbarred attorneys for egregious misconduct despite substantial mitigating circumstances. (See, e.g., *In re Scott* (1991) 52 Cal.3d 968 [narcotics conviction, substance abuse, and violation of judicial canons]; *In re Aquino, supra,* 49 Cal.3d 1122 [conviction on multiple counts of violating immigration and naturalization laws in connection with a sham marriage scheme]; *In re Lamb* (1989) 49 Cal.3d 239 [false personation of a bar examinee].)

[9b] Although respondent presented substantial mitigation, it was not compelling in light of his extremely serious misconduct over a several-year period. It is undisputed that to prevent a forfeiture of the Alamo Heights property, he concealed its true ownership. To get Clem to accept Arocha as a partner in the Rancho California venture, he concealed his prior defense of Arocha against drug charges. He used the Rancho California venture to launder about $100,000 of cash which he knew came from illegal drug deals. He repeatedly hid cash from illegal drug sales for Arocha. He intentionally made false representations about Clem to Arocha when he knew that these representations might endanger Clem and his family. Finally, he helped finance Arocha's illegal drug trade. 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 necessitate disbarment for respondent's extensive participation in criminal activities involving repeated acts of moral turpitude.

IV. RECOMMENDATION

We recommend that respondent be disbarred and that the State Bar be awarded costs under Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

APPLICANT A

Applicant for Admission

No. 92-M-XXXXX

Filed May 24, 1995

SUMMARY

In a moral character proceeding in which applicant partially waived confidentiality, a hearing judge applied principles of collateral estoppel to preclude applicant from relitigating in the State Bar Court a civil fraud judgment against applicant which was affirmed on appeal and which was based on clear and convincing evidence. (Hon. Alan K. Goldhammer, Hearing Judge.)

Applicant sought review contending that the hearing judge's application of collateral estoppel principles denied her a fair hearing. The review department held that civil court findings made under the same clear and convincing standard of proof applied in the State Bar Court could be given preclusive effect in accordance with well established principals of collateral estoppel, and affirmed the hearing judge's application of those principals to bind applicant to the fraud finding.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Applicant: Applicant A, in pro. per.

HEADNOTES

[1 a, b] 2603 Moral Character—Waiver of Confidentiality

Moral character proceedings in the State Bar Court are confidential unless an applicant waives confidentially in writing. Where applicant waived confidentiality on condition that she not be identified by name and only as to the issue of the hearing judge's allegedly improper application of principals of collateral estoppel, the review department's published opinion did not refer to applicant by name and addressed only those matters necessary to resolve that issue. In a separate unpublished opinion, the review department addressed the remaining issues on its de novo review of the hearing judge's ultimate decision as to whether applicant met her burden of proof of current good moral character.

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] **2609 Moral Character—Procedural Issues**

The procedure in moral character proceedings is that an applicant must initially furnish sufficient evidence to make a prima facie showing of good moral character. If the applicant makes such a showing, the State Bar may then seek to rebut it with evidence of the applicant's bad moral character. If the State Bar rebuts the applicant's prima facie showing, the applicant must prove rehabilitation from the acts evidencing bad moral character in order to prove the requisite good moral character. All reasonable doubts are resolved in applicant's favor.

[3] **146 Evidence—Judicial Notice**
191 Effect/Relationship of Other Proceedings
2690 Moral Character—Miscellaneous

Civil court records are proper subjects of judicial notice in moral character proceedings. Therefore, where applicant was a party to the civil proceeding and that proceeding involved many issues substantially identical to issues in the moral character proceeding, the hearing judge properly considered the civil court's jury verdicts, trial minutes and judgment, and a Court of Appeal's unpublished opinion.

[4] **148 Evidence—Witnesses**
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
2690 Moral Character—Miscellaneous

Section 6049.2 of the Business and Professions Code authorizes the admission of transcripts of testimony from civil proceedings in State Bar disciplinary proceedings without proof of the witnesses' unavailability. However, section 6049.2 is, under its express terms, applicable only in disciplinary proceedings, and there is no parallel section permitting admission of prior transcripts in moral character proceedings. Accordingly, if a proper objection is made, transcripts of testimony from civil proceedings are admissible in moral character proceedings only upon a showing that the witnesses whose testimony is recorded in such transcripts are unavailable to testify.

[5] **191 Effect/Relationship of Other Proceedings**
2602 Moral Character—Burdens of Proof
2690 Moral Character—Miscellaneous

In moral character cases, the Supreme Court must independently assess the weight that any civil court findings have with respect to State Bar's burden of proof on rebuttal of applicant's prima facie showing of good moral character, in light of other evidence on rebuttal and applicant's showing, if any, in rehabilitation. The ultimate question is unique to moral character proceeding, in which no deference is owed to a civil judgment.

[6] **139 Procedure—Miscellaneous**
146 Evidence—Judicial Notice
148 Evidence—Witnesses
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
2690 Moral Character—Miscellaneous

Prior civil court findings made under a preponderance of the evidence standard of proof merely constitute evidence in a State Bar Court proceeding, not the exclusive record upon which an issue must be adjudicated. While the State Bar may choose to proffer prior civil court findings as its entire case against an attorney or applicant on the underlying issue, the attorney or applicant then has the

right to controvert, temper, or explain the civil findings with other evidence, including live testimony from the same witnesses who testified in the civil trial.

[7] **147 Evidence—Presumptions**
159 Evidence—Miscellaneous
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings

Prior civil court findings made under the preponderance of the evidence standard of proof are entitled to a strong presumption of validity in State Bar Court proceedings if they are supported by substantial evidence.

[8 a-e] **159 Evidence—Miscellaneous**
162.11 Proof—State Bar's Burden—Clear and Convincing
192 Due Process/Procedural Rights
2602 Moral Character—Burdens of Proof
2690 Moral Character—Miscellaneous

Although the burden of proof in State Bar proceedings is generally clear and convincing evidence, there is no State Bar rule that specifically sets forth the State Bar's burden of proof on rebuttal in moral character proceedings. An applicant's claim for admission to the practice of law in this state is not a mere privilege, but a claim of right that is afforded the protection of due process. Even though there are distinctions between admission proceedings and disciplinary proceedings, the question involved in both disciplinary and admissions proceedings is the same—is the applicant for admission or the attorney sought to be disciplined a fit and proper person to be permitted to practice law. The test for admission and for discipline is and should be the same. Accordingly, except as otherwise provided by law, the State Bar's burden of proof in adducing evidence of bad moral character on rebuttal of an applicant's prima facie showing is by clear and convincing evidence.

[9] **159 Evidence—Miscellaneous**
193 Constitutional Issues
2602 Moral Character—Burdens of Proof

Where First Amendment rights are at stake, the State Bar's burden of proof in adducing evidence of bad moral character on rebuttal of an applicant's prima facie showing is proof beyond a reasonable doubt. Where the right of access to the courts is at stake, proof beyond a reasonable doubt may also be required.

[10 a-c] **159 Evidence—Miscellaneous**
162.90 Quantum of Proof—Miscellaneous
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings
199 General Issues—Miscellaneous

Neither the Supreme Court nor the State Bar Court is bound by civil findings that exculpate a respondent of charged misconduct, or by an attorney's acquittal in a criminal case, or by the dismissal of criminal charges against an attorney. The reasons the State Bar is not bound by exculpatory civil findings or criminal acquittals in disciplinary proceedings are that the parties are different, the quantum of proof required in each proceeding is virtually always different, and the purposes of each proceeding are vastly different.

[11] 139 **Procedure—Miscellaneous**
159 **Evidence—Miscellaneous**
162.90 **Quantum of Proof—Miscellaneous**
169 **Standard of Proof or Review—Miscellaneous**
191 **Effect/Relationship of Other Proceedings**
199 **General Issues—Miscellaneous**

Neither the Supreme Court nor the State Bar Court will bind an applicant or a respondent to an adverse civil finding made upon the usual civil standard of proof of a preponderance of the evidence when the standard of proof in the State Bar proceeding is clear and convincing evidence. When civil findings are made under a preponderance of the evidence standard, they must be independently assessed under the more stringent standard of proof applicable to disciplinary proceedings of clear and convincing evidence. It is only in this context that civil findings have no disciplinary significance apart from the underlying facts.

[12 a-h] 139 **Procedure—Miscellaneous**
159 **Evidence—Miscellaneous**
169 **Standard of Proof or Review—Miscellaneous**
191 **Effect/Relationship of Other Proceedings**
199 **General Issues—Miscellaneous**
2602 **Moral Character—Burdens of Proof**
2690 **Moral Character—Miscellaneous**

The State Bar Court may apply collateral estoppel principles to preclude an applicant from relitigating an issue that was actually litigated and resolved adversely to him or her in a prior civil proceeding, provided that the issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, that the civil finding was made under the same burden of proof applicable to the substantially identical issue in the State Bar Court, that the applicant was a party to the civil proceeding, that there is a final judgment on the merits in the civil proceeding, and that no unfairness in precluding relitigation of the issue is demonstrated by the applicant. An applicant may demonstrate that it would be unfair to bind him or her to an adverse civil finding by showing, among other things, that he or she had less incentive or motive to litigate the issue in the civil proceeding, that the civil finding or judgment is itself inconsistent with some other finding or judgment, or that he or she was required to litigate under different and less advantageous procedures in the civil proceeding. Where applicant's fraud judgment met the above criteria and no unfairness was demonstrated, the hearing judge appropriately applied the doctrine of collateral estoppel to the underlying fraud issue in this moral character proceeding.

ADDITIONAL ANALYSIS

[None]

OPINION

PEARLMAN, P.J.:

I. INTRODUCTION

[1a] Moral character proceedings in the State Bar Court are confidential unless an applicant waives confidentially in writing. (Bus. & Prof. Code, § 6060.2; *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279, 283; see also Cal. Rules of Court, rule 952.6(c).) On review, Applicant A (applicant) filed a waiver of confidentiality[1] **[1b - see fn. 1]** only as to her contention that she was denied a fair hearing due to the hearing judge's allegedly improper application of principles of collateral estoppel with respect to a 1989 superior court civil judgment, affirmed on appeal, which awarded the plaintiffs substantial punitive damages against applicant based on the jury's finding that she was guilty of fraud by clear and convincing evidence.

The State Bar disputes applicant's contention that the hearing judge applied collateral estoppel principles with respect to the prior civil judgment. However, the State Bar embraces her contention that principles of collateral estoppel have no applicability in State Bar proceedings.

We agree with applicant that the hearing judge applied principles of collateral estoppel to preclude applicant from relitigating the underlying fraud issue in this proceeding. We disagree, however, with her contention and the State Bar's parallel argument that the hearing judge's application of collateral estoppel principles was improper.

The Supreme Court has unquestionably held that prior civil court findings made under the preponderance-of-the-evidence standard of proof are not binding in the State Bar Court and has required that the issues underlying such civil findings be retried under the stricter clear and convincing evidence standard of proof. But the Supreme Court has never held that civil court findings made under the same clear and convincing standard of proof applied in the State Bar Court cannot be given preclusive effect in accordance with well-established principles of collateral estoppel.

In accordance with those principles, the hearing judge gave applicant ample opportunity to attack the fairness of being bound by the superior court's judgment, which not only was appealed, but also was the subject of both an unsuccessful petition for review to the California Supreme Court and an unsuccessful petition for certiorari to the United States Supreme Court. As we discuss *post*, applicant did not demonstrate any unfairness. Accordingly, on de novo review, we affirm the hearing judge's application of collateral estoppel principles to bind applicant to the jury's fraud finding.

II. PROCEDURE IN MORAL CHARACTER PROCEEDINGS

[2] In moral character proceedings, the applicant must initially furnish sufficient evidence to make a prima facie showing of good moral character. (*Lubetzky* v. *State Bar* (1991) 54 Cal.3d 308, 312; *Hallinan* v. *Committee of Bar Examiners* (1966) 65 Cal.2d 447, 449, fn. 1.) If the applicant makes such a showing, the State Bar may then seek to rebut it with evidence of the applicant's bad moral character. (*Lubetzky* v. *State Bar*, *supra*, 54 Cal.3d at p. 312, see also 1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, § 130, p. 115.) If the State Bar rebuts the applicant's prima facie showing, the applicant must prove rehabilitation from the acts evidencing bad moral character to prove the requisite good moral character. (*Lubetzky* v. *State Bar*, *supra*, 54 Cal.3d at p. 312; see also *Hightower* v. *State Bar* (1983) 34 Cal.3d 150, 157-158.) All reasonable doubts are resolved in the applicant's favor. (*Kwasnik* v. *State Bar* (1990) 50 Cal.3d 1061, 1068.)

1. **[1b]** Applicant's waiver is conditioned on our not referring to her by name. Accordingly, in this published opinion, we address only those issues necessary to resolve applicant's contention and refer to applicant only as Applicant A. In a separate unpublished opinion, which remains confidential, we address the remaining issues on our de novo review of the hearing judge's ultimate decision as to whether applicant met her burden of proof of current good moral character and announce our judgment.

III. DISCUSSION

A. Use of Prior Civil Fraud Finding in Rebuttal of Applicant's Prima Facie Showing

1. Parties' Contentions

On review, applicant attacks the hearing judge's finding that the jury's fraud finding against her rebutted her prima facie showing of good moral character.[2] As noted *ante*, she contends that the hearing judge denied her a fair hearing by improperly applying collateral estoppel principles to prohibit her from presenting evidence to contradict the jury's fraud finding.

As we also noted *ante*, the State Bar embraces applicant's contention that Supreme Court precedent precludes the application of collateral estoppel principles in State Bar proceedings, but disputes her contention that the hearing judge applied collateral estoppel principles in the present matter. The State Bar urges us to affirm the hearing judge's conclusion that the jury's fraud finding rebuts her prima facie showing because, as the State Bar argues, he "more than complied with applicable Supreme Court precedent by conducting an independent review of the record in the civil proceedings and determining that the fraud judgment supported similar findings in these proceedings."

2. Ruling Below on the Fraud Issue

[3] Applicant was a party defendant to the fraud lawsuit, which involved many issues substantially identical to issues in this proceeding.[3] Accordingly, the hearing judge properly considered the copies of the jury verdicts, the superior court's trial minutes and judgment, and the copy of the Court of Appeal's unpublished opinion. Evidence Code section 452, subdivision (d), provides that judicial notice may be taken of the records of the courts of this state. The Supreme Court has repeatedly held that civil records are proper subjects of judicial notice in State Bar disciplinary proceedings under Evidence Code section 452, subdivision (d) (*Mushrush* v. *State Bar* (1976) 17 Cal.3d 487, 489, fn. 1; *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 444), and the same reasoning applies to moral character proceedings.

In light of the final civil judgment on appeal upholding the jury's fraud finding, the hearing judge, on his own initiative, applied principles of collateral estoppel to preclude applicant from presenting evidence contradicting the jury's fraud finding or otherwise to relitigate it in this proceeding and to bind her to the jury's fraud finding by concluding that it alone rebutted her prima facie showing. The State Bar's position that the hearing judge did not apply collateral estoppel principles is not supported by the record. Indeed, the record indicates that the hearing judge raised the issue of whether he would permit applicant collaterally to attack the jury's fraud finding at the first status conference in this matter. Then, in an order filed January 28, 1993, concerning the presentation of evidence at trial, he ruled that the State Bar could introduce transcripts, pleadings, and exhibits from the fraud lawsuit, subject to objection by applicant as to relevance, materiality, and undue prejudice, and that any prima facie showing of good moral character would be considered to have been rebutted on the basis of such evidence.

In accordance with that pre-trial ruling, the State Bar proffered, and the hearing judge admitted into evidence, a copy of the transcript of the testimony[4] **[4 - see fn. 4]** and copies of 49 of the exhibits admitted

2. Neither party challenges the hearing judge's finding that applicant made the requisite prima facie showing of good moral character. We adopt this finding on our de novo review.

3. "Although the problem of defining moral turpitude is not without difficulty [citations], it is settled that whatever else it may mean, it includes fraud . . . . [Citations.]" (*In re Hallinan* (1954) 43 Cal.2d 243, 247.)

4. **[4]** Business and Professions Code section 6049.2 authorizes the admission of transcripts of testimony from civil proceedings in State Bar disciplinary proceedings without proof of the witnesses' unavailability. However, section 6049.2 is, under its express terms, applicable only in disciplinary proceedings, and there is no parallel section permitting admission of prior transcripts in moral character proceedings. Accordingly, if a proper objection is made, transcripts of testimony from civil proceedings are admissible in moral character proceedings only upon a showing that the witnesses whose testimony is recorded in such transcripts are unavailable to testify. (Evid. Code, § 1291, subd. (a).)

into evidence in the fraud lawsuit.[5] In addition, the hearing judge admitted into evidence copies of the jury verdicts, the superior court's trial minutes and judgment, and the Court of Appeal's unpublished opinion[6] from the fraud lawsuit. The hearing judge also prohibited applicant from calling any witnesses or proffering any exhibits in an attempt to contradict the jury's fraud finding. He expressly rejected applicant's request to introduce into evidence copies of the exhibits which she proffered at the fraud lawsuit, but which the superior court refused to admit. He thereafter reaffirmed the pre-trial ruling in his decision filed May 6, 1993, and concluded that the jury's fraud finding, standing alone, rebutted applicant's prima facie showing of good moral character.

B. Analysis of Supreme Court Precedent

In its supplemental brief on collateral estoppel, the State Bar identifies eleven Supreme Court opinions that refer to the use of civil findings in State Bar proceedings. The State Bar cites to nine of those opinions for the unassailable proposition that civil findings are not binding upon the Supreme Court in adjudicating State Bar matters. (See *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 947; *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, 634; *Mushrush* v. *State Bar, supra*, 17 Cal.3d at p. 489, fn.1; *Yokozeki* v. *State Bar, supra*, 11 Cal.3d at p. 444; *In re Wright* (1973) 10 Cal.3d 374, 377; *Lee* v. *State Bar* (1970) 2 Cal.3d 927, 941; *Bernstein* v. *Committee of Bar Examiners* (1968) 69 Cal.2d 90, 101; *Lefner* v. *State Bar* (1966) 64 Cal.2d 189, 192; *Magee* v. *State Bar* (1962) 58 Cal.2d 423, 429.) State Bar Court rulings are likewise not binding upon the Supreme Court. (*Conroy* v. *State Bar* (1990) 51 Cal.3d 799, 803; cf. *Bernstein* v. *Committee of Bar Examiners, supra*, 69 Cal.2d at p. 101.)

The fact that neither civil findings nor State Bar Court findings are binding upon the Supreme Court is not the question before us. Rather, the question is whether the hearing judge applied principles of collateral estoppel to limit the issues tried in this proceeding. His ruling in that regard, as well as our ruling on appeal therefrom, is, like all other State Bar Court rulings, subject to the Supreme Court's plenary review. (See generally Cal. Rules of Court, rule 951(g).) The purpose of civil proceedings and State Bar proceedings is clearly not the same. (See *Most* v. *State Bar* (1967) 67 Cal.2d 589, 595, fn. 5 [disciplinary proceeding].) **[5]** In all cases, the Supreme Court must independently assess the weight that the civil findings have with respect to the State Bar's burden of proof on rebuttal in light of other evidence on rebuttal and applicant's showing, if any, in rehabilitation. The ultimate question is one unique to the moral character proceeding, in which no deference is owed the civil judgment.

Here, the judge clearly did not consider himself bound as a matter of law to limit the trial in the manner in which he chose, but did so in the interest of judicial and litigant economy after allowing applicant to challenge the fairness of doing so. Therefore, the issue before us is not whether the Supreme Court or this court is bound by civil findings, but a far narrower one: whether the hearing judge was precluded by Supreme Court precedent from limiting the issues to be tried in the State Bar Court by applying collateral estoppel principles *to bind the applicant* to a prior adverse civil fraud finding made under the clear and convincing standard.

None of the Supreme Court opinions cited by the State Bar supports its contention that independent adjudication of the fraud issue means that the hearing judge was required only to review the prior record in the civil proceedings and independently to determine whether it supported a similar fraud finding in this proceeding. To the contrary, **[6]** prior civil findings under a preponderance-of-the-evidence standard of proof merely constitute *evidence* that may be the subject of judicial notice in the State Bar proceeding, *not the exclusive record* upon which the issue

5. Applicant produced copies of additional exhibits that were admitted into evidence in the fraud lawsuit after the hearing. The hearing judge admitted these copies into evidence in an order filed March 12, 1993.

6. Even though the Court of Appeal's opinion is not published, the hearing judge properly relied upon it because it is relevant to this proceeding. (See Cal. Rules of Court, rules 977(b)(1) & 977(b)(2).)

must be adjudicated in the State Bar proceeding. While the State Bar may choose to proffer prior civil findings as its entire case against a respondent or applicant on the underlying issue, the respondent or applicant then has the right to controvert, temper, or explain the civil findings with other evidence, including live testimony from the same witnesses who testified in the civil trial. (See *Rosenthal* v. *State Bar*, *supra*, 43 Cal.3d at pp. 619-620 [respondent permitted to present numerous witnesses to attack civil findings and judgments].)

The general rule that the respondent or applicant has a right to introduce evidence in an attempt to controvert prior civil findings is reflected by at least three of the Supreme Court opinions the State Bar cites to us. (See *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d at pp. 949-950 [no error in admitting civil contempt citations when the respondent did not claim that the State Bar Court prevented him from presenting any other evidence in his defense]; *Rosenthal* v. *State Bar*, *supra*, 43 Cal.3d at pp. 619-620; *Werner* v. *State Bar* (1944) 24 Cal.2d 611, 616 [respondent's right to introduce additional evidence in his own behalf when transcripts of prior testimony were admitted into evidence in State Bar proceedings].)

Ordinarily, the respondent or applicant still has an uphill battle in overcoming prior adverse civil findings. Neither party to this proceeding disputes that **[7]** prior civil findings made under the preponderance-of-the-evidence standard of proof are entitled to a strong presumption of validity in State Bar proceedings if they are supported by substantial evidence. (See, e.g., *Bernstein* v. *Committee of Bar Examiners*, *supra*, 69 Cal.2d at p. 101 [rejecting State Bar subcommittee's findings contrary to earlier civil findings supported by substantial evidence]; *Lefner* v. *State Bar*, *supra*, 64 Cal.2d at p. 193.) From this settled law, however, both parties argue that civil findings made under the clear-and-convincing-evidence standard of proof likewise have only a strong presumption of validity in State Bar proceedings if supported by substantial evidence, but cannot be deemed preclusive under collateral estoppel principles. If we were to accept this proposition, we would be compelled to reverse the hearing judge's findings that the jury's fraud finding, standing alone, rebuts applicant's prima facie showing. Applicant would be right that she is entitled to have us remand the matter for a new hearing so that applicant could offer exhibits and testimony on the fraud issue in an attempt to contradict the prior civil record and thereby relitigate in this proceeding the issue underlying the jury's fraud finding. (Cf. *Rosenthal* v. *State Bar*, *supra*, 43 Cal.3d 612 at pp. 619-620.) But the parties' argument on this issue does not find support in Supreme Court precedent.

In its supplemental brief on collateral estoppel, the State Bar quotes the Supreme Court's statements in *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d 924, to the effect that civil findings and judgments have no significance apart from their underlying facts in disciplinary proceedings and that such civil findings must be assessed independently under the more stringent standard of proof applicable in disciplinary proceedings (i.e., the clear and convincing burden of proof).[7] (*Id.* at p. 947.) The State Bar cites that holding in *Maltaman* as support for its argument that the civil findings and judgment have no significance apart from their underlying facts in this moral character proceeding.

The State Bar's reliance on *Maltaman* appears to be predicated on the assumption that underlying facts in moral character proceedings must be assessed independently under the more stringent, clear and convincing burden of proof.[8] **[8a - see fn. 8]** Indeed, in several past moral character cases, the

7. Certain narrow civil issues resolved in prior proceedings have previously been recognized in State Bar proceedings as binding between the parties to the prior proceeding. (See, e.g., *Lee* v. *State Bar*, *supra*, 2 Cal.3d at p. 941 [civil decision deemed a conclusive legal determination that attorney gave no consideration for a promissory note]; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 729 [arbitration award deemed res judicata between the parties thereto on the issue of offset for costs].)

8. **[8a]** Generally, unless otherwise articulated in the State Bar Act or State Bar rules of procedure, the standard of proof in State Bar proceedings is clear and convincing evidence. (See *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 430-431, and cases cited therein.)

State Bar has claimed that it bears the identical burden of proof in moral character cases as in disciplinary cases.

In contrast, the usual burden of proof on issues of fact in civil cases in this state, including fraud, is and has always been a preponderance of the evidence. (*Liodas* v. *Sahadi* (1977) 19 Cal.3d 278, 287-289 [disapproving contrary court of appeal decisions]; see Evid. Code, § 115 [except as otherwise provided by law, the required burden of proof is proof by a preponderance of the evidence].) In fact, before the 1987 amendments to Civil Code section 3294, subdivision (a), plaintiffs were permitted to recover punitive damages by establishing that the defendant was guilty of oppression, fraud, or malice under the preponderance-of-the-evidence standard of proof. It was not until the 1987 amendments, that plaintiffs were required to prove the defendant's guilt of oppression, fraud, or malice under the clear and convincing standard of proof.

As discussed more fully *post*, we accept the premise that, in moral character proceedings, the State Bar's evidence of bad moral character should be assessed under the same stringent standard of proof as applied in disciplinary proceedings. But we disagree that the application of such burden of proof precludes the application of collateral estoppel principles to prior civil findings and judgments in which the same burden of proof was applied.

C. Burden of Proof on Rebuttal in Moral Character Proceedings

The well-established procedures in moral character proceedings, outlined *ante*, address only the parties' respective burdens of producing or going forward with evidence. They do not address the parties' burdens of proof. The burden of producing evidence "means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) "The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." (Evid. Code, § 550, subd. (b).) If that party produces evidence of such weight that a determination in his or her favor would be required in the absence of contradictory evidence, the burden of producing evidence shifts to the other party to present such contradictory evidence. (1 Witkin, Cal. Evidence, Burden of Proof and Presumptions, *supra*, at § 130, p. 115.)

The burden of proof "means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) The burden of proof addresses the persuasiveness of the evidence presented and the balance that must be struck if conflicting evidence is presented. (See 1 Witkin, *supra*, at § 129, p. 115.) In that regard, the "burden of proof" is more accurately described as the "burden of persuasion." (*Ibid.*)

[8b] Although the burden of proof in State Bar proceedings is generally clear and convincing evidence, there is no State Bar rule that specifically sets forth the State Bar's burden of proof on rebuttal in moral character proceedings. Accordingly, we start with Evidence Code section 115, which provides that "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The phrase "[e]xcept as otherwise provided by law" in section 115 means "'unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, *or decisional law.*'" (*People* v. *Burnick* (1975) 14 Cal.3d 306, 314, quoting the Assembly Committee on Judiciary's comment to section 115, emphasis added by the Supreme Court.) The State Bar's acceptance of an obligation in prior moral character proceedings to meet the identical burden of proof as in disciplinary proceedings and its reliance on *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d 924, as a basis for a higher burden of proof than a preponderance of the evidence in this moral character proceeding appear to be predicated on that decisional law exception.

[8c] An applicant's claim for admission to the practice of law in this state is not a mere privilege, but a claim of right that is afforded the protection of due process. (*Raffaeli* v. *Committee of Bar Examiners* (1972) 7 Cal.3d 288, 300; *Hallinan* v. *Committee of Bar Examiners*, *supra*, 65 Cal.2d at p. 452, fn. 3.) Even though there are distinctions between admission proceedings and disciplinary proceedings, "the question involved in both [disciplinary and admis-

sions proceedings] is the same—is the applicant for admission or the attorney sought to be disciplined a fit and proper person to be permitted to practice law, and that usually turns upon whether he has committed or is likely to continue to commit acts of moral turpitude." (*Hallinan* v. *Committee of Bar Examiners, supra*, 65 Cal.2d at p. 453.)

[8d] The Supreme Court therefore expressly agreed with the State Bar's concession in *Hallinan* that "the test for admission and for discipline is and should be the same." (*Ibid.*) The Supreme Court also noted in *Hallinan* that "insofar as the scope of inquiry is concerned, the distinction between admission and disciplinary proceedings is today more apparent than real." (*Id.* at p. 452.) The Supreme Court recently repeated this observation. (*Kwasnik* v. *State Bar, supra*, 50 Cal.3d at p. 1068.) With changes in the State Bar Rules of Procedure, very few differences now exist between the manner in which moral character and disciplinary proceedings are conducted. (See rule 687, Rules Proc. for State Bar Ct. Proceedings (eff. Jan. 1, 1995).) Indeed, it can be happenstance that a particular disciplinary proceeding based upon misconduct prior to admission was not brought to the attention of the State Bar in time to conduct a moral character proceeding instead. (See, e.g., *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 307; *In the Matter of Passenheim* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 62, 66-67.)

[8e] Accordingly we conclude that, except as otherwise provided by law,[9] **[9 - see fn. 9]** the State Bar's burden of proof in adducing evidence of bad moral character on rebuttal of an applicant's prima facie showing is by clear-and-convincing evidence.

D. Application of Collateral Estoppel Principles

[10a] Neither the Supreme Court nor the State Bar is bound by civil findings that exculpate a respondent of charged misconduct. (*Mushrush* v. *State Bar, supra*, 17 Cal.3d at p. 489, fn. 1.) Similarly, neither the Supreme Court nor the State Bar is bound by an attorney's acquittal in a criminal case or by the dismissal of criminal charges against an attorney. (*Wong* v. *State Bar* (1975) 15 Cal.3d 528, 531; *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 218, 224; *Best* v. *State Bar* (1962) 57 Cal.2d 633, 637.)

[10b] The reasons the State Bar is not bound by exculpatory civil findings or criminal acquittals in disciplinary proceedings are: (1) the parties are different (the State Bar was not a party in any such civil or criminal actions); (2) the quantum of proof required in each proceeding is virtually always different; and (3) the purposes of each proceeding are vastly different. (See *Siegel* v. *Committee of Bar Examiners, supra*, 10 Cal.3d at p. 178, fn. 25.)

[10c] The principal purpose of civil proceedings is to allow individual parties to address wrongs among themselves. The purpose of criminal proceedings is to punish the accused if found guilty. (*Ibid.*) The primary purposes of disciplinary proceedings are 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. (Rules Proc. of State Bar (eff. Jan 1, 1995), Title IV, Standards for Atty. Sanctions for Prof. Misconduct, std. 1.3.)

[11] Neither the Supreme Court nor the State Bar Court will bind an applicant or a respondent to an adverse civil finding made upon the usual civil standard of proof of a preponderance of the evidence when the standard of proof in the State Bar proceeding is clear and convincing evidence. When civil findings are made under a preponderance-of-the-evidence standard, they must be independently assessed "under the more stringent standard of proof applicable to disciplinary proceedings" of clear and convincing evidence. (*Maltaman* v. *State Bar, supra*, 43 Cal.3d at p. 947; see also *Rosenthal* v. *supreme Court, supra*, 43 Cal.3d at p. 634.) It is only in that

9. **[9]** One exception established by case law is set forth in *Siegel* v. *Committee of Bar Examiners* (1973) 10 Cal.3d 156, 178-179, in which the Supreme Court held that when First Amendment rights were at stake, the State Bar had a burden of proof beyond a reasonable doubt. Another example of an exception requiring proof beyond a reasonable doubt may be a case in which the right of access to the courts is at stake. (See, e.g., *Lubetzky* v. *State Bar, supra*, 54 Cal.3d at p. 316.)

context that the Supreme Court has held that civil findings "have no disciplinary significance apart from the underlying facts." (*Maltaman* v. *Supreme Court*, *supra*, 43 Cal.3d at p. 947.)

Contrary to the parties' contention, the Supreme Court has not yet addressed the issue of the effect in State Bar Court proceedings of prior civil findings on identical issues based on a clear and convincing standard of proof. The Supreme Court opinions cited to us by the State Bar involved civil findings made under the preponderance-of-the-evidence standard of proof, *not* under the clear and convincing standard of proof. (See *ibid.*; *Rosenthal* v. *State Bar*, *supra*, 43 Cal.3d at pp. 622-623, 634; *Mushrush* v. *State Bar*, 17 Cal.3d at p. 489, fn. 1; *Caldwell* v. *State Bar*, (1975) Cal.3d 488, 496-497; *Yokozeki* v. *State Bar*, *supra*, 11 Cal.3d at p. 444; *In re Wright*, *supra*, 10 Cal.3d at pp. 376-377; *Lee* v. *State Bar*, *supra*, 2 Cal.3d at pp. 940-941; *Bernstein* v. *Committee of Bar Examiners*, *supra*, 69 Cal.2d at p. 101; *Lefner* v. *State Bar*, *supra*, 64 Cal.2d at pp. 192-193; *Magee* v. *State Bar*, *supra*, 58 Cal.2d at pp. 428-429.)

Therefore, we have been cited no Supreme Court precedent that prevented the hearing judge in the matter before us from applying principles of collateral estoppel to prohibit applicant from relitigating in the State Bar Court the fraud findings found against her on clear and convincing evidence. Indeed, although predicated on a statute rather than case law, we see some parallels in the history of summary disbarment pursuant to Business and Professions Code section 6102 (c), which completely denies a retrial in the State Bar Court to affected respondents. As we discussed in *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71, 78-80, in several Supreme Court opinions after the adoption of Business and Professions Code section 6102 (c), the Supreme Court considered the issue of the propriety of summary disbarment *only after a full evidentiary hearing before the volunteer referees of the former State Bar Court had already taken place*. (See, e.g., *In re Ewaniszyk* (1990) 50 Cal.3d 543; *In re Ford* (1988) 44 Cal.3d 810.)

In *In the Matter of Segall*, *supra*, 2 Cal. State Bar Ct. Rptr. 71, the State Bar did not argue that we lacked authority to save the time and expense of a State Bar Court hearing by recommending summary disbarment. We considered both parties' arguments and issued our opinion recommending that the Supreme Court summarily disbar Segall without any evidentiary hearing in the State Bar Court following the criminal proceeding in which he had already had such opportunity.[10]

After undertaking similarly extensive analysis of applicable Supreme Court precedent, we conclude that there were compelling reasons in the instant proceeding to apply principles of collateral estoppel against applicant to avoid a second full evidentiary hearing on the fraud issue. (See Brickman & Bibona, *Collateral Estoppel as a Basis for Attorney Discipline: The Next Step* (1991) 5 Geo. J. Legal Ethics 1.) Rejecting the application of collateral estoppel principles to the prior civil findings made against applicant under the same burden of proof applicable in State Bar Court proceedings and upheld following thorough review on appeal not only would undermine the principles of consistency and finality of judicial determinations, but also would create a special rule that aggrandizes the position of applicants to the State Bar by granting them the advantage of relitigating issues previously litigated and decided against them. (See *ibid.* [criticizing such a special rule for disciplinary proceedings].) In addition, rejecting the application of collateral estoppel principles in the State Bar Court would needlessly require us to consume the State Bar's very limited resources in retrying civil matters that had already been adjudicated under a sufficiently high burden of proof. (Cf. *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589 [no need to relitigate issues adjudicated in the criminal courts beyond a reasonable doubt], and cases cited therein.)

10. Although Segall thereafter resigned, the Supreme Court adopted our recommendation of summary disbarment in several subsequent cases which were handled in the same manner as in *In the Matter of Segall*, *supra*, 2 Cal. State Bar Ct. Rptr. 71. (See, e.g., *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, recommended discipline adopted by the Supreme Court on October 27, 1993.)

Our conclusion here carries to its logical extension both the Supreme Court's rationale in *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d 924, and its ruling in *Bernstein* v. *Committee of Bar Examiners*, *supra*, 69 Cal.2d 90. In *Bernstein*, testimony of witnesses in the State Bar proceeding conflicted with prior civil findings of fraud. The Supreme Court held that it accorded greater weight to the civil court's earlier findings than it did to the State Bar Court's subsequent contrary findings on the same issues. (See *id.* at p. 102 [the first court to try the matter was "in a better position than the [State Bar] subcommittee or this court to determine the factual issues"].) The Supreme Court's analysis in *Bernstein* underscores the judicial and litigant savings that can be achieved by obviating an unnecessary retrial of issues in the State Bar Court. The ultimate issue of proof of current good moral character remains for the State Bar Court hearing judge to decide independently based on the evidence before him or her, subject to ultimate review by the Supreme Court based on its own examination of the evidence and determination as to its sufficiency. (See, e.g., *Lubetzky* v. *State Bar*, *supra*, 54 Cal.3d at p. 312; *Hightower* v. *State Bar*, *supra*, 34 Cal.3d at pp. 155-156.)

[12a] In summary, we hold that the State Bar Court may apply collateral estoppel principles to preclude an applicant from relitigating an issue that was actually litigated and resolved adversely to him or her in a prior civil proceeding, provided (1) that the issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, (2) that the civil finding was made under the same burden of proof applicable to the substantially identical issue in the State Bar Court, (3) that the applicant was a party to the civil proceeding, (4) that there is a final judgment on the merits in the civil proceeding, and (5) that no unfairness in precluding relitigation of the issue is demonstrated by the applicant. (Cf. *Stolz* v. *Bank of America* (1993) 15 Cal.App.4th 217, 222.) An applicant may demonstrate that it would be unfair to bind him or her to an adverse civil finding by showing, among other things, (1) that he or she had less incentive or motive to litigate the issue in the civil proceeding, (2) that the civil finding or judgment is itself inconsistent with some other finding or judgment, or (3) that he or she was required to litigate under different and less advantageous procedures in the civil proceeding. (*Ibid.*)

E. Analysis of Court of Appeal Opinions on Analogous Collateral Estoppel Issues

There are major differences between the source and scope of the judicial function of regulating the legal profession under the inherent authority of the Supreme Court, on the one hand, and the legislative function of regulating other professions under the police powers, on the other hand. (See *Kenneally* v. *Medical Board* (1994) 27 Cal.App.4th 489, 499-501.) Nevertheless, it is instructive to note that our holding is in accord with the holdings of the Court of Appeal for the Second Appellate District that collateral estoppel applies in disciplinary proceedings involving real estate agents and construction contractors. (See *Richards* v. *Gordon* (1967) 254 Cal.App.2d 735, 738, 742; *Contractors' State License Board* v. *Superior Court* (1960) 187 Cal.App.2d 557, 562.)

The Court of Appeal for the First Appellate District reached a contrary conclusion with respect to disciplinary proceedings involving private investigators in *Lundborg* v. *Director Dept. Professional etc. Standards* (1967) 257 Cal.App.2d 141, 146. As the Court of Appeal for the Fourth Appellate District pointed out in *McNeil's Inc.* v. *Contractors' State License Board* (1968) 262 Cal.App.2d 322, 328, fn. 1, however, the opinion in *Lundborg* v. *Director Dept. Professional etc. Standards*, *supra*, did not consider the prior decision in *Contractors' State License Board* v. *Superior Court*, *supra*, 187 Cal.App.2d 557, which, as noted, concluded that the application of the doctrine of collateral estoppel was appropriate in disciplinary proceedings involving contractors.

As support for its conclusion, the court in *Lundborg* v. *Director Dept. Professional etc. Standards*, *supra*, 257 Cal.App.2d 141, cited the decision in *Title* v. *Immigration and Naturalization Service* (9th Cir. 1963) 322 F.2d 21. (*Lundborg* v. *Director Dept. Professional etc. Standards*, *supra*, 257 Cal.App.2d at p. 146.) The court in *Title* v. *Immigration and Naturalization Service*, *supra*, had rejected the application of collateral estoppel in a deportation hearing. (*Title* v. *Immigration and Naturalization Service*, *supra*, 322 F.2d at pp. 23-25.) That rejection, however, was based upon the court's conclusion that Congress evinced a specific intent that aliens be

given the right to present any evidence relevant to the issue of their deportability at a hearing held for the sole purpose of determining their deportability. (*Id.* at p. 24.) More importantly, the court in *Title* expressly concluded that it was unfair to apply the doctrine of collateral estoppel in the situation before it. (*Id.* at pp. 24-25.)[11] The fairness of applying the doctrine of collateral estoppel in this proceeding is addressed below.

F. Application of Collateral Estoppel Principles to the Jury's Fraud Finding Against Applicant

[12b] Applicant was a named party in the fraud lawsuit. In addition, the superior court's judgment in the fraud lawsuit recites that the jury found applicant guilty of fraud by clear and convincing evidence. Accordingly, the face of the judgment alone establishes that the civil finding of fraud was made under the same burden of proof applicable to the State Bar's burden of proof on rebuttal of applicant's prima facie showing.

[12c] As previously noted, the Court of Appeal affirmed the judgment against applicant in the fraud lawsuit. Thereafter, the Supreme Court of California denied applicant's petition for review, and the Supreme Court of the United States denied her petition for writ of certiorari. Accordingly, the record affirmatively shows that there is a final judgment on the merits in that lawsuit based upon the jury's fraud findings.

[12d] We, therefore, conclude that applicant should be bound by the fraud findings based on clear and convincing evidence in the civil lawsuit in the present moral character proceeding under principles of collateral estoppel unless she has shown that it would be unfair to do so. Applicant contends that it is unfair to bind her to the civil fraud findings in this proceeding because, as she alleges, (1) the trial in the fraud lawsuit was unfair and (2) the evidence in that lawsuit was insufficient to support the jury's fraud findings and punitive damage award.

[12e] The hearing judge addressed in detail applicant's contention that the trial in the fraud lawsuit was unfair and concluded that it was meritless. He also found that the jury's fraud finding was supported by substantial evidence. We affirm his conclusions.

[12f] In addition, as noted *ante*, the Court of Appeal previously ruled against applicant on these two contentions. The Court of Appeal's opinion strongly supports our conclusion that applicant did not show that it would be unfair to apply collateral estoppel principles to bind her to the jury's fraud finding. In addition, the Court of Appeal's opinion is part of the relevant facts and circumstances which bear upon applicant's moral character (see *Lee* v. *State Bar, supra*, 2 Cal.2d at p. 941), and the opinion is relevant to our determination of what was actually litigated in the fraud lawsuit. (See *Abbott* v. *Western Nat. Indemnity Co.* (1958) 165 Cal.App.2d 302, 304.)

In addressing applicant's contention that the substantial punitive damages award against her is not supported by sufficient proof of fraudulent intent, the Court of Appeal noted that the plaintiffs relied upon proof of fraud as defined by the punitive damages statute: "an intentional misrepresentation, deceit, or concealment or a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civ. Code, § 3294, subd. (c)(3).) As noted *ante*, the Court of Appeal then held that the evidence was "substantial and directly support[ed] inferences of the requisite fraudulent intent" and that "[t]he record thus provid[ed] a sufficient basis for the award of punitive damages."[12]

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11. At a prior denaturalization proceeding, Title had declined to present evidence, and the government had established his membership in the Communist Party. Later, "meaningful association" was announced as the test for deportability. At the deportation proceeding, Title wanted to present evidence, but the special inquiry officer did not let him do so. The Ninth Circuit Court of Appeals held that Title should not have been collaterally estopped from presenting evidence at the deportation proceeding.

12. To preserve applicant's confidentiality, we do not cite the unpublished opinion, which is otherwise citable herein under rule 977 (b) of the California Rules of Court.

In addressing applicant's alternative contention that the amount of the punitive damages award was excessive in light of the record as a whole, the Court of Appeal stated: "We find in the record before us ample support for a conclusion that [applicant's] acts were reprehensible, a fair equivalence between compensatory and punitive damages, and an award which, while substantial, should neither disrupt [applicant's] ability to provide for herself nor (in light of all the evidence) 'exceed [] the level necessary to properly punish and deter.' [Citations.] The record does not compel a presumption of passion or prejudice [against applicant]. We shall not disturb the jury's award."

[12g] In addition, we note that even though applicant may have been unaware in 1989 that the civil fraud findings might be used against her by the State Bar, she had, at that time, ample interest and motive in refuting and defending against the fraud allegations. In light of applicant's assertion that *all* of her assets were the subject of a prejudgment writ of attachment for the benefit of the plaintiffs in the fraud lawsuit, we reject applicant's claim that her interest in the present moral character proceedings is of a far greater magnitude than her stake in the fraud lawsuit.

Finally, while this case was under submission following oral argument, applicant submitted a letter brief providing this court with a bankruptcy court memorandum decision filed in an adversary proceeding in her bankruptcy case on April 3, 1995.[13] The bankruptcy adversary proceeding was initiated by the plaintiffs in the fraud lawsuit to determine whether the superior court's judgment was exempted from dischargeability in bankruptcy under one of the subdivisions of section 523(a) of the Bankruptcy Code (i.e., a nondischargeable debt).

In that adversary proceeding, the plaintiffs asserted that the compensatory damages and attorney's fees awarded against applicant in the superior court's judgment were nondischargeable debts for fraud under section 523(a)(2) of the Bankruptcy Code, which provides that certain debts for money obtained by false pretense or fraud are nondischargeable. (11 U.S.C. § 523(a)(2).) The plaintiffs did not argue that the punitive damages award was nondischargeable as a debt for fraud under section 523(a)(2),[14] but instead asserted that it was nondischargeable as a debt either for willful and malicious injury to another under Bankruptcy Code section 523(a)(6) or for fraud or defalcation while acting in a fiduciary capacity under Bankruptcy Code section 523(a)(4). (*Id.* §§ 523(a)(4), 523(a)(6).)

Citing *Grogan* v. *Garner*, *supra*, 498 U.S. at pp. 284-285, in which the United States Supreme Court held that principles of collateral estoppel were applicable in nondischargeability proceedings, the bankruptcy court bound applicant to the jury's fraud finding in holding that the compensatory damage and attorney's fees awards were nondischargeable debts for fraud under section 523(a)(2). The bankruptcy court also held, citing *In re Levy* (9th Cir. 1991) 951 F.2d 196, 199, that the punitive damages award was not a nondischargeable debt for willful and malicious injury to another under section 523(a)(6) because of the Ninth Circuit's characterization of the nature of the wrong as one governed by section 523(a)(2)(A) and not section 523(a)(6). In addition, the bankruptcy court expressly declined to apply collateral estoppel to hold that the punitive damages award was a nondischargeable debt for fraud while acting in a fiduciary capacity under section 523(a)(4) because no fiduciary relationship

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13. We vacated the submission of this matter on April 14, 1995, when applicant filed her letter brief, which we construe as containing a request to take judicial notice of the bankruptcy court's April 3, 1995, memorandum decision. On April 26, 1995, the State Bar timely filed its opposition as well as a motion to strike applicant's letter brief accompanied by its own request to take judicial notice of a separate federal Court of Appeals order concerning applicant. Applicant had until May 11 to respond thereto. This matter was ordered resubmitted for decision on May 12, 1995.

We deny the State Bar's motion to strike and grant applicant's request to take judicial notice of the bankruptcy court's April 3, 1995, memorandum decision because it is subject to judicial notice, postdates the hearing department proceedings, and concerns matters that were litigated therein. (Evid. Code, §§ 452, subd. (d), 453.) Because the State Bar's motion to augment the record does not relate to the issue of collateral estoppel, we announce our ruling on the State Bar's request to take judicial notice of the Court of Appeals memorandum in our unpublished companion opinion.

14. Punitive damages are not debts for fraud within the ambit of section 523(a)(2). (See *Grogan* v. *Garner* (1991) 498 U.S. 279, 282, fn. 2.)

was alleged to have existed between applicant and the plaintiffs before and without reference to the debtor's act of wrongdoing. (See *Ragsdale* v. *Haller* (9th Cir. 1986) 780 F.2d 794, 796 [in order for a debtor to be a fiduciary for purposes of section 523(a)(4), "the debtor must have been a 'trustee' before the wrong and without reference to it"]; *In re Baird* (Bankr. 9th Cir. 1990) 114 B.R. 198, 202.)

Applicant points to the bankruptcy court ruling on the dischargeability of the punitive damage award as support for her position that the finding of fraud supporting punitive damages cannot be used as collateral estoppel here. Contrary to applicant's contention, the bankruptcy court's memorandum decision fully supports our view that it is both fair and appropriate to bind an applicant to a prior fraud finding when the identical issue is involved in a State Bar Court proceeding. The bankruptcy court did not permit applicant to relitigate the fraud issue in that tribunal, but simply made legal rulings under bankruptcy law with regard to the effect of the prior civil fraud findings. Similarly to that bankruptcy court proceeding, some issues in a State Bar Court proceeding may be identical to those litigated in another proceeding, and some may not. The ultimate issue of applicant's moral fitness to practice law is unique to moral character proceedings, but the underlying issue of whether she committed fraud is the same issue that the jury previously resolved against her by clear and convincing evidence—the same standard that applies in this court. Just as the bankruptcy court applied collateral estoppel to the fraud issue previously resolved against applicant where appropriate to conserve judicial resources and litigant time and expense in adjudicating nondischargeability claims in an adversary proceeding in that court, the hearing judge appropriately applied the doctrine of collateral estoppel to the underlying fraud issue in this proceeding.

IV. CONCLUSION

[12h] We conclude that the hearing judge gave applicant ample opportunity to demonstrate, if she could, that it would be unfair to bind her to the jury's fraud finding in the civil lawsuit, but that applicant did not establish any unfairness. Accordingly, she was properly precluded from relitigating the underlying fraud issue in the State Bar Court.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

B. PALMER RIEDEL

A Member of the State Bar

No. 93-C-17313

Filed June 14, 1995

[Editor's note: The State Bar Court Review Department opinion previously published at pp. 333 - 336 has been deleted from the *California State Bar Court Reporter* by order of the State Bar Court Review Department (February 16, 1996).]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MORRIS BEE JENNINGS

A Member of the State Bar

No. 89-O-14401, 90-O-16753, 93-O-11966

Filed August 16, 1995

[Editor's note: The State Bar Court Review Department opinion previously published at pp. 337 - 354 has been deleted from the *California State Bar Court Reporter* by order of the State Bar Court Review Department (April 16, 1996).]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN E. WOLFGRAM

A Member of the State Bar

No. 90-TT-16955

Filed August 22, 1995

SUMMARY

A hearing judge found that, due to a mental infirmity, respondent habitually failed to perform his duties and undertakings as an attorney competently and, accordingly, ordered respondent involuntarily enrolled inactive under Business and Professions Code section 6007 (b)(3). (Hon. Vivian L. Kral, Judge Pro Tempore.)

Respondent sought review alleging that the evidence was insufficient to support the hearing judge's adverse findings and that, in any event, the Americans with Disabilities Act prohibited his involuntary inactive enrollment. The review department rejected respondent's arguments and adopted the hearing judge's findings and decision involuntarily enrolling respondent inactive.

COUNSEL FOR PARTIES

For State Bar: Andrea T. Wachter

For Respondent: Robert E. Noel

HEADNOTES

[1] **2119 Section 6007(b)(3) Proceedings—Other Procedural Issues**
Proceedings in the State Bar Court to involuntarily enroll an attorney inactive because of mental infirmity or illness are confidential. However, respondent waived confidentiality and the hearing judge ordered that the proceeding be public. Accordingly, the review proceeding is public as well.

[2 a-d] **2115 Section 6007(b)(3) Proceedings—Burden of Proof**
Business and Professions Code section 6007 (b)(3) provides that, if a member of the State Bar suffers from mental illness or infirmity, he or she may be enrolled as an inactive member if either the member is unable or habitually fails to perform his or her duties or undertakings competently, or is unable to practice law without substantial threat of harm to the interests of his or her clients or the public. The review department held that the grounds for inactive enrollment were met where respondent was undergoing serious thought disorganization and possessed of an unstable mental

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.

state; was unable to sift out the irrelevant and properly think and reason; suffered from depression not adequately treated; was unable to calendar court and document due dates, keep a file system or find his papers; was emotionally drained by his battles with the judiciary and was habitually unable to concentrate on many significant matters, letting many go unattended; was unable to demonstrate emotional control in courtroom or other settings; and became violent or threatened to do so in his dealings with others.

[3] **2115 Section 6007(b)(3) Proceedings—Burden of Proof**
In a proceeding to involuntarily enroll an attorney inactive because of mental infirmity or illness, the burden is on the State Bar to prove by clear and convincing evidence that the statutory grounds for inactive enrollment have been met.

[4] **130 Procedure—Procedure on Review**
139 Procedure—Miscellaneous
2119 Section 6007(b)(3) Proceedings—Other Procedural Issues
Review department is very reluctant to consider a legal theory raised by an appellant for the first time on review.

[5 a-c] **2190 Section 6007(b)(3) Proceedings—Miscellaneous**
The only subchapter of the Americans with Disabilities Act that the State Bar could be subject to is the public entities subchapter, which provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity. Under that subchapter, a qualified individual with a disability is one who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. In this proceeding to enroll an attorney inactive because of a mental infirmity or illness, respondent is not being enrolled inactive merely because he has a mental infirmity or illness. Rather, required clear and convincing evidence has shown that respondent is unable to or habitually fails to perform his duties or undertakings competently or that he is unable to practice law without substantial threat of harm to his clients or the public. Such a person is clearly not qualified to practice law in this State, not because of illness, but because of proven habitual failure to perform the duties of an attorney competently or proven substantial risk of harm to clients or the public.

[6] **135.81 Procedure—Revised Rules of Procedure—Involuntary Inactive Enrollment**
2119 Section 6007(b)(3) Proceedings—Other Procedural Issues
An attorney involuntarily enrolled inactive because of a mental infirmity or illness may file an application for transfer to active status whenever the attorney is able to show that there is no longer a statutory basis for the inactive enrollment.

ADDITIONAL ANALYSIS

Other

2121 Section 6007(b)(3) Proceedings—Inactive Enrollment Ordered

OPINION

STOVITZ, J.:

In this proceeding we must decide whether the hearing judge's decision to enroll respondent John E. Wolfgram, inactive under Business and Professions Code section 6007(b)(3)[1] rests on clear and convincing evidence that because of mental infirmity or illness, either that he is unable or habitually fails to perform his duties or undertakings competently or that he is unable to practice law without substantial threat of harm to his clients or the public. We hold that it does.

We also decide whether the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213) ("ADA"), prohibits respondent's involuntary inactive enrollment under section 6007(b)(3). We hold that it does not.

In his brief, respondent's counsel outlines additional issues which he does not brief but states that respondent, who is co-counsel, will brief via an Appendix. There is no record of filing of any Appendix or supplement to respondent's brief. Accordingly, we do not deem these additional issues supported. Nevertheless, we have conducted an independent review of the record and find no error.

[1] Proceedings under section 6007(b) are confidential (Former Trans. Rules Proc. of State Bar, rule 225 (a); rule 21, Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings (eff. Jan. 1, 1995)[2]; *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 428, fn. 1). However, at trial, respondent waived this confidentiality privilege, requesting a public proceeding. After determining that his counsel supported respondent's request and that he and his counsel understood that all evidence in the proceeding would be public, including psychiatric diagnostic reports, the hearing judge ordered that this proceeding be public. Accordingly, this review is public as well. (Cf. *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279, 283 [moral character admissions matter in which applicant waived privilege of confidentiality].)

I. THE PROCEEDINGS.

Respondent was admitted to practice law in California in December 1977. In November 1990, a State Bar Court hearing judge issued a notice to show cause alleging that probable cause existed to enroll respondent inactive under the provisions of section 6007(b)(3). (See *Newton* v. *State Bar* (1983) 33 Cal.3d 480, 483-484.)

The November 1990 notice to show cause ("notice") based its determination of probable cause on several instances of respondent's conduct at an October 25, 1990, State Bar Court status conference in another pending original disciplinary proceeding. The notice alleged that at the status conference, respondent stated that he was unable, due to depression, to concentrate and remember matters such as due dates for documents, court appearances and appointments. Respondent told the hearing judge that he had to request his clients to remind him of due dates in their matters so that respondent would not miss them. The notice also alleged that respondent told the judge that he did not have time to represent himself because he was without energy and unable to concentrate. Further, the notice alleged that, at the status conference, respondent appeared to be in tenuous emotional control, appearing to over-react to statements not

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code. As pertinent to this proceeding, section 6007 (b)(3) (read together with section 6086.5) provides that a member of the State Bar shall be enrolled inactive if after notice and opportunity to be heard, the State Bar Court finds that the member, "because of mental infirmity or illness. . ., is (i) unable or habitually fails to perform his or her duties or undertakings competently, or (ii) unable to practice law without substantial threat of harm to the interests of his or her clients or the public."

2. Unless noted, all references to rules are to the former Transitional Rules of Procedure of the State Bar in effect prior to January 1, 1995. This case was tried and oral argument on review was held under those rules.

meant to be provocative and that certain of his responses were circuitous and repetitive. The judge noted that respondent's written submissions also seemed circuitous and repetitive with unexplained references to persons and events. The notice then cited additional examples of related behavior of respondent which could be an indication of mental illness.

Respondent was evaluated by two experts appointed by the State Bar Court, Captane P. Thomson, M.D., a psychiatrist, and David D. Stein, Ph.D., a clinical psychologist nominated by respondent. Both doctors testified at the trial, which lasted 22 days, produced a 3,162 page reporter's transcript, numerous exhibits and which gave respondent abundant opportunity to cross-examine the State Bar's witnesses and to present all relevant evidence. In this proceeding respondent was represented by counsel appointed by the State Bar Court at no expense to him. (Rule 641.) At the trial, respondent testified as did other witnesses who had observed respondent, and the hearing judge[3] received in evidence many documents prepared by respondent.

In August 1993, the hearing judge filed her decision concluding that the evidence presented at trial showed clearly and convincingly that due to mental infirmity, respondent habitually failed to perform his duties as an attorney competently. She therefore enrolled respondent inactive forthwith under section 6007(b)(3). The hearing judge made a number of factual findings which led to her conclusions. At the outset, she made it clear that her decision to enroll respondent inactive was not based on any of respondent's personal or political views or beliefs.

Respondent requested our review claiming primarily that the evidence was insufficient to support the hearing judge's decision enrolling him inactive. Additionally, he urged an issue not presented below, that the ADA barred his inactive enrollment. The State Bar, represented by the Office of Chief Trial Counsel, opposes both of respondent's positions.

While this matter was pending before us, respondent filed suit in federal district court collaterally attacking his inactive enrollment. The federal court stayed this State Bar Court proceeding until December 1994 when the federal action was dismissed.

II. THE ISSUES AND BURDEN IN A SECTION 6007(B)(3) PROCEEDING.

[2a] Section 6007(b)(3) provides as pertinent here, that, if a member of the State Bar suffers from mental illness or infirmity, he or she may be enrolled as an inactive member if *either* the member is unable or habitually fails to perform his or her duties or undertakings competently, *or* is unable to practice law without substantial threat of harm to the interests of his or her clients or the public. At the outset of his brief, respondent contends that the hearing judge appeared to base her decision only on the first ground of inactive enrollment under section 6007(b)(3) and not on the second. However, respondent acknowledged that some of the hearing judge's findings are based on the second ground of section 6007(b)(3).

The hearing judge's decision was reviewable under rules 450 to 453. (See *In the Matter of Respondent B, supra,* 1 Cal. State Bar Ct. Rptr. at p. 430, fn.6.) These rules call on us to conduct an independent assessment of this record. **[3]** We have also held that the burden is on the State Bar in this proceeding to prove by clear and convincing evidence that the statutory grounds for inactive enrollment have been met. (*Id.* at pp. 430-431.) We can make our own findings, but we give great weight to those findings of the hearing judge which rest on her evaluation of the credibility of witnesses. (Rule 453(a).)

[2b] We hold that the findings of the hearing judge are sufficiently based on both grounds of section 6007(b)(3). Even if the hearing judge's decision was read as limited to her determination that there was evidence only of respondent's inability or habitual failure to perform his duties competently; if supported by clear and convincing evidence, that

3. The hearing judge who tried this matter was not the same judge who issued the notice.

would be entirely sufficient to support respondent's inactive enrollment.

III. THE HEARING JUDGE'S FINDINGS AND THE EVIDENCE BEARING ON INACTIVE ENROLLMENT.

[2c] The judge found that although the mental health experts who examined respondent found him not psychotic they concluded that he was undergoing serious thought disorganization and possessed of an unstable mental state. Respondent was unable to sift out the irrelevant and properly think and reason. His inability to focus resulted in rambling and an "often incoherent jumble." He showed great self-preoccupation and misread others which slowed his responses. His stress-coping mechanisms were "stretched to the limit." He suffered from depression not adequately treated. The hearing judge also found that respondent's mental problems were manifested in his inability to calendar court and document due dates, keep a file system or find his papers. He was emotionally drained by his battles with the judiciary and was habitually unable to concentrate on many significant matters, "letting many go unattended." Finally, according to the hearing judge, he was unable to demonstrate emotional control in courtroom or other settings, witnessed by his behavior below, where he became sad, wept and broke down. In his dealings with others he had become violent or threatened to do so. According to the hearing judge, respondent's inability to maintain control posed a substantial threat to his clients or the public. Our independent review of the record leads us to conclude that these findings are supported by clear and convincing evidence.

Before attacking the merits of the expert evidence, respondent disputes that that evidence, offered by Drs. Thomson and Stein, is reliable enough to warrant consideration to support inactive enrollment. Respondent contends that psychiatric attempts to predict the likelihood of future behavior are of highly questionable and of little probative value. Respondent bases this argument on the Supreme Court's decision in *People* v. *Burnick* (1975) 14 Cal.3d 306, and on analysis of several law review articles cited in *Burnick*. Respondent's citation does not support his point. In *Burnick*, the court's task was to determine the proper proof standard in a mentally disordered sex offender proceeding. The discussion of the four-member majority was focused on the reliability of psychiatric predictions of the danger of the person assessed toward others. The *Burnick* majority contrasted the greater reliability of psychiatric diagnoses—which we have before us in this case—with psychiatric predictions and expressly stopped short of holding, inter alia, that in civil commitment proceedings, no psychiatrists should be permitted to give their opinions on the potential for future danger of the subject. (*Id.* at pp. 327-328.)

We note judicial authority holding that psychiatrists and psychologists, who are properly qualified as expert witnesses may render their opinions about the mental state of the person being examined. (See *People* v. *Stoll* (1989) 49 Cal.3d 1136, 1152, fn. 16.) Moreover, the opinions of mental health experts have been considered by the Supreme Court not only in disciplinary cases in which the accused contended that a section 6007(b)(3) proceeding should have been pursued instead (*Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1119; *Ballard* v. *State Bar* (1983) 35 Cal.3d 274, 289), but in other disciplinary cases as well. (E.g., *In re Leardo* (1991) 53 Cal.3d 1, 7-8; *In re Billings* (1990) 50 Cal.3d 358, 364.)

Respondent also argues that the opinions of Drs. Thomson and Stein were inadmissible because the doctors did not demonstrate that the bases of their opinions were reliable and valid. We disagree. Both doctors were properly deemed qualified as expert witnesses.[4] They had each observed respondent personally for several hours. Dr. Stein additionally gave

4. Dr. Thomson was the director of the Sutter Center for Psychiatry in Sacramento and an Associate Clinical Professor of Psychiatry at the University of California, Davis and San Francisco. He had been a physician since 1956 and a psychiatrist since 1963. He held a Diplomate in psychiatry from the American Board of Psychiatry and Neurology and a Diplomate in forensic psychiatry from the American Board of Forensic Psychiatry. He chaired the peer review committee of the Central California Psychiatric Society. Dr. Stein had been a licensed psychologist since 1974, had practiced clinical psychology since 1977, had served as Assistant Clinical Professor of Psychology at University of California, San Francisco and had performed about 200 forensic evaluations and consultations resulting in 30 court appearances.

respondent a battery of psychological tests and both experts testified at length on direct and cross-examination as to their opinions and the bases for them.[5] Although the experts' written reports were received only for limited purposes, their extensive testimony supported the hearing judge's findings as to the doctors' opinions.

Respondent analyzes the expert evidence far too restrictively. There was no conflict between the respective diagnoses of Drs. Thomson and Stein; and, taken in total, the evidence amply supports the hearing judge's findings. While it is unnecessary to set forth the details of the expert diagnoses, Dr. Thomson's primary diagnosis was that respondent was suffering from a major depression with a secondary diagnosis of a paranoid personality, which fell short of the psychiatric definition of schizophrenia. Dr. Thomson considered respondent a troubled and disturbed person, not functioning normally. Dr. Stein found that respondent suffered from a mental disorder, noting that psychological tests showed respondent's serious lapses in thought processes, that his coping mechanisms were "stretched to the limit" and that he displayed a considerable amount of fear, sadness and depression. Dr. Stein also concluded that respondent suffered from a personality disorder with paranoid and narcissistic trends. Dr. Stein opined that respondent had considerable difficulty keeping control of his emotions. Under any type of stress, Dr. Stein predicted that respondent would be very vulnerable to expressing his emotions in socially unacceptable ways.

The record contains considerable evidence from other witnesses and respondent himself which supports the hearing judge's findings. Respondent's own deposition testimony attested to his inability to attend to court appearance dates or due dates for client matters, to deal with incoming mail or to organize and concentrate. John P. McGuire, one of respondent's clients, also had a background in major case investigation and had researched some matters for respondent in respondent's law office. In May 1992, when McGuire started working in respondent's office, he observed a total lack of organization in that office including respondent's inability to attend to keeping case files, to adhere to a schedule and to work on priority matters in a proper fashion. McGuire saw files stacked in piles and on the floor in respondent's office and it was apparent that respondent could not find files.

McGuire also testified to several examples of respondent's violent temper outbursts, including respondent's threatening McGuire to fight, kicking McGuire's dog and smashing an office telephone answering machine when respondent could not get it to work. Also, during this time, respondent required complete silence to concentrate while working in his office. According to McGuire, even the sound of someone biting into an apple was enough to break respondent's concentration. McGuire testified that respondent shared with him respondent's overall litigation approach, which was to file a "blitzkrieg of motions and briefs", never letting the judge get to the point of being able to decide a matter.[6]

Peggy Bell, a legal secretary who had worked for respondent for a time in 1992, corroborated McGuire's testimony about the extreme disorganization of respondent's office and respondent's examples of temper outbursts.

Ken Siebers, an El Dorado County deputy sheriff who acted as bailiff in a courthouse in which

5. In *In the Matter of Respondent B, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 436-437, we pointed out that trial court findings of mental competency have been upheld even where the psychiatrist had not had an opportunity to examine the subject.

6. Another former client of respondent, one Nunez, testified that he was a party to a child custody matter which was emotionally charged because of action taken by a judge and law enforcement personnel regarding his son. Nunez was attracted to hire respondent for representation in a possible suit against the family law judge because of Nunez's agreement with respondent's philosophy as to people being violated through the court system. According to Nunez, the child custody matter made him so emotionally charged, there were times that he felt like planting a bomb in the middle of the courthouse. The record shows no evidence that respondent's own emotional fragility fueled Nunez's emotionalism but given the experts' diagnoses, respondent's clients would appear to be at great risk given respondent's emotionally charged condition.

respondent appeared in 1989 testified as to respondent's insistence in being in the court-secured corridor in order to see a judge. Respondent failed to accede to Siebers' direction to leave the corridor and when he insisted on proceeding, he was arrested on contempt of court charges. Abdon Loebs, a correctional officer of El Dorado County testified to respondent's threat to fight and the actual struggle he had with respondent incident to the arrest on the contempt of court charge. Loebs deemed it essential to place respondent in a padded cell for safety and respondent continued to engage in loud, unruly conduct.

Moreover, the record contains numerous exhibits consisting of correspondence or legal documents prepared by respondent and filed in this court or other courts. These documents show clearly respondent's failure, over a considerable period of time, to separate the irrelevant from the relevant. The Supreme Court has observed that the nature of an attorney's own written submissions can confirm a determination of mental illness. (See *Newton* v. *State Bar*, *supra*, 33 Cal.3d at p. 484.)

[2d] In summary, there was ample clear and convincing evidence to support the hearing judge's conclusions that the grounds for inactive enrollment under section 6007(b)(3) were met.

IV. APPLICABILITY OF THE ADA.

[4] At the outset, we note that respondent did not raise below the applicability of the ADA. We are therefore very reluctant to consider his claim made for the first time on review that the ADA warrants granting him relief. Given our independent review, however, we have considered his arguments about the ADA and reject them.

The ADA became effective in January 1992. Although one statutory purpose of the ADA is oft-quoted: to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (42 U.S.C. § 12101), the reach of the ADA is nevertheless limited by its definitions and judicial construction. (See, e.g., *Tyndall* v. *National Educ. Centers, Inc. of California* (4th. Cir. 1994) 31 F.3d 209, 212-213.)

[5a] The ADA is divided into three main subchapters: employment, public services and public accommodations, and services operated by private entities. Each subchapter contains applicable definitions. As pertinent here, the State Bar could be subject to the ADA only under the subchapter involving public entities. (42 U.S.C. §§ 12131-12181.) Section 12132 of the ADA provides: " . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."

[5b] The ADA's "public entity" subchapter defines "qualified individual with a disability" as one who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." (42 U.S.C. § 12131(3).)[7]

Courts have applied the ADA's "public entity" subchapter to the state's administration of a bar examination or the process of applying for admission to practice law. (See, e.g., *Clark* v. *Virginia Bd. of Bar Examiners* (E.D.Va. 1994) 861 F.Supp. 512, 516-517 [completion of admission application's question regarding mental illness or treatment]; on motion to reconsider, see *Id.* at pp. 518-519; *Argen* v. *New York State Bd. of Law Examiners* (W.D.N.Y. 1994) 860 F.Supp. 84 [applicant failed to meet burden of proof that he was a qualified individual with a disability under the ADA]; *D'Amico* v. *New York State Bd. of Law Examiners* (W.D.N.Y. 1993) 813 F.Supp. 217 [applicant with marked vision disability entitled to bar examination testing arrangement recommended

7. The "public entity" subchapter's definition of qualified individual with a disability is somewhat different from the "employment" subchapter definition which reads as follows: "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . ." (42 U.S.C. § 12111(8).)

by her long-time consulting ophthalmologist]; *In re Rubenstein* (Del. 1994) 637 A.2d 1131 [previously undiagnosed learning disability which did not diminish applicant's acumen or intellectual capability warranted bar examination accommodation].) In none of these cited cases was there expert evidence that the applicant could not practice law without danger to potential clients or the public because of disability.

We have found no case involving an attorney disciplinary proceeding in which applicability of the ADA has been discussed. In employment discharge cases, federal courts have held that disabilities which prevented an otherwise qualified employee from meeting the essential requirements of the job were not entitled to protection under the ADA. (*Tyndall* v. *National Educ. Centers, Inc. of California, supra*, 31 F.3d at pp. 212-214 [teacher's disability prevented her from meeting essential attendance requirements of teaching job even with extensive accommodations]; *Reigel* v. *Kaiser Foundation Health Plan of North Carolina* (E.D.N.C. 1994) 859 F.Supp. 963 [physician's shoulder injury rendered her unable to perform essential patient diagnosis and care functions and was also accompanied by unresolved concerns over her mental fitness]; *Larkins* v. *CIBA Vision Corporation* (N.D.Ga. 1994) 858 F.Supp. 1572 [accident causing a customer service representative to suffer repeated, frequent "panic attacks" prevented her from performing essential job functions even with many accommodations].)

[5c] The proceeding we review does not enroll respondent inactive merely because he has a mental infirmity or illness. Rather, required clear and convincing evidence has shown that respondent is unable to or habitually fails to perform his duties or undertakings competently or that he is unable to practice law without substantial threat of harm to his clients or the public. A person enrolled under this section is clearly not qualified to practice law in this State, not because of illness, but because of proven habitual failure to perform the duties of an attorney competently or proven substantial risk of harm to clients or the public. Unlike the duty set forth in the ADA to provide reasonable accommodations to a qualified, disabled test-taker, respondent can point to no provision of the ADA which would require the State Bar to make accommodations to allow respondent to practice law despite the substantial threat of harm to clients and the public as a result. **[6]** However, if at any time respondent can show that there is no longer a basis for this inactive enrollment, he may file an application in the hearing department of this Court for transfer to active status. (Rules 440-447, Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings (eff. Jan 1, 1995).)

V. CONCLUSION.

For the foregoing reasons, we adopt the findings and decision of the hearing judge enrolling respondent as an inactive member of the State Bar under section 6007(b)(3).

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SHERYLL LAYNE MYRDALL

A Member of the State Bar

No. 86-O-11005

Filed August 22, 1995; as corrected

SUMMARY

Respondent committed misconduct in a dozen matters spanning much of her legal career. She filed declarations in which she deliberately made false statements to courts, she disobeyed a court order which she herself had submitted for the court's approval, and she habitually disregarded clients' interests. In a number of matters, she recklessly or repeatedly failed to provide competent legal services. In several matters, she did not properly forward clients' files and communicate with clients. She also failed to keep advanced costs in a trust account, failed to obtain written consent from clients who were adverse parties, and accepted employment from clients or continued representation of clients when she lacked sufficient time and resources for competent completion of their matters. The hearing judge recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until restitution and rehabilitation. (Hon. Peter K. Krichman, Hearing Judge Pro Tempore.)

Respondent requested review. The review department altered some of the hearing judge's findings. Stressing respondent's serious and wide-ranging misconduct, as well as significant aggravation and limited mitigation, the review department concluded that public protection required respondent's disbarment.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: David A. Clare

HEADNOTES

[1] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
The rule of professional conduct prohibiting an attorney from withdrawing from employment unless the attorney has taken reasonable steps to avoid foreseeable prejudice to the client's rights applies to attorneys who are discharged as well as to attorneys who withdraw.

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] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous
A client's complaint letter offered into evidence to prove the truth of the matter asserted was hearsay. Because events were not fresh in the client's mind when he wrote the letter, it did not qualify for admission under the exception for a past recollection recorded that corroborated the client's testimony. Even if the letter did qualify for this exception, it should not have been received into evidence because it was offered by the State Bar rather than by an adverse party. Nor did the letter qualify for admission under the corroborative evidence exception to the hearsay rule because it lacked sufficient indicia of trustworthiness. Accordingly, the letter was struck from the record.

[3 a, b] **277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]**
Where clients terminated respondent's employment and demanded the return of their file, the rule of professional conduct regarding withdrawal from employment required respondent to deliver the clients' file promptly. Such delivery did not depend on the clients' signing a substitution of attorney. By waiting two months to send the file, respondent violated that rule.

[4 a, b] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
The rule of professional conduct regarding withdrawal from employment requires an attorney who withdraws to refund promptly any part of a fee that has been paid in advance, but has not been earned. This rule also applies when a client terminates the employment of an attorney. By failing to return advanced fees after performing only minimal preliminary services, an attorney who withdraws from employment violates the rule. Yet an attorney who withdraws from employment after performing some services and providing an accounting does not necessarily violate the rule. Respondent did not violate the rule where she communicated regularly with the clients, negotiated a settlement which would have achieved the clients' purpose, sent them a billing statement showing a credit balance several months before they discharged her, was owed more than this balance by the time of her discharge, and agreed with the clients to call matters even.

[5 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.40 Rule 3-700(C) [former 2-111(C)]
A client's nonpayment of fees did not excuse respondent's reckless and repeated failure to pursue the client's case diligently. Respondent had to seek permission from the court to withdraw, or pursue the case diligently. She did neither and therefore violated the rule of professional conduct regarding attorney competence.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
Where the notice to show cause erroneously charged a violation of former rule 2-111(A)(2) of the Rules of Professional Conduct, but where the factual allegations of the notice stated that respondent had not refunded unearned fees, the subject of former rule 2-111(A)(3) of the Rules of Professional Conduct, respondent had adequate notice of a charge under former rule 2-111(A)(3).

[7 a, b] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
In broad terms, any act contrary to honesty and good morals involves moral turpitude. Although an evil intent is not necessary for moral turpitude, some level of guilty knowledge or at least gross

negligence is required. Where respondent's failure to comply with a court order was either intentional or grossly negligent, this failure involved moral turpitude.

[8] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
221.00 State Bar Act—Section 6106

An attorney's habitual disregard of clients' interests involves moral turpitude even if such disregard results only from carelessness or gross negligence. Where respondent recklessly or repeatedly failed to provide competent legal services in seven matters and failed to return files properly to clients in four matters, these failures together constituted habitual disregard of clients' interests and amounted to moral turpitude.

[9] **740.31 Mitigation—Good Character—Found but Discounted**

Where three clients and three attorneys offered positive character assessments of respondent, their testimony received limited mitigating weight because they did not constitute a broad range of references from the legal and general communities.

[10 a-c] **1091 Substantive Issues re Discipline—Proportionality**
1099 Substantive Issues re Discipline—Miscellaneous

Cases involving a magnitude and wide range of misconduct have typically resulted in disbarment, notwithstanding the attorney's lack of a prior record of discipline or even with some mitigation present. Where respondent's misconduct was quite serious and wide-ranging, and, very importantly, commenced only two years after respondent's admission and continued for over seven years thereafter, the review department concluded that the public was entitled to the protection of a formal reinstatement proceeding to ensure respondent's fitness to practice before she is again allowed to practice law.

ADDITIONAL ANALYSIS

Culpability

Found

213.41 Section 6068(d)
214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.12 Section 6106—Gross Negligence
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
273.01 Rule 3-300 [former 5-101]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.01 Rule 4-100(A) [former 8-101(A)]
320.01 Rule 5-200 [former 7-105(1)]

Not Found

213.15 Section 6068(a)
213.55 Section 6068(e)
214.35 Section 6068(m)
220.05 Section 6103, clause 1
220.15 Section 6103, clause 2
220.35 Section 6104
221.50 Section 6106
258.05 Rule 2-200(A) [former 2-108(A)]

270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.05 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)]

Aggravation

Found

561 Uncharged Violations
582.10 Harm to Client
586.12 Harm to Administration of Justice

Found but Discounted

533 Pattern

Declined to Find

582.50 Harm to Client

Mitigation

Found but Discounted

725.32 Disability/Illness

Discipline

1010 Disbarment

OPINION

STOVITZ, J.:

At the request of respondent, Sheryll Layne Myrdall, we review a decision by a hearing judge pro tempore. The decision recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until respondent makes restitution and proves rehabilitation. Respondent challenges many of the findings of her culpability in most of the 12 separate matters of found misconduct. She also argues that the suspension recommendation is excessive.

The State Bar's Office of Chief Trial Counsel (the State Bar) advocated below that the hearing judge recommend disbarment. On review, the State Bar urges that we affirm the hearing judge's decision but notes that "disbarment or at least a very long actual suspension period is appropriate."

Respondent committed serious misconduct in 12 separate matters which, in total, spanned most of her legal career. She filed two declarations in which she deliberately made false statements to courts, she disobeyed a court order which she herself had submitted for the court's approval, and she habitually disregarded clients' interests. Also, she recklessly or repeatedly failed to provide competent legal services in seven matters, did not properly forward clients' files in four matters, and did not appropriately communicate with clients in two matters. Further, she failed to keep advanced costs in a trust account, failed to obtain written consent from clients who were adverse parties, and accepted employment from clients or continued representation of clients when she lacked sufficient time and resources for competent completion of their matters. Given such widespread misconduct, and the significant aggravation and very limited mitigation surrounding it, we read precedent to call for us to recommend respondent's disbarment.

I. PROCEDURAL HISTORY

Respondent was admitted to practice law in May 1979. She has no prior disciplinary record.

In May 1990, the State Bar filed a notice to show cause containing 14 counts. Respondent's answer denied all allegations of misconduct.

At a pre-trial conference in January 1991, the parties stipulated to the dismissal of many allegations in the notice. The hearing judge filed an order dismissing these allegations.[1]

Between January and December 1991, 20 days of hearings were held on issues of culpability. In June 1991, the State Bar amended count 6 of the notice, and respondent denied the amended allegations of misconduct.

After an interim decision on culpability, three days of hearings on degree of discipline were held in October 1992. The parties submitted post-trial briefs, and the hearing judge took the matter under submission in February 1993. In July 1993, the hearing judge filed a decision.

The State Bar sought reconsideration on a few specific grounds. After the hearing judge granted

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1. The order dismissed the allegations that respondent violated Business and Professions Code section 6068 (a) in counts 1 through 14, Business and Professions Code section 6103 in counts 1 through 10 and counts 12 and 14, Business and Professions Code section 6104 in count 10, Business and Professions Code section 6068 (m) in count 1, and rule 2-108 of the former Rules of Professional Conduct in count 10. We agree with the dismissal and devote no further attention to these allegations, except for the section 6103 allegation in count 12.

Unless otherwise indicated, all future references to sections are to sections of the Business and Professions Code, and all future references to former rules are to the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

some of the State Bar's requested points, respondent sought review.[2]

II. DISCUSSION

We must independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing decision. (Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings, rule 305(a); Former Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9.) In a disciplinary proceeding, the State Bar must prove culpability and aggravating circumstances by clear and convincing evidence, and an attorney accused of misconduct must prove mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), stds. 1.2(b), 1.2(e); Former Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, stds. 1.2(b), 1.2(e); see also *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725; *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239.) All reasonable doubts about culpability must be resolved in favor of the accused attorney. (*In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 240.)

Having independently reviewed the record, which is more than 6,000 pages long, we adopt the factual findings contained in the hearing judge's 101-page decision except as indicated below. In our discussion, we focus on the facts essential to determinations about culpability and degree of discipline.

A. Count 1: Frazier Matter

1. Findings of fact

In July 1981, Sandra Frazier retained respondent to help her become conservator for her uncle, Ralph Ross. Frazier lived in Pennsylvania and wanted to bring her uncle back to live with her.

In August 1981, respondent filed a conservatorship petition. Frazier became conservator of Ross's estate and returned with him to Pennsylvania.

After the establishment of the conservatorship, respondent failed to prepare and file the required inventory and appraisal due in November 1981 and the required periodic accounting due in August 1982. (See Prob. Code, §§ 2610, 2620.) Although respondent told Frazier to send her any bills and receipts for Ross, Frazier was slow to provide such documents. Respondent, however, did not explain the statutory requirements to Frazier. Nor did respondent send Frazier written instructions stating precisely what information she needed to comply.

Frazier expressed concern to respondent about protecting Ross's assets, specifically his interest in real property in Los Angeles. Although respondent promised to handle everything for Frazier, respondent did not seek to quiet title to the property.

Ross died in February 1983. Frazier notified respondent of his death and her wish to be the executor of his estate. Respondent was slow to handle the probate of the estate.

From September 1983 onwards, Frazier made many attempts to contact respondent, who seldom returned her telephone calls and who did not meet with Frazier when Frazier visited respondent's office in June 1984. In March 1985, Frazier retained Roger Perry, a Pennsylvania attorney, to inquire on her behalf about the probate of Ross's estate. Respondent did not respond to Perry's letters or to most of Perry's telephone calls and did not keep an appointment with Perry when Perry visited respondent's office in December 1985.

2. Conclusions of law

The State Bar charged respondent with violating section 6106 and former rules 2-111(A)(2), 6-101, and 6-101(A)(2).

2. When the review department received the record, exhibits 122, 142, 146, 147, 156, 157, 165, 166, 167, 168, 169, 170, and 171 were missing. At oral argument, the parties stipulated that copies of the missing exhibits were accurate and could be substituted in the record for the originally admitted exhibits.

a. Section 6106 and former rule 2-111(A)(2)

The hearing judge concluded that respondent did not violate section 6106 and former rule 2-111(A)(2).[3] The State Bar's brief on review does not dispute the hearing judge's conclusions on these charges, and we agree with those conclusions.

b. Former rules 6-101 and 6-101(A)(2)

Part (2) of former rule 6-101, which was in effect from January 1, 1975, to October 23, 1983, provided that an attorney shall not wilfully or habitually "[f]ail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed." Former rule 6-101(A)(2), which was in effect from October 24, 1983, to May 26, 1989, provided that an attorney "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently."

Finding that respondent failed to use reasonable diligence and her best judgment to prepare the required inventory and accounting in the conservatorship proceeding, to complete the probate of the Ross estate with reasonable speed, and to quiet title to the Los Angeles property, the hearing judge determined that these failures constituted violations of former rules 6-101 and 6-101(A)(2). We conclude that respondent violated former rule 6-101, but not 6-101(A)(2).

Respondent argues that the allegations in the notice to show cause addressed only her handling of the conservatorship and thus that the hearing judge's culpability conclusion exceeds the scope of the notice. We agree. An attorney can be disciplined solely for ethical violations alleged in the notice to show cause. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 33.) Because the notice mentioned only the conservatorship, respondent can be held culpable only for her misconduct in this matter.[4]

Respondent habitually failed to use reasonable diligence in handling the conservatorship. On review, respondent places the onus on Frazier's alleged failure to have provided respondent with necessary information. We disagree and agree instead with the hearing judge who saw and heard the witnesses and found respondent culpable. The hearing judge found that Frazier was an unsophisticated client and respondent never established that she had formally instructed Frazier as to the information needed. By not providing proper instructions to Frazier and not preparing and filing necessary documents, she violated former rule 6-101. Because her misconduct occurred in 1981 and 1982, she cannot be culpable of violating former rule 6-101(A)(2), which became effective in 1983.

As the hearing judge found, respondent neither attempted to quiet title to the Los Angeles property nor completed the probate of the Ross estate with reasonable speed. Also, from September 1983 through December 1985, respondent failed to reply to numerous inquiries from Frazier and Perry. By habitually failing to use reasonable diligence between July 1981 and October 1983 and by repeatedly failing to perform legal services competently between October 1983 and December 1985, respondent committed uncharged violations of former rules 6-101 and 6-101(A)(2). Although these violations do not form a

3. Section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension.

Former rule 2-111(A)(2) prohibited an attorney's withdrawal from employment until the attorney had taken reasonable steps to avoid foreseeable prejudice to the client's rights. Such steps included giving due notice to the client, allowing time for the employment of other counsel, delivering to the client all papers and properties to which the client was entitled, and complying with applicable laws and rules.

4. The notice to show cause could have been amended prior to trial to specifically include allegations concerning the probate matter. (Former Trans. Rules Proc of State Bar, rule 557; see also Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings, rule 104.) It was not and the hearing judge sustained respondent's objection at trial that inquiry into the probate matter exceeded the scope of the charges.

basis for culpability, they constitute an aggravating circumstance. (See *Grim* v. *State Bar*, *supra*, 53 Cal.3d at p. 34; *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 775; std. 1.2(b)(iii).)

B. Count 2: Crippen Matter

Respondent concedes her culpability in this count as found by the hearing judge.

1. Findings of fact

In September 1984, Hyman Crippen was injured in a car accident. He retained respondent to represent him in seeking damages for his injuries and the total loss to his car.

Respondent performed some services for Crippen, but from June 1985 onwards, Crippen had problems in communicating with respondent. He left many telephone messages which she failed to return. In July 1986, he retained another attorney, John Rapillo.

In mid-July 1986, Rapillo sent respondent a letter asking her to sign an enclosed substitution of attorney form and to forward Crippen's file. She did not reply. The next month, Rapillo sent respondent a second letter demanding that she sign the substitution of attorney form and forward the file. Again, she did not reply.

In September 1986, Rapillo left two telephone messages, which respondent failed to return. He then sent her a letter by certified mail in which he enclosed copies of his earlier letters and advised her that her failure to forward Crippen's file was a violation of the Rules of Professional Conduct. She did not respond to this letter and never forwarded the file.

Respondent failed to file an action within one year of Crippen's accident, as required by the applicable statute of limitations. (See Code Civ. Proc., § 340(2).)

Rapillo filed a legal malpractice action for Crippen against respondent. This action was settled in July 1987 for $12,000.

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 (m) and 6106 and former rules 2-111(A)(2) and 6-101(A)(2).

a. Sections 6068 (m) and 6106

The hearing judge concluded that respondent did not violate sections 6068 (a), 6068 (m), 6103, and 6106.[5] We agree.

a. Former rule 2-111(A)(2)

As noted *ante*, former rule 2-111(A)(2) required that an attorney who withdrew from employment take reasonable steps to avoid foreseeable prejudice to the client's rights, including delivery to the client of all papers and property to which the client was entitled. We agree with the hearing judge's conclusion that respondent violated former rule 2-111(A)(2) by failing to forward Crippen's file to Rapillo despite three requests in writing and two requests by telephone for the file.

b. Former rule 6-101(A)(2)

As discussed *supra*, former rule 6-101(A)(2) forbade the intentional, reckless, or repeated failure to provide competent legal services. The hearing judge concluded that respondent violated former rule 6-101(A)(2) by recklessly failing to file a timely action on Crippen's behalf and to communicate with Crippen. We agree. On review, respondent acknowledges culpability.

5. Section 6068 (m) did not become effective until January 1, 1987. It provides that an attorney has the duty to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant matters with regard to which the attorney has agreed to provide legal services.

C. Count 3: Gann Matter

1. Findings of fact

C.T. Sam Gann, who resided in Oklahoma, retained respondent in September 1985 to set aside a default judgment against him in California. When the plaintiff sought to register the California judgment in Oklahoma, Gann and the other defendants argued that they had not been properly served and that the California court lacked personal jurisdiction.

On December 18, 1985, respondent signed a declaration for submission in the Oklahoma case. Her declaration stated that she had filed a motion to set aside Gann's default judgment; that she had served a copy of all the papers related to the motion on the plaintiff's attorney; and that a hearing on this motion was set for February 5, 1986.

These statements were false. She did not file a motion to set aside the judgment or serve the plaintiff's attorney with a copy of the papers related to the motion until February 13, 1986. Nor had a hearing been scheduled for February 5, 1986.

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 (d) and 6106 and former rule 7-105. As noted *ante*, under section 6106, the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension. Section 6068 (d) requires that an attorney employ only such means as are consistent with the truth for the purpose of maintaining the causes confided to the attorney and that an attorney never seek to mislead a judge by a false statement of fact or law. Part (1) of former rule 7-105 restated the requirements of section 6068 (d). We agree with the hearing judge's conclusion that respondent violated sections 6106 and 6068 (d) and former rule 7-105.

By deliberately making false statements of fact in her declaration of December 1985, respondent was dishonest and thereby violated section 6106. These dishonest representations to a court also violated her duties under section 6068 (d) and former rule 7-105 to employ only such means as are consistent with the truth and never to seek to mislead a judge by a false statement of fact. Because the misconduct underlying the section 6068 (d) and former rule 7-105 charges is the misconduct covered by the section 6106 charge, which supports identical or greater discipline, we give no additional weight to the section 6068 (d) charge and former rule 7-105 charge in determining the appropriate discipline. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose served by duplicative allegations of misconduct]; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 634.)

Respondent defends by stressing her own testimony; and relying on a telephone bill showing that a call was made on December 18, 1985, from her office to the court; and an order imposing sanctions on Gann, not respondent. She testified that she had prepared and filed, or attempted to file, a motion to set aside the default judgment in early December 1985; that she had served a copy of this motion on the plaintiff's attorney; that she telephoned the court clerk's office on December 18, 1985, to confirm that a hearing had been scheduled on her motion; and that the court clerk told her that the hearing was calendared for February 5, 1986. According to respondent, she learned in January 1986 that the motion was not in the court's file and had not been scheduled for a hearing on February 5, 1986. She attributed this situation to "some mix up" between the court clerk's office and her office. On February 13, 1986, she filed a motion to set aside the default judgment; and on March 5, 1986, the judge denied the motion and imposed sanctions on Gann, but not respondent.

Respondent's explanation is unpersuasive. The hearing judge determined that respondent's testimony about the December 1985 declaration was not credible. This determination deserves great deference. (Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings, rule 305(a); Former Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Kopinski* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 716, 724-725.)

The telephone bill does not show who spoke or what was said. Given other reliable evidence, the bill might corroborate respondent's claim that a court

clerk advised her about the calendaring of a motion to set aside the default for February 5, 1986. By itself, the bill establishes only that a call was made on December 18, 1985, from respondent's office to the court.

The sanction order reveals neither the judge's reasoning nor the facts relied upon by the judge in sanctioning only Gann.

Respondent failed to produce crucial documents which would have exculpated her. She did not provide a conformed copy of the motion allegedly filed in December 1985, a copy of a declaration by Gann which should have accompanied the December 1985 motion, or a proof of service of the December 1985 motion on the plaintiff's attorney.

The evidence weighs against respondent. The purported copy of the December 1985 motion offered by respondent at the disciplinary hearing had no file stamp and included no declaration by Gann. The declaration accompanying respondent's motion of February 13, 1986, was signed by Gann not in December 1985, but in January 1986. The plaintiff's attorney denied that he was served with any motion from respondent in December 1985 motion. Further, if respondent had filed a motion in December 1985 and if the court clerk had failed to calendar the hearing properly, only a notice of a new hearing date would have been required, not the filing of a new motion.

D. Count 4: Leon Garabet Matter

1. Findings of fact

Leon Garabet, a jeweler, retained respondent to defend him in a civil suit filed by Francis Kaufman, the plaintiff. Kaufman complained that Garabet had received her ring to replace the stone, refused to return it and denied he had ever received it. Respondent prepared an answer to the complaint in October 1985 and filed it in June 1986.

The matter was twice scheduled for trial and taken off calendar. Trial was then rescheduled for April 6, 1987. At respondent's request, it was taken off calendar because the parties had reached a tentative settlement.

Walter Last, Kaufman's attorney, telephoned respondent's offices eight times between April 14 and 27, 1987, to discuss the tentative settlement. Each time, he left his name and telephone number and asked respondent to return his call. At the disciplinary hearing, he could not recall whether she had done so.

On April 27, 1987, Last wrote to respondent. He informed her that he would reschedule the matter for trial because the settlement had not been consummated.

On April 30, 1987, Last filed a memorandum to set the matter for trial. He declared that on April 27, 1987, he had served the memorandum on respondent by mail.

On June 2, 1987, a clerk's notice of trial was filed and served on the parties. The trial was scheduled for July 7, 1987. On June 9, 1987, Last separately served a notice of the July 7 trial on respondent by mail.

Respondent and Garabet did not appear at the trial on July 7, 1987. The court entered judgment in favor of Kaufman for $13,800 plus costs of $34.

Garabet then retained attorney Vicken Berjikian to represent him in seeking to set aside the judgment. On August 8, 1987, Berjikian wrote to respondent by certified mail requesting that she sign an enclosed substitution of attorney and send the signed form and Garabet's file to him. She did not reply to this letter.

Between August 7 and September 8, 1987, Berjikian telephoned respondent's office several times. She returned none of these calls.

On September 8, 1987, Berjikian sent respondent another letter by certified mail requesting Garabet's file. Again, respondent did not reply.

Berjikian filed a motion for relief from the judgment against Garabet. A hearing on this motion was scheduled for October 22, 1987.

On October 21, 1987, respondent filed a declaration in support of Berjikian's motion. In this

declaration, respondent stated that she had sent Last a letter confirming the terms of the tentative settlement in early April 1987, that Last had not responded to her letter, and that she had not received the memorandum to set the case for trial or the clerk's notice of the trial on July 7, 1987. She also indicated that Last had not telephoned her office between April and October 1987.

Respondent did not appear at the hearing on October 22, 1987. By an order filed in December 1987, the court denied Berjikian's motion.

Garabet paid the judgment and filed a legal malpractice action against respondent. This action was settled for $20,000, which respondent paid in full.

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 (d) and 6106 and former rules 2-111(A)(2), 6-101(A)(2), and 7-105(1).

a. Sections 6106 and 6068 (d) and former rule 7-105(1)

The hearing judge concluded that respondent violated sections 6106 and 6068 (d) and former rule 7-105 by deliberately making false statements in her declaration of October 21, 1987.

We agree. As discussed relative to count 3, *ante*, we give no additional weight to the section 6068 (d) charge and former rule 7-105(1) charge in determining the appropriate discipline because the misconduct underlying those two charges is the misconduct covered by the section 6106 charge, which supports identical or greater discipline.

Respondent argues that from early April 1987 onwards, Last engaged in "sinister manuevers [*sic*]" to obtain a default judgment against Garabet. According to respondent, no evidence in the record shows that she ever received notice of Garabet's trial on July 7, 1987, except for the evidence provided by Last. She contends that the court never notified her of the trial at her correct address. Although respondent acknowledges that Last's telephone records show several one-minute calls to respondent's offices, she claims that one minute is "barely enough time" to leave a message. In addition, respondent maintains that the hearing judge's credibility determination in favor of Last over respondent was insufficient by itself to sustain the conclusion that her declaration of October 21, 1987, contained deliberately false statements.[6]

The record clearly and convincingly establishes culpability. The only error in the memorandum to set Garabet's case for trial on July 7, 1987, and in the clerk's notice of the trial on July 7, 1987, was that they listed Los Angeles, rather than Beverly Hills, as the city where respondent's office was located. Respondent's name, the street, the number of the building on the street, the number of the suite in the building, and the zip code were all correct. Respondent admits that she received other documents from the court with this address. Such documents included the memorandum to set Garabet's case for trial on April 6, 1987; the clerk's notice of the trial scheduled for April 6, 1987; and the clerk's notice of entry of the default judgment on July 7, 1987. Also, on June 9, 1987, Last mailed to respondent a notice of the trial on July 7, 1987; the address shown for respondent on the proof of service is Beverly Hills rather than Los Angeles. Further, as we noted *ante*, the hearing judge's credibility determinations in favor of Last and against respondent deserve great weight. The preceding evidence warrants the conclusions that respondent received one or more documents informing her in advance of the trial on July 7, 1987, and that her statement to the contrary in her declaration of October 21, 1987, was deliberately false.

6. Respondent also objects to the admission of Last's letter of April 27, 1987. She correctly points out that this letter was not produced in response to her pretrial inspection demand, was not on the deputy trial counsel's pretrial exhibit list, and did not appear until the day when Last testified in January 1991.

The letter, however, need not be stricken from the record. We note that respondent could have requested a continuance to investigate the letter, but did not do so. Because she did not testify about the letter until November 1991, she had more than nine months to undertake an investigation. She neither presented rebuttal evidence nor recalled Last for further questioning.

Last's telephone bills show that between April 14 and 27, 1987, he made eight one-minute telephone calls to respondent's offices. Respondent asserts that one minute is sufficient to leave a message, even though she describes it as "barely" so. Further, the hearing judge found Last's testimony that he left messages for respondent to be credible. Respondent offered no explanation of how she might have failed to receive these messages; instead, she argued that Last never left them. The foregoing evidence and the hearing judge's credibility determinations in favor of Last and against respondent warrant the conclusions that respondent was aware of messages from Last and that the assertion to the contrary in her declaration of October 21, 1987, was deliberately false.

b. Former rule 2-111(A)(2)

[1] As discussed *ante*, former rule 2-111(A)(2) prohibited withdrawal from employment unless the attorney had taken reasonable steps to avoid foreseeable prejudice to the client's rights, including the delivery to the client of all papers and property which the client is entitled to receive. This rule applied to attorneys who were discharged as well as to attorneys who withdrew. *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 365.) We agree with the hearing judge's conclusion that respondent willfully violated former rule 2-111(A)(2) by failing to supply Garabet's file to Berjikian upon his repeated requests.

Respondent contends that she offered "plausible and uncontradicted" testimony that a law clerk of Berjikian told her shortly after she received Berjikian's letter of August 7, 1987, that Berjikian would not need Garabet's file. This testimony is inherently implausible because any subsequent attorney handling a matter for a client is likely to want the client's file from the former attorney, but also because Berjikian testified to his efforts to secure Garabet's file. These efforts included a September 8, 1987, letter alerting respondent to Berjikian's ongoing demand for Garabet's file. On this record, the hearing judge properly found in accord with the State Bar witnesses' version of events, rather than respondent's.

c. Former rule 6-101(A)(2)

As discussed *ante*, former rule 6-101(A)(2) prohibited the intentional, reckless, or repeated failure to perform legal services competently. The hearing judge concluded that respondent violated former rule 6-101(A)(2) by recklessly failing to consummate the tentative settlement of April 1987 and to appear at trial in July 1987. We agree.

Respondent claims that she was not aware in advance of the trial on July 7, 1987. As discussed *ante*, the record clearly and convincingly establishes that she was.

E. Count 5: Burke Matter

1. Findings of fact

In June 1988, Stiles Burke and his wife, retirees, retained respondent to recover their $75,000 investment in a real property syndication. Dr. Bernie Goler, another investor, had obtained an injunction regarding funds in an escrow account belonging to the property syndicate. Claiming that the funds in the escrow account belonged solely to them, the Burkes wanted respondent to represent them in two actions: *Burke* v. *Goler et al.* (*Burke*) and *Goler et al.* v. *Eagle Mobile Home Center et al.* (*Goler*). In Stiles Burke's view, time was of the essence as the Burkes needed the invested funds for living expenses. As the hearing judge found, respondent assured Stiles Burke that she could handle the case.

On June 30, 1988, respondent obtained the Burkes' file from the Goldie Law Corporation, which had previously represented them. On July 11, 1988, respondent met with the Burkes. She suggested intervening in *Goler* because the Burkes were not named as a party in this action.

On July 15, 1988, Stiles Burke telephoned respondent to find out whether she had obtained certain necessary documents from the escrow company. When he learned that she had not, he offered to get them. Respondent assured Burke that she would obtain the documents.

On August 19, 1988, Burke learned that respondent had still not obtained the documents from the escrow company. He got them and personally delivered them to respondent.

We adopt the hearing judge's finding that between August 23 and September 1, 1988, Burke unsuccessfully tried to reach respondent a number of times by telephone. Relying on documentary evidence in the record, we also find that on August 25, 1988, respondent sent a demand letter to Goler's attorney in *Burke*; that she mailed a copy of the letter to Burke; and that the letter allowed Goler's attorney 10 days to reply (i.e., until September 4, 1988).

On September 6, 1988, respondent met with the Burkes. She promised to file a motion for summary judgment in *Burke* and a motion to intervene in *Goler*.

We also accept the hearing judge's finding that on October 5, 1988, Stiles Burke wrote respondent asserting she was not communicating with him. Relying on Burke's own testimony, we reject the hearing judge's finding that respondent failed to reply to this letter. Burke testified that on October 12, 1988, he telephoned respondent's office and spoke with her law clerk, who informed him about a tentative court date in *Goler* on November 21, 1988. Also, Burke testified that sometime after October 5, 1988, respondent told him about the court date. According to respondent's telephone records, she initiated a 20-minute telephone call with Burke on October 13, 1988.

In early November 1988, respondent telephoned the Burkes and asked them to sign papers for intervention in *Goler*. They met with respondent and signed the papers.

After the meeting, respondent telephoned Burke to inform him that she had negotiated a settlement whereby the escrow funds would go to the Burkes. From early July onwards, she had made a number of telephone calls to Goler's attorney, and she had talked with the opposing party's (Swain's) attorney on November 16, 1988. When respondent told Burke that she had cancelled the court date, Burke was upset because he distrusted Swain's attorney.

Although the settlement was supposed to be consummated in November 1988, Swain's attorney did not forward the necessary stipulation to respondent. We reject the hearing judge's finding that respondent failed to respond to Burke's telephone calls from late November onwards. Based on respondent's uncontradicted testimony, on her telephone bills, and on a letter written by Burke himself, we find that on December 6, 1988, respondent talked again with Swain's attorney and with Burke. As established by Burke's letter, respondent informed him that she had confirmed the terms of the settlement with Swain's attorney, who was to send her the signed stipulation. She also assured Burke that if Swain's attorney did not promptly send her the stipulation, she would immediately set a court date, which she believed she could obtain in a couple of days.

On December 14, 1988, before the settlement agreement was reduced to writing, the Burkes terminated respondent's services. They orally advised respondent's law clerk that they wanted their file. Also, they wrote respondent by certified mail asking her to turn over their file as soon as possible.

We adopt the hearing judge's findings that respondent did not send the Burkes their file and that on January 17, 1989, D. Brian Reider, the Burkes' new attorney, sent respondent a letter demanding that respondent forward their file to him within 10 days. Relying on documentary and testimonial evidence and resolving all reasonable doubts in respondent's favor, we also find that respondent telephoned the Burkes on December 21, 1988; that she told them they needed to sign substitutions of attorney if they wanted their file; that Stiles Burke told her that Reider would contact her; that she telephoned Reider on January 23, 1989, in response to his letter; that she asked Reider to send her signed substitutions of attorney; that Reider did not do so; that she sent him the Burkes' file on February 13, 1989; and that Reider did not receive the file.

We adopt the hearing judge's findings that August 1, 1988, was the date of the last billing statement which the Burkes received from respondent and that this statement reflected a credit balance of $1,759.18 on an initial advanced fee payment of $3,000. Rely-

ing on documentary evidence and uncontradicted testimony by respondent and resolving all reasonable doubts in respondent's favor, we also find that this credit balance had been used by the time the Burkes discharged her, that the Burkes owed her more fees, and that she and the Burkes agreed to call matters even.

Represented by other counsel, the Burkes obtained summary judgement in 1990 in the investment matter for $100,000, which included interest *and* attorney fees.

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 (m) and 6106 and former rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2).

a. Section 6106

The hearing judge concluded that respondent did not violate section 6106. We agree. On review, the State Bar does not dispute the hearing judge's conclusions regarding section 6106.

b. Section 6068 (m)

As noted *ante*, section 6068 (m) requires an attorney to respond promptly to reasonable status inquiries from a client and to keep clients reasonably informed of significant developments in their matters. The hearing judge concluded that respondent violated section 6068 (m) on the following grounds: (1) that Stiles Burke had great difficulty in contacting respondent between August 23 and September 1, 1988; (2) that respondent failed to respond to Burke's letter of October 5, 1988; and (3) that respondent failed to return Burke's telephone calls between late November and December 14, 1988.

We disagree with this conclusion.[7] **[2 - see fn. 7]** Respondent communicated frequently with Burke. With regards to the period between August 23 and September 1, 1988, respondent sent Burke a copy of her August 25 demand letter to Goler's attorney. This letter allowed Goler's attorney 10 days to reply (i.e., until September 4, 1988). Assuming that Burke received his copy of the demand letter soon after it was mailed, he would have been aware of respondent's efforts and of the 10-day reply period. In addition, less than a week elapsed until respondent next talked with Burke on September 1. This was not an unreasonable passage of time in this matter.

Burke's letter of October 5, 1988, asked for a status report. Burke testified that sometime thereafter respondent told Burke about a court date and that on October 12, 1988, an assistant to respondent informed Burke

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7. **[2a]** During the hearing, respondent objected to the admission of exhibit 33, a letter which Stiles Burke wrote on October 2, 1988, to the Orange County Bar Association and which complains about the legal services provided by respondent. In discussing the section 6068 (m) charge, respondent renews this objection on review. We conclude that the complaint letter is inadmissible hearsay, and we strike it from the record.

[2b] The State Bar contends that the complaint letter was properly admitted as a past recollection recorded that corroborates Burke's testimony. As a previous writing by Burke, the complaint letter is hearsay. (See Evid. Code, § 1200, subd. (a); *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 142.) Burke testified that he based the complaint letter on notes taken when events were fresh in his mind, but not that events were still fresh in his mind when he wrote the complaint letter. Indeed, Burke's use of the notes suggests that he did not clearly remember the events when he wrote the letter. Because the record does not establish that Burke wrote the letter when the events occurred or were still fresh in his mind, the complaint letter does not qualify as an exception to the hearsay rule for previous writings by a witness. (See Evid. Code, § 1237, subd. (a)(1).) Even if the complaint letter did qualify for this exception, it should not have been received into evidence because it was offered by the State Bar rather than by an adverse party. (See *id.*, § 1237, subd. (b).)

[2c] Nor does the complaint letter qualify for admission under the corroborative evidence exception to the hearsay rule. (Cf. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 698-699.) As established by *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42-43, this exception applies to medical bills or repair bills because they carry with them sufficient indicia of their trustworthiness. (See Jefferson, Cal. Evidence Benchbook (2d ed. 1982) The Hearsay Rule, § 1.3, p. 46.) The complaint letter lacks sufficient indicia of trustworthiness, and the record does not show that the complaint letter accurately reflects the contents of the earlier notes upon which Burke relied in writing it.

about a court date. It is undisputed that in early November 1988 respondent telephoned the Burkes and asked them to sign papers for intervention in *Goler* and that they met with respondent to sign the papers. Also, respondent's telephone records show that on October 13, she initiated a 20-minute telephone call to Burke. Thus, after October 5, 1988, respondent continued to communicate with the Burkes.

With regards to the period from late November until December 14, 1988, a letter written by Stiles Burke acknowledges a telephone conversation with respondent on December 6, 1988. In addition, Burke testified that after this conversation, respondent left a message on Burke's answering message that she had been in touch with Swain's attorney, who would be away for the holidays, and that she would get back to Burke.

c. Former rule 2-111(A)(2)

[3a] As discussed *ante*, former rule 2-111(A)(2) required an attorney whose employment had been terminated to return to the client all papers and property to which the client is entitled. We adopt the hearing judge's conclusion that under the circumstances, respondent violated former rule 2-111(A)(2) by not promptly delivering the Burkes' file.

[3b] Respondent argues that she is not culpable because her husband was ill and because the Burkes failed to provide her with substitutions of attorney. Although respondent may have suffered anxiety as a result of her husband's illness, she should have instructed her staff to deliver the Burkes' file. Such delivery did not depend on the Burkes' signing substitutions of attorney. (Cf. *Kallen* v. *Delug* (1984) 157 Cal.App.3d 940, 950; *Weiss* v. *Marcus* (1975) 51 Cal.App.3d 590, 599.) Further, the Burkes' letter of December 14, 1988, demanded the delivery of their file at the earliest possible moment; and Reider's letter of January 17, 1989, stressed the immediate need for the file and demanded its delivery within 10 days. Under these circumstances, respondent should have acted promptly. Her two-month delay in sending the file violated former rule 2-111(A)(2). (See *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 655 [prompt surrender of a client's file required upon request from the client or the client's new counsel].)

d. Former rule 2-111(A)(3)

[4a] Former rule 2-111(A)(3) required an attorney who withdrew from employment to refund promptly any part of a fee that had been paid in advance, but had not been earned. This requirement also applied when a client terminated the employment of an attorney. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 27; *In the Matter of Whitehead, supra*, 1 Cal. State Bar Ct. Rptr. at p. 365.) By failing to return advanced fees after performing only minimal preliminary services, an attorney who withdrew from employment violated the requirement. (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 227, 229.) Yet an attorney who withdrew from employment after performing some services and providing an accounting did not necessarily violate the requirement. (*In the Matter of Frazier, supra*, 1 Cal. State Bar Ct. Rptr. at p. 690.) The hearing judge concluded that respondent violated former rule 2-111(A)(3) on the grounds that she performed no services of benefit to the Burkes; provided no accounting to them after August 1, 1988; and retained $1,759.18 in unearned fees.

[4b] We disagree. The record shows that respondent communicated regularly with the Burkes; that she negotiated a settlement which would have achieved their purpose, the receipt of the escrow funds; that although August 1, 1988, was the date of her last billing statement to them, the credit balance of $1,759.18 had been used by the time they discharged her; that they owed her more fees; and that they agreed with her to call matters even. Under these circumstances, respondent did not violate former rule 2-111(A)(3).

e. Former rule 6-101(A)(2)

As discussed *ante*, former rule 6-101(A)(2) prohibited the intentional, reckless, or repeated failure to perform legal services competently. The hearing judge concluded that respondent wilfully violated former rule 6-101(A)(2) on the ground that she did not take any significant action on behalf of the Burkes, although she knew of their insistence on a prompt resolution of their matter.

Again we must disagree with the hearing judge. Although respondent failed to intervene in *Goler*, the Burkes' goal was to obtain the escrow funds. Intervention was merely the initially anticipated means of accomplishing this goal. According to respondent's uncontroverted testimony, the settlement which she negotiated would have gained the escrow funds for the Burkes and obviated the need for intervention. Under these circumstances, the record does not clearly and convincingly establish that respondent intentionally, recklessly, or repeatedly failed to perform legal services competently.

F. Count 6: Duncan Matter

1. Findings of fact

In April 1987, Elaine Duncan, the owner of an ambulance service, retained respondent to represent her in securing a contract to provide backup emergency ambulance service to the City of Westminster's Fire Department. Respondent performed services for Duncan while the matter was before the city council. On July 28, 1987, the city awarded the contract to another provider. Duncan asked respondent to file a petition as soon as possible for a writ of mandate challenging the contract award.[8]

Respondent filed the petition on November 20, 1987. No memorandum of points and authorities was attached to the petition or served on the defendants. The hearing on the petition was scheduled for January 20, 1988.

Duncan became concerned about the status of the mandate proceeding and asked attorney Robert Dobbins, who had represented her in other matters, to contact respondent to make sure that the proceeding was going forward. Dobbins wrote respondent offering to help in connection with the hearing scheduled for January 20, 1988.

On January 19, 1988, respondent telephoned Duncan and Dobbins to advise them that the clerk had "lost" some paperwork, that the hearing could not be held on the next day, and that the hearing was rescheduled for February 16, 1988. The "lost" paperwork was the memorandum of points and authorities.[9]

On February 15, 1988, respondent telephoned Duncan to inform her that the hearing would not be on the next day, but had been reset for February 26, 1988. On February 25, 1988, an associate of respondent informed Duncan that the matter had been taken off calendar because respondent was in the hospital.

On March 1, 1988, Dobbins wrote to respondent a second time on Duncan's behalf. Dobbins asked for information about the mandate proceeding, including the likelihood of obtaining a favorable result. Respondent did not reply.

No hearing was ever held on the mandate petition.

During the disciplinary proceeding, respondent testified that she stopped working on the mandate proceeding because Duncan told her to stop work and because she and Duncan were engaged in a fee dispute. Duncan testified that she did not tell respondent to stop work. The hearing judge resolved the testimonial conflict in favor of Duncan and against respondent. This credibility determination is entitled to great weight on review and we have been provided no reason to make a different finding.

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 (m) and 6106 and former rules 2-111(A)(2) and 6-101(A)(2).

8. In November 1987, Duncan asked respondent to return certain corporate records to her. She sent a driver to respondent's office to collect the records, but the driver was unable to get them.

On December 12, 1987, Duncan drove to respondent's home to get the records. Respondent indicated that the records had been sent to Duncan's office by courier.

Two days later, Duncan found the records in the lobby of her office.

a. Sections 6068 (m) and 6106 and former rule 2-111(A)(2)

The hearing judge concluded that the record lacked clear and convincing evidence that respondent violated section 6068 (m), section 6106, or former rule 2-111(A)(2). We agree, also noting that the State Bar's brief on review does not dispute these conclusions.

b. Former rule 6-101(A)(2)

As discussed *ante*, former rule 6-101(A)(2) prohibited the intentional, reckless, or repeated failure to perform legal services competently. The hearing judge determined that respondent wilfully violated former rule 6-101(A)(2) by failing to file a memorandum of points in support of the writ petition and to schedule and attend a hearing on the petition. The hearing judge did not specify whether he considered respondent's misconduct to be intentional, reckless, or repeated.

[5a] We conclude that respondent violated former rule 6-101(A)(2) by recklessly and repeatedly failing to provide competent legal services. Although respondent knew that time was of the essence, she waited almost four months to file the writ petition. As the hearing judge noted, the petition respondent filed for Duncan did not indicate whether it was one seeking administrative mandamus (Code Civ. Proc., § 1094.5) or ordinary mandamus (*id.*, § 1085). If the former, the petition was untimely when filed. (*Id.*, § 1094.6, subd. (b).) Also, she did not ensure the filing of the memorandum of points and authorities in support of the petition and did not follow through to the end of setting a hearing on the petition.

Respondent argues that two errors in the hearing judge's findings of fact greatly affected the judge's credibility determinations. We conclude, and the State Bar concedes, that the hearing judge misstated the dates of two conversations: (1) on January 19, 1988, not sometime after March 1, 1988, Dobbins spoke with respondent about the "lost" memorandum of points and authorities; and (2) on March 14, 1988, not February 8, 1988, respondent indicated to Dobbins that she was not prepared to work for Duncan because of their fee dispute. These minor errors, however, do not undermine the hearing judge's credibility determinations.

[5b] Citing former rule 2-111(C)(1)(f), respondent claims that she was justified in not following through with the mandate proceeding after November 1987 on the grounds that Duncan's last payment to her was made on November 20, 1987; that Duncan breached their fee agreement; and that Duncan owed her a substantial sum. Former rule 2-111(C)(1)(f) prohibited an attorney from requesting permission to withdraw in matters pending before a tribunal unless the attorney's client deliberately disregarded an agreement as to expenses or fees. Respondent, however, did not seek permission from the court to withdraw as Duncan's attorney in the mandate proceeding. Duncan's nonpayment of fees failed to justify respondent's nonperformance of services. Respondent had to pursue Duncan's mandate proceeding diligently or seek permission to withdraw. (See *Fitzpatrick* v. *State Bar* (1977) 20 Cal.3d 73, 85.) She did neither.

G. Count 7: Tovar Matter

As in Count 2, *ante*, respondent does not dispute before us in this count her culpability as found by the hearing judge.

1. Findings of fact

Bruce Tovar retained respondent in July 1987 to incorporate an ambulance service business. He gave her a $377 check for advanced costs to cover the payment of the incorporation fee and the purchase of a corporate kit. She deposited this check into her general business account rather than a trust account.

Respondent submitted articles of incorporation and a check drawn on her general business account for the incorporation fee to the Office of the Secretary of State (office). By letter of August 12, 1987, the office informed respondent that her check had not been honored because of insufficient funds and that

the incorporation of Tovar's business would be cancelled on September 1, 1987, unless proper payment was received. By letter of September 1, 1987, the office notified respondent that the incorporation of Tovar's business was cancelled because the previously dishonored check had not been replaced.

Respondent did not inform Tovar of the cancellation. On October 5, 1987, Tovar sent the office a corporate statement. By letter of November 3, 1987, the office informed Tovar that the statement was no longer required because of the corporation's cancellation.

On November 19, 1987, respondent refiled the articles of incorporation for Tovar's business and submitted a check for the new incorporation fee. She also telephoned Tovar and told him for the first time about the earlier cancellation.

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 (e), 6068 (m), and 6106 and former rules 8-101(A) and 8-101(B)(4).

a. Sections 6068 (e) and 6106 and former rule 8-101(B)(4)

The hearing judge concluded that respondent did not violate sections 6068 (e) and 6106 and former rule 8-101(B)(4).[10] We agree. On review, the State Bar does not dispute the hearing judge's conclusions regarding these charges.

b. Section 6068 (m)

As noted *ante*, section 6068 (m) requires that an attorney respond promptly to reasonable status inquiries from a client and keep clients reasonably informed of significant developments in their matters. We agree with the hearing judge's conclusion that respondent violated section 6068 (m) by failing to inform Tovar for two and one-half months of the cancellation of the incorporation of Tovar's business—a most significant development.

c. Former rule 8-101(A)

Former rule 8-101(A) required that an attorney keep all funds held for the benefit of clients, including advanced costs, in a trust account. The hearing judge correctly concluded that respondent violated former rule 8-101(A) by depositing Tovar's check for advanced costs into her general business account.[11] As we noted, respondent acknowledges culpability on review.

H. Count 8: Maurice Garabet Matter

1. Findings of fact

In September 1986, Maurice Garabet retained respondent to represent him in a marital dissolution proceeding begun by his wife. Respondent told him that she would file an answer to his wife's petition, as well as a petition on his behalf.

In October 1986, respondent telephoned Joseph Spirito, the attorney for Garabet's wife. Wanting to explore a possible settlement, respondent requested an extension of time to file an answer. Spirito agreed to an extension until November 14, 1986. Respondent, however, neither filed an answer nor contacted Spirito.

Garabet and his wife reconciled in late November 1986. He telephoned respondent's offices to

10. Section 6068 (e) provides that an attorney has the duty to maintain the confidences and preserve the secrets of clients.

Former rule 8-101(B)(4) required that upon request from a client, an attorney promptly deliver funds which the client was entitled to receive.

11. Also, the hearing judge determined that respondent misappropriated the advanced costs of $377 because the balance in her general business account repeatedly fell below $377 and reached $0 on September 14, 1987. We conclude that respondent used the advanced costs for her own purposes but agree with the hearing judge that this conduct was a wilful violation of former rule 8-101(A) and not a violation of section 6106.

advise her of the reconciliation, but was not able to reach her.[12]

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 6068 (m), and 6106 and former rules 2-111(A)(3)[13] **[6 - see fn. 13]** and 6-101(A)(2).

a. Sections 6068 (a), 6068 (m), 6103, and 6106 and former rule 2-111(A)(3)

The hearing judge concluded that respondent did not violate sections 6068 (m) and 6106 and former rule 2-111(A)(3). We agree. On review, the State Bar does not dispute the hearing judge's conclusions regarding these charges.

b. Former rule 6-101(A)(2)

As discussed *ante*, as to other counts, former rule 6-101(A)(2) prohibited the intentional, reckless, or repeated failure to perform legal services competently. The hearing judge determined that respondent wilfully violated former rule 6-101(A)(2) insofar as she did not file an answer to the marital dissolution petition. The hearing judge did not explicitly characterize respondent's misconduct as reckless.

We conclude that respondent wilfully violated former rule 6-101(A)(2). By neither filing an answer nor contacting Spirito, respondent recklessly failed to provide competent legal services.

Respondent argues that the hearing judge should have found her testimony credible rather than Garabet's testimony. Respondent testified that Garabet refused to let her file an answer and told her he had changed attorneys. Garabet testified that he believed respondent had filed an answer and that he did not discharge her, although he told her he had talked with another attorney. The hearing judge chose to credit Garabet's version of the events over respondent's. As we noted *ante* such a determination merits great weight, and the record does not justify disturbing it.

I. Count 9

1. Findings of fact

In late 1985 or early 1986, Shirley Lutgen retained respondent to investigate another person. Respondent obtained some information about this person and hired a private investigator to obtain more information. She received many telephone calls from the investigator and conveyed the information which she received to Lutgen.

In November 1986, Lutgen asked for a written report from the investigator. Although respondent asked the investigator four or five times for a written report, he did not supply a report.

2. Conclusions of law

The State Bar charged respondent with violating rule 8-101(B)(3).[14] The hearing judge found no violation. We agree. On review, the State Bar does not argue that respondent is culpable of violating former rule 8-101(B)(3), and the record provides no reason to reach a contrary conclusion.

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12. For reasons which the record does not clarify, Spirito submitted a request to enter Garabet's default on December 1, 1986. The court rejected this request because it was not in the proper form. On March 12, 1987, Spirito filed a new request to enter Garabet's default. Although the court granted this request, neither Garabet nor his wife pursued the divorce proceeding after their reconciliation.

13. **[6]** The notice to show cause erroneously charged a violation of former rule 2-111(A)(2). Yet the factual allegations of the notice alleged that respondent had not refunded unearned fees, the subject of former rule 2-111(A)(3). Respondent did not argue that she lacked adequate notice of the former rule 2-111(A)(3) charge.

14. In part, former rule 8-101(B)(3) required attorneys to maintain complete records of all client funds and render appropriate accounts to clients.

J. Count 10

1. Findings of fact

Lutgen had also retained respondent in August 1984 to pursue collection claims on her company's behalf against T.G. Frances and Sherman Plumbing. In 1985, respondent filed and served a complaint against T.G. Frances. She also filed, but did not serve, a complaint against Sherman Plumbing. Thereafter, she engaged in no discovery and took no further action in either matter.

In March 1987, Lutgen wrote respondent requesting, among other things, updated information about the collection matters. Lutgen advised respondent that if she did not receive a prompt written reply, she would be forced to substitute a new attorney.

Lutgen terminated respondent's employment in April 1987 and obtained new counsel.

2. Conclusions of law

The State Bar charged respondent with violating former rule 6-101(A)(2). As discussed *ante*, former rule 6-101(A)(2) prohibited the intentional, reckless, or repeated failure to perform legal services competently. The hearing judge determined that respondent wilfully violated former rule 6-101(A)(2) in the collection matter against T.G. Frances by not prosecuting the action after serving the complaint and in the collection matter against Sherman Plumbing by not serving the summons and pursuing the action. The hearing judge did not explicitly characterize respondent's misconduct as intentional, reckless, or repeated.

We conclude that respondent wilfully violated former rule 6-101(A)(2). By not serving the complaint against Sherman Plumbing and not pursuing the claims of Golden West Pipe & Supply Company against T.G. Frances and Sherman Plumbing, respondent repeatedly failed to provide competent legal services.

Respondent argues that the hearing judge should have found her testimony credible rather than Lutgen's testimony. Respondent testified that Lutgen directed her not to pursue the collection matters because the claims were uncollectible. Lutgen denied giving such direction. The hearing judge resolved the testimonial conflict in favor of Lutgen and against respondent. These credibility determinations deserve great weight and the record does not justify disturbing them.

The letter of March 1987 supports Lutgen's testimony, whereas respondent failed to produce any documents corroborating her testimony. Such failure is significant, considering that an attorney would be expected to document such a significant client instruction. When a client directs an attorney to stop work on a matter, the attorney ordinarily is expected to write a confirming letter or memorandum. (Cf. *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 43 [ordinary expectation of a confirming letter or accounting from a discharged attorney].)

K. Count 11: Lutgen/Bel-Shore, Inc., Matter

1. Findings of fact

In October 1985, Lutgen also retained respondent to form a Subchapter S corporation called Bel-Shore, Inc. Although respondent prepared articles of incorporation and filed them with the California Secretary of State, she did not prepare or file federal tax form 2553 for Bel-Shore to be treated as a Subchapter S corporation.

In July 1986, the Internal Revenue Service (IRS) sent Lutgen a letter acknowledging the receipt of Bel-Shore's federal income tax form as a Subchapter S corporation, but stating that the IRS had no form 2553 for Bel-Shore. Respondent promised to take care of the problem, but did not do so.

In April 1987, Lutgen terminated respondent's employment and asked for Bel-Shore's file. Respondent did not deliver this file to respondent until October 1987.

2. Conclusions of law

The State Bar charged respondent with violating former rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2).

a. Former rule 2-111(A)(2)

As discussed *ante*, former rule 2-111(A)(2) required a discharged attorney to deliver to a client all papers and property which the client was entitled to receive. The hearing judge concluded that respondent violated former rule 2-111(A)(2) by failing to deliver Bel-Shore's file to Lutgen for five and one-half months. We agree. On review, respondent concedes culpability.

b. Former rule 2-111(A)(3)

As discussed *ante*, former rule 2-111(A)(3) required a discharged attorney to refund promptly any part of a fee which had been paid in advance, but not earned. The hearing judge concluded that the record lacked clear and convincing evidence to support the allegation that respondent violated former rule 2-111(A)(3). We agree. The State Bar's brief on review does not dispute this conclusion.

c. Former rule 6-101(A)(2)

As discussed *ante*, former rule 6-101(A)(2) prohibited the intentional, reckless, or repeated failure to perform legal services competently. The hearing judge determined that respondent wilfully violated former rule 6-101(A)(2) by not preparing and filing the federal tax form 2553 for Bel-Shore to be treated as a Subchapter S corporation. The hearing judge did not specify whether he considered respondent's misconduct to be intentional, reckless, or repeated.

We conclude that respondent wilfully violated former rule 6-101(A)(2). After Lutgen received the IRS's letter and respondent promised to take care of the problem, her inaction constituted a reckless failure to provide competent legal services.

Again, respondent attacks the hearing judge's credibility determinations. Respondent testified that Lutgen never asked her to file a federal tax form 2553 for Bel-Shore to be treated as a Subchapter S corporation or mentioned the IRS's letter to her. Lutgen testified otherwise. The hearing judge resolved this testimonial conflict in favor of Lutgen and against respondent. These credibility determinations warrant great weight, and the record does not justify disturbing them. This count yields another example of the client's testimony supported by documentary evidence contrasted to respondent's unsupported testimony.

L. Count 12: Luzano Matter

1. Findings of fact

In 1981, Augustina and Joe Luzano[15] retained respondent to prevent a trustee's sale of their home. Respondent filed a fraud action on their behalf against a lender and others, as well as a motion for a preliminary injunction to stop the lender from foreclosing on the Luzanos' home. The court granted this motion, and respondent drafted the preliminary injunction order, which was filed in February 1982. Among other provisions, the order required respondent to keep a check for $7,987.21 from the lender in an interest-bearing trust account for the benefit of the Luzanos.

Respondent complied with this requirement until January 15, 1986, when she withdrew the funds, which amounted to $9,699.97, in the form of a cashier's check. She ascribed the withdrawal to the facts that she had moved her office, that the bank's location was no longer convenient for her, and that the interest rate on the account had declined. Respondent held the cashier's check in her safety deposit box at another bank until September 8, 1986, when she deposited the funds in another interest-bearing trust account.

In February 1988, the Luzanos met with respondent and asked her to complete their case. She promised to contact the Luzanos in about a month, yet did not do so. They then tried many times to talk with her by telephone, but could not reach her. In 1989, they retained another attorney to represent them.

15. The Luzanos were Spanish-speaking. Augustina also spoke some English, but neither Luzano could read English.

2. Conclusions of law

The State Bar charged respondent with violating sections 6068 (m), 6103, and 6106 and former rule 8-101(A).

a. Section 6068 (m)

As noted *ante*, section 6068 (m) requires that an attorney respond promptly to reasonable status inquiries from a client. The hearing judge concluded that respondent violated section 6068 (m) because she did not contact the Luzanos after their meeting of February 1988 and respond to their subsequent telephone calls. We agree.

Respondent once more attacks the credibility determinations of the hearing judge, who believed Augustine Luzano's testimony rather than respondent's testimony. The record does not justify reversing the credibility determinations, which deserve great weight.

b. Section 6103

Section 6103 provides that the disobedience of a court order constitutes a cause for suspension or disbarment. The hearing judge concluded that respondent violated section 6103 by failing to comply with the court order of February 1982.

We do not consider this culpability determination appropriate on this record. Pursuant to a stipulation between the parties, the hearing judge ordered the dismissal of the section 6103 charge at the January 1991 pretrial conference. Due process requires adequate notice of the charges. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168-169.) Because respondent had no notice of the section 6103 charge after the filing of the dismissal order, she cannot be held culpable of violating section 6103. On review, the State Bar does not object to the striking of the section 6103 culpability conclusion.

c. Section 6106

As discussed *ante*, section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension. The hearing judge determined that respondent did not violate section 6106 because she had no dishonest or deceitful intent in withdrawing the funds from an interest-bearing trust account in January 1986 and maintaining them in a safety deposit box until September 1986. The State Bar's brief on review does not dispute this determination.

[7a] Pursuant to our obligation of independent review, we conclude that respondent's failure to comply with the court order of February 1982 was an act of moral turpitude in violation of section 6106. In broad terms, any act contrary to honesty and good morals involves moral turpitude. (*Kitsis* v. *State Bar* (1979) 23 Cal.3d 857, 865; *Stanford* v. *State Bar* (1940) 15 Cal.2d 721, 727; see also *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110.) Although an evil intent is not necessary for moral turpitude (*Murray* v. *State Bar* (1985) 40 Cal.3d 575, 582; *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327, 331), some level of guilty knowledge or at least gross negligence is required. (See *In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 241 and cases cited therein.)

[7b] The record does not clarify whether respondent remembered the requirement from the order of February 1982 to keep the funds in an interest-bearing trust account when she withdrew them in January 1986 and kept them in a safety deposit box for eight months. If she was aware of the requirement, her disobedience of the order was intentional. If she was not aware of the requirement, she was grossly negligent. In either event, her failure to comply with the important provisions of the order violated section 6106.

e. Former rule 8-101(A)

As discussed *ante*, former rule 8-101(A) required an attorney to maintain all funds held for the benefit of clients in a trust account. The hearing judge concluded that respondent's failure to promptly redeposit in a trust account funds held for the benefit of the Luzanos after she withdrew them violated former rule 8-101(A). Respondent does not dispute culpability on this charge.

We agree that respondent violated former rule 8-101(A). Yet because the misconduct underlying the former rule 8-101(A) charge is the misconduct covered by the section 6106 charge, which supports identical or greater discipline, we give no additional weight to the former rule 8-101(A) charge in determining the appropriate discipline.

M. Count 13: Lutgen/Luzano Matter

1. Findings of fact

In early 1985, Respondent arranged for Shirley Lutgen to loan $5,000 to Augustina and Joe Luzano. Respondent's client in the loan transaction was Lutgen. Another attorney represented the Luzanos regarding the loan.

Respondent orally advised Lutgen that the Luzanos were her clients in another matter. Also, the Luzanos knew that Lutgen was respondent's client in another matter. Respondent did not, however, obtain written consent from either Lutgen or the Luzanos.

2. Conclusions of law

The State Bar charged respondent with violating former rule 5-102. Subdivision (A) of former rule 5-102 prohibited an attorney from accepting employment without disclosing any relationship with the adverse party and required the attorney to obtain the client's written consent to such employment. We agree with the hearing judge's conclusion that respondent violated subdivision (A) of the rule by failing to obtain written consent from Lutgen and the Luzanos.

Because respondent represented Lutgen and had a relationship with the Luzanos in other matters, subdivision (A) of former rule 5-102 required her to get Lutgen's written consent. Because she represented the Luzanos in another matter and had a relationship with Lutgen, subdivision (A) of former rule 5-102 also made it necessary for her to get the Luzanos written consent. She obtained written consent from neither Lutgen nor the Luzanos. On review, respondent concedes culpability under former rule 5-102.

N. Count 14: Pattern of Misconduct

1. Findings of fact

The hearing judge's findings in count 14 incorporate by reference the findings of fact of nine previous counts: 1, 2, 4, 5, 6, 7, 8, 10, and 11, which we have adopted as set forth *ante*.

2. Conclusions of law

The State Bar charged respondent with violating section 6106 and former rules 6-101(A)(2) and 6-101(B)(2).

a. Section 6106

As discussed *ante*, section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension. The hearing judge found respondent not culpable of violating section 6106 on the grounds that a culpability conclusion in count 14 would unnecessarily duplicate prior culpability conclusions.

[8] Applying relevant decisions, we must disagree with the hearing judge on this point. An attorney's habitual disregard of clients' interests involves moral turpitude even if such disregard results only from carelessness or gross negligence. (*Grove* v. *State Bar* (1967) 66 Cal.2d 680, 683-684; see also *Martin v. State Bar* (1978) 20 Cal.3d 717, 722; *Selznick* v. *State Bar* (1976) 16 Cal.3d 704, 709.) In counts 1, 2, 4, 6, 8, 10, and 11, respondent recklessly or repeatedly failed to provide competent legal services. In counts 2, 4, 5, and 11, she failed to return files properly to clients. Taken together, these failures constitute habitual disregard of clients' interests and amount to moral turpitude in violation of section 6106. (Cf. *In the Matter of Collins* (Rev. Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 14-15 [the number and similarity of misappropriations warranted the conclusion that the attorney engaged in a pattern of disregard of clients' interests amounting to moral turpitude].)

b. Former rule 6-101(A)(2)

As discussed *ante*, former rule 6-101(A)(2) forbade the intentional, reckless, or repeated failure to perform legal services competently. Again, the hearing judge found respondent not culpable on the grounds that a culpability conclusion in count 14 would unnecessarily duplicate prior culpability conclusions.

We agree that respondent should not be found culpable, but for a different reason. Pursuant to stipulation between the parties, the hearing judge struck the former rule 6-101(A)(2) charge from this count of the notice to show cause on December 5, 1991. Thus, due process precludes a culpability determination. (Cf. *In the Matter of Glasser, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 168-169.)

c. Former rule 6-101(B)(2)

Under former rule 6-101(B)(2), unless an attorney associated or consulted another lawyer whom the attorney reasonably believed to be competent, the attorney was prohibited from repeatedly accepting employment or continuing representation in legal matters when the attorney reasonably should have known that the attorney did not have, or would not acquire before performance was required, sufficient time, resources, and ability to provide competent legal services. We agree with the hearing judge's conclusion that respondent's misconduct in prior counts reflected her repeated failure to devote sufficient time and resources to complete matters with competence.

On review, both respondent and the State Bar argue that the results of respondent's challenges to the culpability conclusions in prior counts determine the result of her challenge to the former rule 6-101(B)(2) culpability conclusion. Because her other challenges were largely unsuccessful, her challenge to the current culpability conclusion fails.

O. Aggravating Circumstances

The hearing judge found the following aggravating circumstances: multiple acts of wrongdoing and a pattern of misconduct (std. 1.2(b)(ii)); significant harm to clients, including Hyman Crippen, Leon Garabet, the Burkes, and Shirley Lutgen (std. 1.2(b)(iv)); and significant harm to the administration of justice because of the deliberately false statement in the declaration submitted in count 3. (Std. 1.2(b)(iv).)

We conclude that the record clearly and convincingly establishes a pattern of misconduct: respondent's habitual disregard of clients' interests in counts 1, 2, 4, 5, 6, 8, 10, and 11. Yet because of our culpability determination about this pattern in count 14, attaching additional weight to it as an aggravating circumstance would be duplicative and inappropriate.

We conclude that the record proves significant harm to Crippen and Garabet, but not the Burkes and Lutgen. Crippen lost his cause of action, and Garabet suffered a default judgment. That they eventually obtained malpractice settlements does not undermine our conclusion. The record, however, lacks clear and convincing evidence that respondent significantly injured other clients.

The record shows that respondent significantly hurt the administration of justice by making a dishonest statement to the Oklahoma court in count 3, since the statement may have led the court to delay a hearing for nearly two months.

Pursuant to our obligation of independent review, we conclude that respondent's uncharged violations of former rules 6-101 and 6-101(A)(2) in count 1 are an aggravating circumstances under standard 1.2(b)(iii).

P. Mitigating Circumstance

The hearing judge found two significant mitigating circumstances: the grave illnesses of respondent's husband (std. 1.2(e)(iv)) and the favorable character testimony by three attorneys and three clients who were generally aware of the charges against respondent. (Std. 1.2(e)(vi).)

We can give only limited weight to the health problems of respondent's husband because her distraction over these problems correlates with little of

her misconduct. The record establishes that these problems absorbed respondent's attention at two periods: (1) from the middle of July to the middle of October in 1987 and (2) from late December 1988 through March 1989. Thus, her husband's illnesses completely overlapped her misconduct in count 5 and largely overlapped her misconduct in counts 4 and 7. Yet only partial overlap occurred in counts 2, 6, 11, and 14; and none existed in counts 1, 3, 8, 10, 12, and 13.

[9] We also give limited weight to the testimony by character witnesses on respondent's behalf. Although they provided positive character assessments, the three attorneys and three clients who testified hardly constituted a broad range of references from the legal and general communities. (Cf. *Grim* v. *State Bar*, *supra*, 53 Cal.3d at pp. 28-29 [considerable weight given to testimony by ten witnesses and letters from three clients]; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628 [character testimony by two clients and one attorney discounted as not extensive]; *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 107-108 [significant weight given to testimony by a wide spectrum of very credible sources and to more than 30 letters and declarations from well respected members of the attorney's community].)

Q. Discipline

The hearing judge recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until respondent makes restitution and proves rehabilitation, present fitness to practice, and present learning and ability in the general law at a hearing under standard 1.4(c)(ii). Respondent suggests that even if all the hearing judge's culpability determinations are affirmed, the appropriate discipline is actual suspension for only one year. The State Bar supports the hearing judge's recommendation, but also notes that disbarment is appropriate for the number and types of respondent's violations.

In determining the proper discipline, we first seek guidance from the standards. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 628.) Standard 1.3 provides that the primary purposes of discipline are 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. Under standard 1.6(a), if the court finds several acts of wrongdoing and if the standards prescribe different sanctions for these acts, the discipline to be imposed is the most severe of the different applicable sanctions. Of the various standards applicable to respondent's acts of wrongdoing, the one with the most severe sanction is standard 2.3, which calls for the disbarment or actual suspension of an attorney culpable of moral turpitude or intentional dishonesty toward a court.

In determining the proper discipline, we examine whether the recommended discipline is consistent with the discipline imposed in similar proceedings. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 160.) Yet no fixed formula binds our determination. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316.) Our task is to analyze all relevant factors. (*Grim* v. *State Bar*, *supra*, 53 Cal.3d at p. 35; *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at p. 316.) Following the Supreme Court's standard: "'Our principle concern is always the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standard for attorneys.'" (*Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1055, quoting *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 132.)

[10b] Respondent's misconduct was quite serious and wide-ranging. She filed two intentionally dishonest declarations with courts, disobeyed a court order which she, herself, had submitted for the court's approval, and habitually disregarded her clients' interests. In seven counts, she recklessly or repeatedly failed to provide competent legal services. In four counts, she did not properly forward clients' files. In two counts, she did not properly communicate with clients. Also, she failed to keep advanced costs in a trust account, failed to obtain written consent from clients who were adverse parties, and

accepted employment from clients or continued representation of clients when she lacked sufficient time and resources for competent completion of their matters. As discussed *ante*, the current proceeding involves significant aggravating circumstances and limited mitigating circumstances. Very importantly, this large record of misconduct commenced only two years after respondent's admission and continued for over seven years thereafter.

Respondent argues that even if we affirm the hearing judge's culpability conclusions, a comparable case is *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071. Silva-Vidor stipulated to facts which showed a pattern of misconduct involving abandonments of clients, misrepresentations, misappropriations, and other ethical violations. Yet most of this misconduct occurred when she was experiencing severe financial, personal health and emotional problems. By the time of the disciplinary proceeding, she had substantially recovered from these problems. Also, she fully cooperated with the State Bar and entered into as stipulation as to facts and culpability in order to simplify the disciplinary proceeding. Stressing these mitigating circumstances, the Supreme Court ordered a five-year stayed suspension and five-year probation, conditioned on actual suspension for only one year.

The current proceeding is easily distinguishable from *Silva-Vidor* v. *State Bar, supra*. As discussed *ante*, respondent's two periods of inattention to her duties resulting from her husband's grave illnesses correlate with little of her misconduct. Nor did respondent show the same degree of cooperation with the State Bar as did Silva-Vidor.

[10a] Cases of the magnitude and wide range of misconduct similar to that here have typically resulted in disbarment, notwithstanding the attorney's lack of a prior record of discipline or even with some mitigation present. (See *Read* v. *State Bar* (1991) 53 Cal.3d 394; [13 matters of serious misconduct; inability to attribute severe emotional and financial problems to all of lawyer's misconduct; inadequate recognition of misdeeds]; *In re Billings* (1990) 50 Cal.3d 358 [18 matters of misconduct over a lengthy period causally connected to alcohol abuse but with insufficient evidence of successful rehabilitation]; *Coombs* v. *State Bar* (1989) 49 Cal.3d 679 [13 matters of misconduct with extremely modest mitigation compared to substantial aggravation; no proof of sustained freedom from alcohol abuse]; *In the Matter of Collins, supra*, 2 Cal. State Bar Ct. Rptr. 1 [14 matters of misconduct spanning six of nine years of law practice; inadequate evidence of rehabilitation].)

In addition to *Silva-Vidor* v. *State Bar, supra*, 49 Cal.3d 1071, we read past decisions of the Supreme Court or of our court for suspension to have involved less serious or narrower misconduct or more mitigation than found in this record. (See *Hawes* v. *State Bar* (1990) 51 Cal.3d 587 [six matters of misconduct, evidence that mental disorder and addictive alcohol and drug abuse causally contributed to misconduct; and demonstration of meaningful and sustained period of rehabilitation]; *Young* v. *State Bar* (1990) 50 Cal.3d 1204 [cooperation with Bar by stipulation to nine matters of misconduct mitigated by illness with hepatitis and pressures of practice, no client substantially harmed; remorse shown]; *Pineda* v. *State Bar* (1989) 49 Cal.3d 753 [cooperation with Bar by stipulation to seven matters of misconduct; demonstration of remorse by law practice reform]; *In the Matter of Frazier, supra*, 1 Cal. State Bar Ct. Rptr. 676 [six matters of misconduct, evidence of acute psychological problems which contributed to some misconduct coupled with some evidence of rehabilitation].)

[10c] On this record, the public is entitled to the protection of a formal reinstatement proceeding to ensure respondent's fitness to practice before she is again allowed to practice law.

III. RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Sharon L. Myrdall, be disbarred from the practice of law in this State. We also recommend that she be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of rule

955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court order. We further recommend that the State Bar be awarded costs under section 6086.10 of the Business and Professions Code.

We concur:

NORIAN, J.
PEARLMAN, P.J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GLORIA BRIMBERRY

A Member of the State Bar

Nos. 86-O-14915, 90-O-14748

Filed October 19, 1995

SUMMARY

Respondent committed multiple acts of egregious misconduct. In one matter, she signed her client's signature without authorization, deliberately misrepresented her client's county of residence, misappropriated $2,000, and repeatedly displayed gross negligence in providing legal services. In a second matter, respondent offered an illegal finder's fee. In a third matter, acting solely for her own immediate financial gain and totally against her client's interest, respondent knowingly filed pleadings with the false assertion that her client's case had settled; she also deliberately appeared in court without authorization and intentionally made false representations to the court after the client had terminated her employment and rejected the settlement. In a fourth matter, respondent failed to return $4,700 in unearned advanced fees to her client and to provide the client with a prompt, accurate accounting. The hearing judge recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for six months and until restitution. (Hon. Elliot R. Smith, Hearing Judge Pro Tempore.)

Respondent requested review. She attacked most of the hearing judge's factual findings and all of his culpability conclusions. The review department adopted almost all of the hearing judge's material findings, and, to protect the public, as well as to maintain high professional standards and public confidence in the legal profession, recommended disbarment.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Gloria J. Brimberry, in pro. per.

HEADNOTES

[1] **130 Procedure—Procedure on Review**
139 Procedure—Miscellaneous
The State Bar Court must address all charges unless they are dismissed on motion of the prosecutor.

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] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous

Delay in prosecution bars a disciplinary proceeding only if the delay caused specific actual prejudice resulting in the denial of a fair trial.

[3] **166 Independent Review of Record**
1093 Substantive Issues re Discipline—Inadequacy

Regardless of who seeks review, the review department has the authority and obligation to conduct de novo review and to increase the discipline, if appropriate.

[4 a, b] **822.10 Standards—Misappropriation—Disbarment**
831.90 Standards—Moral Turpitude—Disbarment

Disbarment was recommended where respondent's culpability arose from a record exceptional in displaying respondent's repeated, deliberate overreaching of her clients for personal gain, and her repeated dishonesty, where respondent also demonstrated complete lack of recognition of the most basic duties of attorneys in this state, and where respondent's misconduct arose just four years after her admission. In each of the three most serious matters, respondent became an advocate against her client, unabashedly disregarding her clients' instructions in order to maximize her fees, and she threw aside a lawyer's fundamental duty of honesty during her protracted, stubborn pursuit of personal gain. The review department concluded that only disbarment could give the level of protection the public and the courts deserve.

ADDITIONAL ANALYSIS

Culpability

Found

213.41 Section 6068(d)
220.31 Section 6104
221.11 Section 6106—Deliberate Dishonesty/Fraud
252.41 Rule 1-320(B) [former 3-102(B)]
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
290.01 Rule 4-200 (former 2-107)
320.01 Rule 5-200 [former 7-105(1)]

Not Found

213.15 Section 6068(a)
280.05 Rule 4-100(A) [former 8-101(A)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
290.05 Rule 4-200 [former 2-107]
490.05 Miscellaneous Misconduct

Aggravation

Found

521 Multiple Acts
561 Uncharged Violations
582.10 Harm to Client
586.11 Harm to Administration of Justice
611 Lack of Candor—Bar
621 Lack of Remorse

Found but Discounted

603 Lack of Candor—Victim

Discipline

1010 Disbarment

Other

178.10 Costs—Imposed

OPINION

PEARLMAN, P.J.:

This case presents very important public protection issues. We notified the parties at oral argument that we considered the discipline recommended by the hearing judge pro tempore—and urged below by the State Bar—to be seriously inadequate in light of the fact that respondent, Gloria Brimberry, was found to have engaged in multiple acts of egregious misconduct over a several-year period starting just four years after her admission to the State Bar.

In one matter,[1] respondent signed her client's signature without authorization, deliberately misrepresented her client's county of residence, misappropriated $2,000 in excess of an agreed $500 fee, and repeatedly displayed gross negligence in providing legal services to a minor client.

In another matter,[2] respondent offered an illegal finder's fee to a client for helping her to obtain another client.

In a third matter, respondent knowingly filed pleadings falsely asserting that a case had settled, deliberately appeared in court without authorization, and intentionally made false representations to the court after the client had terminated her employment and rejected the settlement. Respondent did so solely for her own immediate financial gain in seeking a $20,000 fee and totally against her former client's interest.

In a fourth matter, respondent failed to return $4,700 in unearned advanced fees to a church which sought her services in a contract dispute but then notified her immediately thereafter to cease work. She did not provide the church with a prompt or accurate accounting. In aggravation, she never acknowledged the church's right to restitution, nor made any payments to honor a final judgment obtained by the church against her.

At the hearing level, the deputy trial counsel originally recommended a one-year stayed suspension and three-year probation, conditioned on actual suspension for only three months. In a later trial brief on discipline, the deputy trial counsel increased the State Bar's recommendation to a two-year stayed suspension and three-year probation, conditioned on actual suspension for six months.

In his decision, the hearing judge pro tempore concluded that respondent's actions toward the client in the third matter "were reprehensible, corrupt, dishonest and involved moral turpitude." He further noted that "her competency in many areas of the law is lacking" and that when "she makes a competency mistake she seems to abandon her basic honesty and concentrate on simple greed, at the expense of her clients." The hearing judge then recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for six months and until respondent makes restitution.

Only respondent sought review. She attacked most of the hearing judge's factual findings and all of his culpability conclusions. The State Bar originally sought to have the respondent's request for review dismissed on procedural grounds; such dismissal would have caused the hearing judge's recommendation of a six-month actual suspension to be transmitted directly to the Supreme Court for its administrative review. Thereafter, the State Bar filed a brief in support of all of the hearing judge's culpability determinations, characterizing respondent's violations as blatant and describing respondent as having betrayed the trust of her clients and the courts. In that brief, the State Bar characterized the recommendation of the hearing judge as "somewhat lenient" and "at the low end of the acceptable range." Focus-

1. This matter was originally dismissed by the State Bar's Office of the Chief Trial Counsel (State Bar) in 1987 and reinstated in 1990 following the recommendation of the Complainants' Grievance Panel upon the successful appeal of the complaining witness.

2. This matter was also originally dismissed by the State Bar and later reinstated.

ing on respondent's delay of proceedings on appeal,[3] the State Bar recommended that the minimum level of discipline be increased to one year of actual suspension.[4]

At oral argument, in response to questioning from the bench, counsel for the State Bar stated that respondent constituted a current risk to the public with a complete lack of insight into her misconduct, posing "a danger to . . . clients and the profession," as well as the administration of justice. The State Bar then indicated that it would support a greater sanction than actual suspension for one year, if this court considered it warranted, but offered no precedential guideposts as to the appropriate greater discipline.

Based on Supreme Court precedent and prior opinions of this court in analogous cases, we have on our own initiative felt compelled to consider disbarment. Being fully cognizant of the effect disbarment has on any lawyer, particularly one who has apparently struggled so hard as respondent has to achieve a legal career, nonetheless we have concluded that disbarment is necessary for public protection, as well as maintenance of high professional standards and public confidence in the integrity of the profession. We do not believe that any lesser discipline would do justice in addressing the repeated lack of fidelity to her oath respondent has demonstrated in discharging her responsibilities to the courts and her clients.

I. PROCEDURAL HISTORY

In 1991, the State Bar filed an initial and amended notice to show cause against respondent in case number 86-O-14915, as well as a notice to show cause in case number 90-O-14748. The State Bar Court consolidated these cases, which came to trial in 1993. After the hearing judge's decision, respondent filed a reconsideration motion, which the hearing judge denied. Respondent then sought review.

II. DISCUSSION

We must independently review the record and may make findings, conclusions, and a decision or recommendation different from those made by the hearing judge. (Rules Proc. of State Bar, title II, State Bar Court Proceedings (eff. Jan. 1, 1995), rule 305(a); former Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9.) The hearing judge in the instant case did a careful job analyzing the offers of proof in light of the State Bar's burden to provide culpability by clear and convincing evidence (see, e.g., *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725), and we adopt almost all of his material factual findings with modifications and additional findings as noted herein.

A. Count 1 of Case Number 86-O-14915

The first amended notice to show cause charged respondent in count one with wilfully violating fifteen statutes and rules: sections 6068 (a), 6068 (d), and 6106 of the Business and Professions Code; rules 2-107, 6-101(A)(2), 6-101(B)(2), 7-105, 8-101(A), and 8-101(B)(4) of the former Rules of Professional Conduct, which were in effect from January 1, 1975, through May 26, 1989; and rules 3-110(A), 3-110(B), 4-100(A), 4-100(B)(4), 4-200, and 5-200 of the current Rules of Professional Conduct, which have been in effect since May 27, 1989.[5] As noted *post*, many of those charges were duplicative and, if proved,

3. Respondent failed to make timely payment of transcript costs, to assist in preparing a statement concerning lost testimony of a witness, and to file a timely opening brief.

4. At oral argument, counsel for the State Bar requested that the review department also include the common provision that if respondent fails to complete restitution in a timely manner and, as a consequence, remains actually suspended for more than two years, she should be required under standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct (standards) to prove rehabilitation, present fitness to practice law and present learning and ability in the general law before she is relieved of actual suspension.

5. Unless otherwise indicated, all further references to sections denote sections of the Business and Professions Code; all references to former rules denote provisions of the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989; and all references to current rules denote provisions of the Rules of Professional Conduct in effect from May 27, 1989, onwards.

would not result in greater discipline. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 ["[L]ittle, if any, purpose is served by duplicative allegations of misconduct."].) **[1]** Nonetheless, all charges must be addressed by the court unless dismissed on motion of the prosecutor.[6]

The following facts were established in the record in support of count one. In 1984, a car accident injured Bobbie Rufus, an adult, and Cory Rufus, her nine-year-old daughter. In 1985, Bobbie Rufus negotiated a $7,500 settlement for her daughter and asked respondent to review the settlement papers. Respondent agreed to do so and to handle the $7,500 settlement for a $500 fee.

Also, respondent suggested that in the event of any additional recovery, she would be willing to accept a 25 percent contingency fee instead of her usual 33 1/3 percent contingency fee. Bobbie Rufus agreed to this arrangement, which applied only to funds in excess of the initial $7,500 settlement.

Respondent delivered to Bobbie Rufus a document entitled "Retainer Agreement," which stated that respondent would receive a 33 1/3 percent contingency fee for a recovery prior to court filing. Next to the fee clause was the handwritten phrase "Subject to court approval if necessary." Believing that this printed document only provided respondent a contingent fee on any additional recovery above the $7,500 settlement, Bobbie Rufus signed the document for Cory Rufus.

After unsuccessfully attempting to recover more compensation for Cory Rufus, respondent recommended that Bobbie Rufus accept the $7,500 settlement. In June 1986, respondent prepared a petition for the compromise of the disputed claim of a minor under Probate Code section 3500. Although respondent knew that Bobbie and Cory Rufus resided in Kern County, she listed a Los Angeles address for them and filed the petition in Los Angeles County Superior Court.

Without authorization from Bobbie Rufus, respondent signed Bobbie Rufus's name on the petition. During the disciplinary proceeding, respondent claimed to have signed the petition pursuant to the provisions of Code of Civil Procedure section 446, which allows an attorney to sign a document for a client absent from the county. Respondent did not, however, file the affidavit required by section 446.

In the petition, respondent requested attorney's fees of $1,875. This sum represented 25 percent of the $7,500 settlement.

The superior court scheduled a hearing on the petition in July 1986. Sometime before this hearing, respondent received the $7,500 settlement check, which she deposited in her trust account. Incorrectly considering court approval of the settlement to be optional, respondent did not appear at the July 1986 hearing. Bobbie Rufus also failed to appear, although the reason for this failure is not clear.

The superior court continued the hearing on the petition to August 1986. No one appeared at this hearing. On the evening before the hearing, respondent told Bobbie Rufus that she and her daughter did not have to attend the hearing. The superior court continued the hearing to September 1986. Again, no one appeared.

Several days later, respondent distributed the settlement without court approval. At the disciplinary hearing, respondent testified that she believed she could make the distribution without court approval under former Probate Code section 3401,

6. As we noted in *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 634: "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 [State Bar] may dismiss charges in the notice to show cause. Rule 1222(k) of the [former] Provisional Rules of Practice [see new rule 1223(k), State Bar Court Rules of Practice (eff. Jan. 1, 1995)] 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."

which allowed a parent to receive funds belonging to a minor if the total amount did not exceed $5,000. Although the total amount of the settlement was $7,500, respondent apparently tried to come within the ambit of former Probate Code section 3401 by paying herself an attorney's fee of $2,500, which she referred to as her "standard fee." Respondent, however, violated former Probate Code section 3302, which made a contract for attorney's fees for litigation services on behalf of a minor void without court approval. Further, respondent disregarded both her 1985 agreement to take a fee of only $500 plus 25 percent of any recovery over $7,500 and her request in the petition for attorney's fees of $1875. The hearing judge found she did not even earn the $500 fee insofar as she failed to review the agreement properly and handle the settlement correctly.

Respondent sent two checks to Bobbie Rufus. One check for $4,500 was made payable to Bobbie Rufus as guardian for Cory Rufus. The other check for $500 was made payable to Bobbie Rufus to cover expenses for Cory Rufus, although Bobbie Rufus had never requested reimbursement for expenses. The record reveals no justification for reducing Cory Rufus's share by $500.

In early October 1986, Bobbie Rufus sent respondent a letter complaining about the fee which respondent had taken and stressing that they had agreed to a fee of $500 plus a share of any recovery over $7,500. Respondent promptly replied that Bobbie Rufus had signed a retainer agreement providing for a fee amounting to one-third of the recovery.

Bobbie Rufus filed a complaint with the State Bar in October 1986. After an initial investigation, the matter was closed in late May 1987. Bobbie Rufus promptly filed a request to reopen the investigation. In early 1990, the State Bar reopened the investigation.[7] During the period of the delay, Bobbie Rufus negotiated the checks for $4,500 and $500.

In December 1990, respondent filed a petition to restore Cory Rufus's settlement petition to the calendar of the Los Angeles County Superior Court. In May 1991, she filed an additional declaration seeking a fee of $2,533.50. She arrived at this figure by adding medical payments of $2,634, the amount which the insurance carrier had paid directly to physicians, to the $7,500 settlement and by then claiming 25 percent of the increased sum of $10,134 as her fee. Respondent officially withdrew from her representation of Cory Rufus in August 1991.

1. Delay

[2] With regard to the Cory Rufus matter, respondent argues that rule 513 of the former Rules of Procedure of the State Bar and the doctrine of laches prevented the reopening of the investigation against her in 1990. We disagree. Because Bobbie Rufus requested review within three months of the closing of the initial investigation in late May 1987, former rule 513 required the Complainants' Grievance Panel to act on her request, as it eventually did. The expiration of more than two and one-half years in this process is regrettable from the point of view of both the Rufuses and respondent, but does not necessarily bar disciplinary proceedings. (See *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 60; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 645.) Respondent must establish that the delay denied her a fair trial by demonstrating specific actual prejudice. (*Rhodes* v. *State Bar*, *supra*, 49 Cal.3d at p. 60; *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 41.) She failed to do so.

2. Section 6068 (a)

The hearing judge determined that respondent violated section 6068 (a) by failing to comply with unspecified Probate Code provisions requiring court approval of Cory Rufus's settlement. Respondent

7. The record does not explain why the delay of more than two and one-half years occurred.

denies all wrongdoing. On review, the State Bar argues that she violated section 6068 (a) by failing to comply with former Probate Code sections[8] 3401, 3410, 3413, 3500, 3601, 3610, and 3611.[9]

Respondent was grossly negligent in failing to comply with Probate Code provisions which required court approval of her attorney's fee and the petition for Cory Rufus and which governed the distribution of the $7,500 settlement. (See former Prob. Code, §§ 3302, 3401, 3500, 3601, 3610, 3611.) The amended notice, however, did not specifically identify the relevant provisions of the Probate Code, and the State Bar made no motion to amend the notice further so that it would specifically identify these provisions. Thus, respondent cannot be found culpable of violating section 6068 (a) on the grounds that she was grossly negligent in failing to comply with Probate Code provisions. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 33-34.) As discussed *post*, however, such misconduct does constitute a basis for culpability under former rule 6-101(A)(2).

3. Sections 6068 (d) and 6106; former rule 7-500; and current rule 5-200

The hearing judge determined that respondent intentionally misrepresented the address of Bobbie and Cory Rufus so that she could improperly file the petition in Los Angeles County and save herself the trouble of handling the matter in Kern County, where she knew that the Rufuses lived. Although respondent denies all wrongdoing, we agree with the hearing judge and the State Bar that respondent violated sections 6068 (d) and 6106, as well as former rule 7-105 and current rule 5-200 by intentionally misrepresenting the Rufuses' address. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497.) In addition, we conclude that respondent violated both sections 6068 (d) and 6106, as well as the applicable version of the rule against misleading a tribunal, in two other ways: by intentionally claiming an excessive fee in the 1986 petition and intentionally filing the 1990 petition to restore the 1986 petition without corrections.[10] In addition, respondent violated section 6106 by her misappropriation of $2,000, the only nonduplicative misconduct underlying the section 6106 charge.

4. Former rule 2-107; current rule 4-200

Former rule 2-107(A) prohibits the charging or collection of an illegal or unconscionable fee. The hearing judge determined that respondent violated former rule 2-107 because she acted without court approval in charging and collecting a fee which was both illegal and unconscionable. He determined that she could have been entitled at most to only $500 and was not even entitled to that sum because of her incompetent services. We agree with the hearing judge.

The provisions of current rule 4-200(A) are the same as those of former rule 2-107(A). The hearing judge determined that respondent violated current rule 4-200 in 1991 by claiming fees of $2,533.50 without any legal basis. Respondent disagrees with this determination. We must reverse this culpability determination on procedural grounds. Because the amended notice did not mention the 1991 claim and because the State Bar made no motion to amend the notice further to address the 1991 claim, respondent cannot be found culpable of wilfully violating current rule 4-200(A) on the basis of the 1991 claim.[11]

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8. These sections of the Probate Code were among those repealed effective July 1, 1991. However, the statutes which superceded them continued the sections without change.

9. Under section 6068 (a), an attorney has the duty to support the laws of California. Section 6068 (a) is a conduit for disciplining attorneys who violate laws and are not otherwise disciplinable under the State Bar Act (i.e., section 6000 et seq.).

10. Although the amended notice identified these two additional acts of misconduct, the hearing judge did not address them as bases of culpability under section 6068 (d). Nor did the State Bar do so at the hearing level or on review. However, respondent's intent to claim an excessive fee through a deliberately uncorrected petition follows from the hearing judge's determination that she knew she had agreed to a $500 fee.

11. Uncharged misconduct, however, may be used to establish an aggravating circumstance. (*Grim* v. *State Bar*, *supra*, 53 Cal.3d at p. 34; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 401.)

The amended notice, however, did address respondent's filing her 1990 petition to restore to the court's calendar the uncorrected 1986 petition. Such misconduct makes her culpable of violating current rule 4-200(A).

5. Former rule 6-101(A)(2); current rule 3-110(A)

Former rule 6-101(A)(2) and current rule 3-110(A) prohibit the intentional, reckless, or repeated failure to provide competent legal services. The hearing judge determined that respondent violated these rules by her reckless and repeated failures to perform legal services competently in Cory Rufus's case. The hearing judge specifically mentioned only respondent's failure to obtain required court approval of the settlement.

On review, respondent opposes the determination that she violated former rule 6-101(A)(2) and current rule 3-110(A). The State Bar defends the hearing judge's determinations and also argues that respondent's incompetence included her failure to appear at court hearings, improper signing of Bobbie Rufus's name, failure to obtain court approval for the settlement, and distribution of funds without court approval.

We conclude that respondent violated former rule 6-101(A)(2) by the following intentional acts of dishonesty and repeated acts of gross negligence: her intentional misrepresentation of the Rufuses' address in the 1986 petition; her grossly negligent signing of Bobbie Rufus's name on the 1986 petition when she lacked authorization from Bobbie Rufus; her intentional claim for attorney's fees of $1,875 in the 1986 petition when she knew that Bobbie Rufus had agreed to a fee of only $500; her grossly negligent failure to obtain court approval of the 1986 petition, including her failure to appear at court hearings; her grossly negligent distribution of the $7,500 settlement without court approval; her intentional misappropriation of $2,000; and her grossly negligent distribution of a $500 check to Bobbie Rufus to cover expenses for Cory Rufus when Bobbie Rufus had not requested reimbursement for any expenses and when no justification existed for reducing Cory Rufus's share by $500. Also, we conclude that respondent violated current rule 3-110(A) by her intentional filing of the 1990 petition to restore the uncorrected 1986 petition.[12]

6. Former rule 6-101(B)(2); current rule 3-110(B)

Respondent challenges the hearing judge's determination that respondent violated former rule 6-101(B)(2) and current rule 3-110(B) because she lacked familiarity with the relevant Probate Code sections and failed to consult a competent attorney. Both former rule 6-101(B)(2) and current rule 3-110(B) address an attorney's conduct in multiple legal matters. We conclude that respondent is not culpable of violating either former rule 6-101(B)(2) or rule 3-110(B).

7. Former rule 8-101(A); current rule 4-100(A)

Former rule 8-101(A) required an attorney to keep client funds in a trust account until the attorney's interest in such funds became fixed and to retain disputed funds in a trust account until the resolution of the dispute. Current rule 4-100(A) sets forth the same requirements. The hearing judge determined that respondent violated these rules by failing to maintain the $7,500 settlement in her trust account. We conclude that respondent wilfully violated former rule 8-101(A) by misappropriating $2,000 of an improperly claimed $2,500 fee and distributing the remaining $5,000 of the $7,500 settlement without court approval.[13] We conclude that respondent did not violate current rule 4-100(A) because the relevant misconduct occurred in 1986.

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12. Insofar as the violations of former rule 6-101(A)(2) and current rule 3-110(A) rest on intentional wrongdoing and constitute bases for violations of sections 6068 (d) and 6106, as discussed post, we give no additional weight to them in determining the proper discipline. (See *Bates* v. *State Bar, supra*, 51 Cal.3d at p. 1060.) We do, however, give weight to respondent's repeated acts of gross negligence. (Cf. *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179.)

13. Again, as the misappropriation of the $2,000 formed the basis for the section 6106 violation, we give no additional weight to this aspect of the former 8-101(A) violation in determining the appropriate discipline.

denies all wrongdoing. On review, the State Bar argues that she violated section 6068 (a) by failing to comply with former Probate Code sections[8] 3401, 3410, 3413, 3500, 3601, 3610, and 3611.[9]

Respondent was grossly negligent in failing to comply with Probate Code provisions which required court approval of her attorney's fee and the petition for Cory Rufus and which governed the distribution of the $7,500 settlement. (See former Prob. Code, §§ 3302, 3401, 3500, 3601, 3610, 3611.) The amended notice, however, did not specifically identify the relevant provisions of the Probate Code, and the State Bar made no motion to amend the notice further so that it would specifically identify these provisions. Thus, respondent cannot be found culpable of violating section 6068 (a) on the grounds that she was grossly negligent in failing to comply with Probate Code provisions. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 33-34.) As discussed *post*, however, such misconduct does constitute a basis for culpability under former rule 6-101(A)(2).

3. Sections 6068 (d) and 6106; former rule 7-500; and current rule 5-200

The hearing judge determined that respondent intentionally misrepresented the address of Bobbie and Cory Rufus so that she could improperly file the petition in Los Angeles County and save herself the trouble of handling the matter in Kern County, where she knew that the Rufuses lived. Although respondent denies all wrongdoing, we agree with the hearing judge and the State Bar that respondent violated sections 6068 (d) and 6106, as well as former rule 7-105 and current rule 5-200 by intentionally misrepresenting the Rufuses' address. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497.) In addition, we conclude that respondent violated both sections 6068 (d) and 6106, as well as the applicable version of the rule against misleading a tribunal, in two other ways: by intentionally claiming an excessive fee in the 1986 petition and intentionally filing the 1990 petition to restore the 1986 petition without corrections.[10] In addition, respondent violated section 6106 by her misappropriation of $2,000, the only nonduplicative misconduct underlying the section 6106 charge.

4. Former rule 2-107; current rule 4-200

Former rule 2-107(A) prohibits the charging or collection of an illegal or unconscionable fee. The hearing judge determined that respondent violated former rule 2-107 because she acted without court approval in charging and collecting a fee which was both illegal and unconscionable. He determined that she could have been entitled at most to only $500 and was not even entitled to that sum because of her incompetent services. We agree with the hearing judge.

The provisions of current rule 4-200(A) are the same as those of former rule 2-107(A). The hearing judge determined that respondent violated current rule 4-200 in 1991 by claiming fees of $2,533.50 without any legal basis. Respondent disagrees with this determination. We must reverse this culpability determination on procedural grounds. Because the amended notice did not mention the 1991 claim and because the State Bar made no motion to amend the notice further to address the 1991 claim, respondent cannot be found culpable of wilfully violating current rule 4-200(A) on the basis of the 1991 claim.[11]

8. These sections of the Probate Code were among those repealed effective July 1, 1991. However, the statutes which superceded them continued the sections without change.

9. Under section 6068 (a), an attorney has the duty to support the laws of California. Section 6068 (a) is a conduit for disciplining attorneys who violate laws and are not otherwise disciplinable under the State Bar Act (i.e., section 6000 et seq.).

10. Although the amended notice identified these two additional acts of misconduct, the hearing judge did not address them as bases of culpability under section 6068 (d). Nor did the State Bar do so at the hearing level or on review. However, respondent's intent to claim an excessive fee through a deliberately uncorrected petition follows from the hearing judge's determination that she knew she had agreed to a $500 fee.

11. Uncharged misconduct, however, may be used to establish an aggravating circumstance. (*Grim* v. *State Bar*, *supra*, 53 Cal.3d at p. 34; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 401.)

The amended notice, however, did address respondent's filing her 1990 petition to restore to the court's calendar the uncorrected 1986 petition. Such misconduct makes her culpable of violating current rule 4-200(A).

5. Former rule 6-101(A)(2); current rule 3-110(A)

Former rule 6-101(A)(2) and current rule 3-110(A) prohibit the intentional, reckless, or repeated failure to provide competent legal services. The hearing judge determined that respondent violated these rules by her reckless and repeated failures to perform legal services competently in Cory Rufus's case. The hearing judge specifically mentioned only respondent's failure to obtain required court approval of the settlement.

On review, respondent opposes the determination that she violated former rule 6-101(A)(2) and current rule 3-110(A). The State Bar defends the hearing judge's determinations and also argues that respondent's incompetence included her failure to appear at court hearings, improper signing of Bobbie Rufus's name, failure to obtain court approval for the settlement, and distribution of funds without court approval.

We conclude that respondent violated former rule 6-101(A)(2) by the following intentional acts of dishonesty and repeated acts of gross negligence: her intentional misrepresentation of the Rufuses' address in the 1986 petition; her grossly negligent signing of Bobbie Rufus's name on the 1986 petition when she lacked authorization from Bobbie Rufus; her intentional claim for attorney's fees of $1,875 in the 1986 petition when she knew that Bobbie Rufus had agreed to a fee of only $500; her grossly negligent failure to obtain court approval of the 1986 petition, including her failure to appear at court hearings; her grossly negligent distribution of the $7,500 settlement without court approval; her intentional misappropriation of $2,000; and her grossly negligent distribution of a $500 check to Bobbie Rufus to cover expenses for Cory Rufus when Bobbie Rufus had not requested reimbursement for any expenses and when no justification existed for reducing Cory Rufus's share by $500. Also, we conclude that respondent violated current rule 3-110(A) by her intentional filing of the 1990 petition to restore the uncorrected 1986 petition.[12]

6. Former rule 6-101(B)(2); current rule 3-110(B)

Respondent challenges the hearing judge's determination that respondent violated former rule 6-101(B)(2) and current rule 3-110(B) because she lacked familiarity with the relevant Probate Code sections and failed to consult a competent attorney. Both former rule 6-101(B)(2) and current rule 3-110(B) address an attorney's conduct in multiple legal matters. We conclude that respondent is not culpable of violating either former rule 6-101(B)(2) or rule 3-110(B).

7. Former rule 8-101(A); current rule 4-100(A)

Former rule 8-101(A) required an attorney to keep client funds in a trust account until the attorney's interest in such funds became fixed and to retain disputed funds in a trust account until the resolution of the dispute. Current rule 4-100(A) sets forth the same requirements. The hearing judge determined that respondent violated these rules by failing to maintain the $7,500 settlement in her trust account. We conclude that respondent wilfully violated former rule 8-101(A) by misappropriating $2,000 of an improperly claimed $2,500 fee and distributing the remaining $5,000 of the $7,500 settlement without court approval.[13] We conclude that respondent did not violate current rule 4-100(A) because the relevant misconduct occurred in 1986.

12. Insofar as the violations of former rule 6-101(A)(2) and current rule 3-110(A) rest on intentional wrongdoing and constitute bases for violations of sections 6068 (d) and 6106, as discussed post, we give no additional weight to them in determining the proper discipline. (See *Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060.) We do, however, give weight to respondent's repeated acts of gross negligence. (Cf. *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179.)

13. Again, as the misappropriation of the $2,000 formed the basis for the section 6106 violation, we give no additional weight to this aspect of the former 8-101(A) violation in determining the appropriate discipline.

8. Former rule 8-101(B)(4); current rule 4-100(B)(4)

The hearing judge determined that respondent wilfully violated former rule 8-101(B)(4) and current rule 4-100(B)(4) which require that an attorney promptly pay to a client upon request such funds as the client is entitled to receive, because she did not promptly pay to Bobbie Rufus the funds for Cory Rufus. As discussed *ante*, respondent should not have obtained the settlement funds for Cory Rufus without court approval, paid $500 to Bobbie Rufus for expenses, and taken $2,000 more than the agreed $500 fee. Upon receipt of Bobbie Rufus's complaint letter of early October 1986, respondent should have promptly paid the additional sum to which Cory Rufus was entitled. We conclude that by failing to do so, respondent wilfully violated former rule 8-101(B)(4), but because the misconduct occurred in 1986, respondent did not violate current rule 4-100(B)(4).

B. Count 2 of Case Number 86-O-14915

Bobbie Rufus testified that in 1985, respondent offered her a finder's fee if Rufus could convince her friend Emma Lovies to retain respondent to handle a personal injury matter. Rufus gave respondent's telephone number to Lovies's daughter, who passed it on to Lovies. Later, Lovies employed respondent, although respondent did not pay Rufus a finder's fee.

Former rule 3-102(B) prohibited an attorney from giving or promising a finder's fee. Respondent claims that her own testimony refuted Bobbie Rufus's testimony. The hearing judge, however, made credibility determinations in favor of Rufus and against respondent. Deferring to these determinations, we reject respondent's claim that respondent did not wilfully violate this rule by offering such a fee to Bobbie Rufus.

C. Count 1 of Case Number 90-O-14748

In January 1987, Simi Akin-Olugbade retained respondent to represent her in a personal injury matter. On June 6, 1990, Olugbade discussed possible settlement of the matter with respondent. For the purpose of negotiation, Olugbade signed one release for $50,000 and another release for $75,000, although she modified the waiver provision of the $50,000 release.

On June 7, 1990, Olugbade told respondent that she revoked the releases. At respondent's request Olugbade went with respondent to discuss proposed settlement conditions with the insurance adjuster, who wanted Olugbade to sign an unmodified $50,000 release. Olugbade refused to do so.

In a conversation with respondent on June 8, 1990, Olugbade stated that she no longer wanted respondent to represent her. She repeated this statement in conversations with respondent on June 11 and June 12. Also, Olugbade retained attorney Ola Moore to tell respondent to stop work on her matter and to retrieve her file from respondent. Moore made these requests in a letter of June 22, 1990. Respondent did not reply to this letter.

On June 27, 1990, respondent filed a declaration in support of a motion in superior court to confirm a settlement of the Olugbade matter for $50,000. Neither Olugbade nor Moore knew about this motion. In the declaration, respondent falsely stated that the case had been settled since June 6, 1990; that the parties intended to settle the case; and that the parties wanted the agreement read into the record.

On June 27, 1990, respondent also appeared in court in the Olugbade matter to obtain confirmation of the alleged settlement. Such confirmation would have resulted in respondent's receipt of a $20,000 attorney's fee. We adopt the hearing judge's finding, based on credibility determinations, that respondent's attempt to have the alleged settlement confirmed by the court constituted "a complete and utter betrayal of Olugbade."

Respondent filed additional papers in the Olugbade matter on July 2, 1990. On the same date, Moore sent respondent a second letter asking her to stop work on Olugbade's matter and to return Olugbade's file. Respondent did not promptly reply to this letter.

On July 6, 1990, respondent appeared in court for a second time in the Olugbade matter, although Olugbade did not know about, or consent to, the

appearance. The court denied confirmation of the $50,000 settlement because only one party had signed the release.

The notice to show cause charged respondent with wilfully violating sections 6104 and 6106.

1. Section 6104

Under section 6104, corruptly or wilfully and without authority appearing as an attorney for a party to an action constitutes a cause for disbarment or suspension. The hearing judge determined that respondent violated section 6104 by filing pleadings on June 27 and July 2, 1990, and going to court on June 27 and July 6, 1990, in the Olugbade matter without Olugbade's knowledge or consent and when she knew that Olugbade had terminated her employment.

On review, respondent relies on her own account of events, which the hearing judge rejected in favor of Olugbade's. Respondent gives us no reason why we should not defer to the hearing judge's credibility determination. We conclude that respondent's misconduct was not only wilful and without authority, but also corrupt. Although she knew that Olugbade opposed the settlement and had terminated her employment, she tried to have the court force the settlement on Olugbade for her own financial gain.

2. Section 6106

The hearing judge determined that respondent violated section 6106 by filing pleadings and going to court on Olugbade's behalf after respondent had been repeatedly informed of the termination of the attorney-client relationship and by attempting to force Olugbade to accept a settlement which she knew Olugbade rejected so that she could collect the $20,000 attorney's fee.

We conclude that, by the same conduct which violated section 6104, respondent committed acts of intentional dishonesty, moral turpitude, and corruption in violation of section 6106. In determining the appropriate discipline, we give no additional weight to the section 6106 violation. (See *Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060.)

3. Collateral estoppel

Citing *Faye* v. *Feldman* (1954) 128 Cal.App.2d 319, 328, respondent argues that a Los Angeles Superior Court ruling and the release signed by Olugbade collaterally estop the State Bar from pursuing disciplinary charges against her. The State Bar contends that the doctrine of collateral estoppel does not apply because the State Bar was not a party to the superior court proceeding and does not represent Olugbade in the disciplinary proceeding. Also, the State Bar argues that collateral estoppel would not excuse respondent's misconduct even if it did apply.

We agree with the State Bar that it would not be appropriate to apply collateral estoppel in these circumstances, but hold that respondent's argument must fail in any event because the record establishes that both releases signed by Olugbade were revoked.

D. Count 2 of Case Number 90-O-14748

On Friday afternoon, February 9, 1990, respondent met with Richard Turner and Walter Lias, members of the board of directors of Nineveh Baptist Church, about a dispute between the church and a remodelling contractor. Respondent, who had previously done work for Turner, explained the legal alternatives available to the church, but warned Turner and Lias that pursuing such alternatives might be futile.

Turner and Lias gave respondent a $5,000 check drawn on the church's checking account to cover legal expenses. She neither provided them with a written fee agreement nor stated that the $5,000 was nonrefundable. Turner and Lias believed that respondent would charge them for any work and take her fee out of the $5,000.

Respondent asked Turner and Lias to bring her the church's corporate papers and seal on Monday, February 12, 1990. She told them that she would do no work on the matter until she received the papers and seal. While driving home after the meeting with respondent, Turner and Lias discussed the church's options. They agreed that pursuing a legal action against the contractor would be futile.

Between 3:30 and 4:00 p.m. on February 9, 1990, Lias telephoned respondent's office. On being told that she was not available, he left a message for her. He stated that the church had decided not to pursue a legal action against the contractor, that he would not deliver the church's corporate papers and seal to her, and that the church wanted her to return the $5,000.

Early on Monday, February 12, 1990, Turner telephoned respondent's office. On being told that she was not available, he left a message for her that he wanted her to stop all work for the church against the contractor. Later in the week, respondent returned Turner's telephone call. He asked her about the cost of the work she had done for the church, and she said that she would send him papers.

Turner heard nothing more from respondent until he received a letter dated February 26, 1990, with a document entitled "Declaration of Richard Turner." Respondent provided no accounting, but did refer to an agreement with the church that the $5,000 check was to serve as a nonrefundable retainer. Further, she ascribed to Turner the following statements: that the church had decided to delay litigation action against the contractor and that Turner wanted her to work with him in devising another agreement with the contractor. She knew, however, that there had been no such agreement and that Turner had made no such statements.

After receiving respondent's letter, Turner telephoned respondent several times, but received no reply. Lias also telephoned respondent several times, but received no reply. In November 1990, Lias wrote to respondent to request an accounting and a refund. He received no written reply, although respondent met several times with the church board. She promised to refund part of the $5,000 on one occasion and all of it on another occasion.

Having received neither an accounting nor a refund, the church filed an action against respondent. In April 1991, a trial was held in small claims court. Respondent produced a statement for services rendered which she had purportedly sent to Turner in her letter of February 26, 1991. According to this statement, she had worked a total of 37 hours on the church matter (including 32 hours between Friday, February 9, 1990, and Monday, February 12, 1990), had received a retainer of $5,000, and was due $5,500. The small claims court, however, awarded the church $2,500 plus $28 in costs.

The hearing judge found that respondent did not include the statement for services rendered in her letter of February 26, 1990, and did not give it to the church until the small claims court trial. Further, the hearing judge found that at the disciplinary proceeding, respondent produced no time slips, notes, or other writings related to the complaint which she had purportedly drafted, according to the statement for services rendered. We agree with these findings.

Respondent appealed the small claims court judgment. In July 1991, the superior court awarded the church $3,500 plus $28 in costs. The church then sent respondent a demand letter. As of the disciplinary hearing, respondent had paid nothing to the church. The hearing judge found that respondent was entitled only to $300 for the two-hour meeting which she had with Turner and Lias on February 9, 1990. We agree.

The notice charged respondent with wilfully violating current rules 3-700(D)(2) and 4-100(B)(3).

1. Current rule 3-700(D)(2)

Current rule 3-700(D)(2) requires an attorney whose employment has terminated to refund promptly any unearned part of an advanced fee. We agree with the hearing judge's conclusion that respondent wilfully violated this rule by failing to return $4,700 of unearned fees. Although respondent contends that the $5,000 payment was a true retainer, we defer to the hearing judge's credibility determination against her and in favor of the State Bar's witnesses. Respondent alleges as defenses that the church was not an active corporation and that Turner personally owed her fees for other work. The record does not contain documents supporting these allegations. Even if true, the allegations are irrelevant to her ethical duties to the church.

2. Current rule 4-100(B)(3)

Current rule 4-100(B)(3) requires an attorney to render appropriate accountings to clients. We agree with the hearing judge that respondent wilfully violated this rule by failing to render a prompt accounting to the church.

E. Aggravating Circumstances

The State Bar must prove aggravating circumstances in a disciplinary proceeding by clear and convincing evidence. (Rules Proc. of State Bar (eff. Jan. 1, 1995), title IV, Standards for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b); former Trans. Rules Proc. of State Bar, div. V, Standards for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)

1. Multiple acts of misconduct

We agree with the hearing judge that respondent's multiple acts of wrongdoing constitute an aggravating circumstance. (See std. 1.2(b)(ii).)

2. Dishonesty

As aggravating circumstances, the hearing judge identified various acts of bad faith, dishonesty, concealment, and overreaching by respondent. The State Bar, however, aptly notes that most of these acts should not be considered in aggravation because they constituted the grounds for culpability conclusions. (See *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 11.) We find as an aggravating circumstance that in the Nineveh Baptist Church matter, respondent dishonestly represented to the State Bar Court that she had included the statement for services rendered in her letter of February 26, 1990. (See std. 1.2(b)(vi).)

3. Significant harm to clients

The hearing judge found in aggravation that respondent caused significant injury to her clients and the administration of justice. We agree with the hearing judge. (See std. 1.2(b)(iv).)

4. Indifference to rectifying misconduct

We also agree with the hearing judge that in aggravation respondent has also demonstrated complete indifference to the rectification of her misconduct. (See std. 1.2(b)(v).) She has shown callousness to her former clients and total disinterest in atonement. She has further shown lack of any real insight or understanding as to the gravity of her misconduct. (*Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 317; *Carter* v. *State Bar* (1988) 44 Cal.3d 1091, 1100-1101; but see *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 932-933.)

5. Lack of candor and cooperation

We agree with the hearing judge's finding in aggravation that respondent failed to cooperate with Cory Rufus, Simi Akin-Olugbade, and the Nineveh Baptist Church (see std. 1.2(b)(vi)), although we discount such failure insofar as we have already found that she significantly harmed Rufus and the church. We also agree with the hearing judge's findings in aggravation that respondent repeatedly displayed lack of candor and cooperation during the disciplinary trial, especially by her failure to heed warnings about improper tactics which she persistently tried to pursue. As a further aggravating circumstance, we find that on review respondent repeatedly failed to follow directions and comply with deadlines set forth in our orders.

F. Mitigating Circumstance

An attorney culpable of misconduct in a disciplinary proceeding must prove mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The hearing judge found that respondent established only one mitigating circumstance, a good reputation in the general community, but we must substantially discount this finding because she presented only four character witnesses from the general community and because they did not know the extent of her wrongdoing. (See std. 1.2(e)(vi).)

G. Discipline

The hearing judge recommended a three-year stayed suspension and a three-year probation, conditioned on actual suspension for six months and until respondent makes restitution to Cory Rufus and the Nineveh Baptist Church. As we noted *ante*, respondent claims that the recommendation is excessive while the State Bar's recommendation has gradually increased from its original recommendation of a three-month actual suspension to its position at oral argument on review that respondent be suspended for at least one year and until she makes restitution.

We look initially to the standards for guidance in determining the appropriate discipline. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Twitty* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 664, 676.) Under standard 1.3, the primary purposes of discipline are 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 also *Morse* v. *State Bar* (1995) 11 Cal.4th 184, 205.) If the standards prescribe different sanctions for various acts, the discipline to be imposed is the most severe of the different applicable sanctions. (Std. 1.3.) Of the standards applicable to respondent's acts of wrongdoing, the ones with the most severe sanctions are standards 2.2(a) and 2.3 which could justify either suspension or disbarment.

In determining the proper discipline, no fixed formula applies (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055), but we must consider whether the recommended discipline is consistent with the discipline imposed in similar proceedings. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 160.) As noted *ante*, we give no additional weight to duplicative charges. (*Bates* v. *State Bar, supra*, 51 Cal.3d. at p. 1059 ["[T]he appropriate discipline does not depend on whether multiple labels can be attached to the misconduct . . . ."].)

[3] Although respondent is the only party who sought our review—and she seeks a reduction in the discipline recommended—we have the authority and obligation to conduct de novo review and to increase the discipline if we deem it appropriate to do so whether or not the State Bar has appealed (see, e.g., *Morse v State Bar, supra*, 11 Cal.4th 184, 207;[14] *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, affd. S022164 (Oct. 29, 1991) [review department's disbarment recommendation adopted by the Supreme Court following respondent's appeal of lengthy suspension recommendation by hearing judge]) and whether or not the State Bar has appealed, but urged a lesser sanction (see, e.g., *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, affd. S038422 (Nov. 30, 1993) [Although the State Bar recommended suspension, the review department recommended, and the Supreme Court adopted, a disbarment order.]; *In the Matter of Twitty, supra*, 2 Cal. State Bar Ct. Rptr. 664, 678 [vacating an order approving a stipulation to inadequate discipline and remanding for further proceedings]).

There are ample Supreme Court opinions and review department recommendations adopted by the Supreme Court compelling the conclusion that respondent committed serious misconduct worthy of disbarment or, at a minimum, a very lengthy suspension had sufficient mitigating circumstances been found. Her intentional misrepresentations to courts reflect a "disregard of the fundamental rule of ethics—that of common honesty—without which the [legal] profession is worse than valueless in the place it holds in the administration of justice." (*Borré* v. *State Bar* (1991) 52 Cal.3d 1047, 1053, citing *Levin* v. *State Bar, supra*, 47 Cal.3d 1140, 1147.) Her misappropriation also "violates basic notions of honesty and endangers public confidence in the legal profession." (*Grim* v. *State Bar, supra*, 53 Cal.3d at

14. In that case, the State Bar sought no actual suspension in the hearing department. In response to Morse's request for review, the State Bar sought affirmation of the 15-day suspension recommended by the hearing judge. The review department then recommended a two-month actual suspension, which a six-member majority of the Supreme Court increased to two to three years' actual suspension, depending on Morse's compliance with probation conditions.

p. 29, citing *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 656.) Further, she provided grossly negligent legal services, offered a referral fee, refused to return unearned advanced fees, and failed to give a prompt accounting. She overreached her clients for her personal benefit. Substantial aggravation and minimal mitigation surrounded her misconduct.

Comparable to some of respondent's misconduct is the misconduct in *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d 300. Rodgers entered into an improper business transaction with a client, obtained an interest adverse to a client, commingled client funds, and dishonestly concealed his wrongful conduct from opposing counsel and a probate court. "No act of concealment or dishonesty," observed the Supreme Court, "[was] more reprehensible than Rodgers's attempt to mislead the probate court." (*Id.* at p. 315.) A host of aggravating circumstances, including lack of insight into the wrongfulness of his actions, surrounded his misconduct, although he had practiced law for 20 years with no prior record of discipline. The Supreme Court noted that it had the authority to disbar Rodgers, but considered disbarment unnecessarily drastic under the circumstances, "to achieve the goal we are obligated to achieve." (*Id.* at p. 318) In assessing the appropriate discipline, the Supreme Court further stated, "It is also noteworthy that the State Bar did not seek review of the 90-day actual suspension recommended by the referee." (*Ibid.*) Nonetheless, the Supreme Court imposed a five-year stayed suspension and five-year probation, conditioned on a two-year actual suspension.

The totality of respondent's misconduct is worse than Rodgers'; and unlike Rodgers, respondent has not had a lengthy period of unblemished practice or established any significant mitigating circumstance.

In *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, Hertz prematurely disbursed trust funds for his client's reimbursement and his own attorney's fee, although the funds paid to the client were later determined to have been properly reimbursable and although he replaced the funds withdrawn for his fee. The gravamen of the case was the prolonged deceit which he perpetrated against opposing counsel and the courts. While much aggravation surrounded his misconduct, very reputable character witnesses attested to his otherwise high standing in the legal community and high ethical standards, his diligence on behalf of clients, and his substantial community service and pro bono activities. Also, his stipulation to charges at the outset of the hearing constituted mitigation. We recommended, and the Supreme Court ordered, a five-year stayed suspension and five-year probation, conditioned on actual suspension for two years and until he proved rehabilitation.

Respondent's misconduct surpasses Hertz's which involved only one protracted domestic relations case. She not only engaged in repeated acts of dishonesty towards courts in more than one case, but also committed deliberate misappropriation. Further, unlike Hertz, respondent established no significant mitigation.

The misconduct established in *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 185, is also comparable to some of respondent's misconduct. Over a relatively short period of time following a long career with no prior record of discipline, Lilly commingled about $20,000 of trust funds with his own money, misappropriated the trust funds, and misrepresented to a third party that the funds were in a trust account when he knew they were not. In aggravation, Lilly used funds from a probate estate to make restitution without court approval. In that case, unlike here, the State Bar sought disbarment. However, in light of the fact that Lilly had practiced law for 21 years without prior discipline, we recommended, and the Supreme Court ordered, a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until he proved rehabilitation.

In contrast to Lilly, respondent had only practiced law for four years prior to her misconduct and respondent's misconduct occurred not during a short period of time, but over several years in 1985, 1986, and 1990. Also, respondent's tortuous defense of her dishonesty and incompetence reflects no insight into her misconduct. (See *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at p. 317 [increased discipline warranted by lack of insight].) *Martin* v. *State Bar* (1991) 52 Cal.3d 1055 is also instructive. There, the respondent

received two years actual suspension coupled with the requirement of a standard 1.4(c)(ii) hearing for multiple acts of misconduct in mishandling five client matters during a four-year period. Two members of the Supreme Court would have disbarred Martin. Three of the matters involved dishonesty to clients including one which also involved the attorney's wrongful retention of the client's watch. We consider respondent's misconduct more serous than Martin's as respondent's involved deceit toward courts as well as clients and showed more overreaching of clients than in *Martin*.

The very recent case of *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, is likewise on point. In that case, the respondent exploited a vulnerable relative whom she represented in a personal injury action by improperly borrowing the bulk of the client's net settlement proceeds and not repaying the loan. The judge found a number of aggravating circumstances to offset respondent's eleven years of prior practice without discipline, and we affirmed his recommendation of two years' actual suspension and until proof of compliance with the requirements of standard 1.4(c)(ii). The Supreme Court affirmed that recommendation.

The gravity of the misconduct in *Johnson* is comparable to that in count one of this proceeding against respondent. The additional misconduct against other clients militates in favor of greater discipline, as does the lack of a prior blemish-free career of any cognizable length.

[4a] The findings and conclusions by the hearing judge pro tempore of respondent's culpability arise from a record exceptional in displaying respondent's repeated, deliberate overreaching of her clients for personal gain, and her repeated dishonesty. She also demonstrated complete lack of recognition as recently as at oral argument before us, of the most basic duties of attorneys in this state. We are not faced with individual matters of isolated misconduct as, for example, when an attorney simply fails to perform legal services competently. Here, the findings show alarming similarities of respondent's misconduct arising just four years after admission in the three most serious matters involving Rufus, Olugbade, and the Nineveh Baptist Church. In each, respondent became an advocate against her client, unabashedly disregarding her clients' instructions in order to maximize her fees. In each of these three matters, respondent also threw aside a lawyer's fundamental duty of honesty during her protracted, stubborn pursuit of personal gain. Although we have not dwelt on the one matter involving respondent's promise of payment for a client referral, that matter is related to the other three by its own corrupt character.

[4b] Only a disbarment recommendation can give the level of protection we believe the public and the courts deserve in this case. We strongly believe that respondent should not practice law again without proving her rehabilitation and fitness to practice by clear and convincing evidence of sustained exemplary conduct as is required in a formal reinstatement proceeding. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1089, 1091-1092.)

IV. RECOMMENDATION

For the reasons stated above, we recommend that respondent be disbarred from the practice of law in the State of California. We also recommend that she be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of rule 955 within 30 days and 40 days, respectively after the effective date of the Supreme Court order; we further recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

STOVITZ, J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS JOSEPH BURNS

A Member of the State Bar

Nos. 90-C-17469

Filed October 26, 1995

SUMMARY

Respondent was convicted of assault with a firearm, with the enhancement that he discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another. The hearing judge ordered that respondent be privately reproved without conditions, based on her conclusions regarding the circumstances of the criminal conduct, which she found strongly supported respondent's claim of self-defense, the extensive mitigating and absence of aggravating circumstances, and the period of time respondent was interimly suspended. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar sought review, arguing that the discipline should be increased. The review department concluded that although the facts and circumstances surrounding the conviction, plus the other mitigation, were significant, they were less compelling than found by the hearing judge and did not outweigh the seriousness of respondent's violent felony conviction involving substantial injury to an innocent victim. The review department increased the recommended discipline to two years stayed suspension, with probation for two years on conditions.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Dal Cerro

For Respondent: Tom Low

HEADNOTES

[1 a, b] 148 Evidence—Witnesses
159 Evidence—Miscellaneous

Character evidence is important on the issue of the degree of discipline, and the credibility of the character witnesses should be weighed the same as any other witness. Accordingly, it was improper to admit telephonic testimony and the hearsay letters over the objection of the State Bar.

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] **791 Mitigation—Other—Found**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
Although agreeable demeanor is not a recognized factor in mitigation, where respondent committed a violent crime, the hearing judge's finding that respondent had an agreeable demeanor and was not violent or aggressive, was a factor to consider in determining the degree of discipline because it was relevant to his potential capacity for future violence.

[3] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
To the extent that the reduction of an attorney's felony conviction to a misdemeanor was an indication of the criminal court's view of the seriousness of the criminal conduct, the evidence was relevant to the issue of the appropriate discipline.

[4] **720.10 Mitigation—Lack of Harm—Found**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
The lack of client harm is a relevant mitigating circumstance in the context of a criminal conviction.

[5] **106.30 Procedure—Pleadings—Duplicative Charges**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
As part of his plea in the criminal case, respondent admitted that he caused great bodily injury to another person. Thus, the crime for which respondent was convicted necessarily involved severe injury and it would be duplicative to consider harm to the victim as a separate aggravating circumstance.

[6] **791 Mitigation—Other—Found**
802.30 Standards—Purposes of Sanctions
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1549 Conviction Matters—Interim Suspension—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues
Although the record indicated that respondent was not likely to commit similar misconduct in the future, the discipline system also has a responsibility to preserve the integrity of the legal profession. That concern persuaded the review department that public discipline, including a period of suspension, was warranted for an attorney's conviction of assault with a firearm, with the enhancement that he discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another. However, given the totality of the circumstances, including the fact that respondent had already been interimly suspended for ten and one-half months as the result of his conviction, and comparable case law, the review department did not believe that a period of prospective actual suspension was necessary. Accordingly, it recommended a period of stayed suspension along with a period of probation with conditions.

ADDITIONAL ANALYSIS

Aggravation
Found
691 Other
Declined to Find
695 Other

Mitigation

Found

740.10 Good Character

745.10 Remorse/Restitution

791 Other

Declined to Find

710.54 No Prior Record

795 Other

Discipline

172.11 Probation Monitor—Appointed

173 Ethics Exam/Ethics School

Probation Conditions

1613.08 Stayed Suspension—2 Years

1617.08 Probation—2 Years

Other

178.10 Costs—Imposed

OPINION

NORIAN, J.:

We review the decision of a hearing judge that respondent, Thomas Joseph Burns, be privately reproved without conditions, as the result of his 1991 felony conviction for assault with a firearm, with the enhancement that he discharged a firearm at an occupied motor vehicle which caused great bodily injury to the person of another. This case was originally tried in the State Bar Court in 1992 and the hearing judge found that the circumstances of respondent's conviction did not involve moral turpitude or other misconduct warranting discipline and dismissed the matter.

The State Bar thereafter sought review and we determined that the circumstances of the conviction involved other misconduct warranting discipline, but not moral turpitude. (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 591.) We remanded for a determination of the appropriate discipline.

Additional evidence was admitted on remand. The hearing judge ordered that respondent be privately reproved without conditions, based on her conclusions regarding the circumstances of the criminal conduct, which she found strongly supported respondent's claim of self-defense, the extensive mitigating and absence of aggravating circumstances, and the period of time respondent was interimly suspended.

The State Bar again seeks review, arguing that the discipline should be increased to three years stayed suspension, three years probation, with one year actual suspension, on the grounds that the misconduct is serious, that the hearing judge erred in admitting telephonic character evidence, that the hearing judge gave too much weight to the mitigating circumstances, and that she ignored aggravating circumstances. Respondent argues in reply that we should adopt the hearing judge's decision.

We have independently reviewed the record in this matter and conclude that although the facts and circumstances surrounding the conviction, plus the other mitigation, are significant, they are less compelling than found by the hearing judge and do not outweigh the seriousness of respondent's violent felony conviction involving substantial injury to an innocent victim. Accordingly, we conclude that a period of suspension is necessary to protect the public, courts, and, especially, the integrity of the legal profession. However, in light of the ten and one-half months that respondent has been interimly suspended as the result of this conviction and the discipline imposed in past comparable cases, we do not believe that a period of prospective actual suspension is warranted. We therefore recommend that respondent be suspended for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the conditions set forth post.

BACKGROUND

Briefly, in our original opinion we found that respondent's conviction resulted from an altercation he had on a crowded freeway with the occupants of another car in June 1990. Respondent was at the time a reserve police officer on his way home alone from that job in his civilian car when another car, with two people in the front seat and a 15 year old girl in the rear seat, attempted to pass him. A confrontation between the drivers of the cars followed which ended when the other car pulled along side respondent's car and the passenger in that car leaned out the window and shattered the driver's side window of respondent's car with a baseball bat. Respondent believed he had been shot at by the passenger. The other car initially pulled ahead of respondent's car, then slowed. Believing that he was going to be shot at again, respondent removed a handgun from his glove compartment, which he was legally entitled to possess, and fired a single round at the right passenger door of the other car. The bullet entered the right rear window of that car and struck the back seat passenger in the face, entering the right side and exiting the left side of her face. The passenger lost several teeth and part of her gum. (*In the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 587.)

In June 1991, respondent was charged with two felony counts: shooting at an occupied motor vehicle (Pen. Code, §246), with the allegation that he in-

tended 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 the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 585.)

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.[1] 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 was dismissed. (*In the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 585.)

On January 6, 1992, respondent was interimly suspended from the practice of law as a result of his felony conviction pursuant to section 6102, subdivision (a), of the Business and Professions Code. Effective November 24, 1992, we vacated the interim suspension based on the hearing judge's original decision dismissing the matter.

FACTS AND FINDINGS ON REMAND

A. Mitigating Circumstances

The hearing judge found the following circumstances in mitigation. Respondent practiced law without blemish for ten years, seven years before the misconduct and three years after the misconduct. The hearing judge viewed the combined 10 years as a "significant" mitigating circumstance.

Respondent's actions were done in good faith in that he believed that he had been shot at, that he considered all other available options and only then retrieved his gun, that he fired his weapon as safely as he could, and that he honestly believed he was in imminent danger of being shot at again.

Respondent's good character and community service were attested to by a number of people in both the legal and general communities. Many of these witnesses were familiar with the circumstances of respondent's misconduct and several described respondent as dedicated, honest, hardworking, honorable, and unselfish.[2]

Respondent has been involved in extensive service to his community. As a child he was involved in Cub Scouts and Boy Scouts. Respondent was an honor student in high school and was involved in extra-curricular activities. While in college, respondent performed social services work. Starting in law school, respondent became involved as a reserve police officer. During the following years he performed a considerable amount of work as a reserve police officer, averaging between 800 and 1,000 hours per year, and received several commendations for this work from his superiors at the police department. Respondent has an agreeable demeanor. He is even-tempered and does not have a violent or aggressive nature. During his many years as a reserve police officer, respondent fired his weapon only once, at the time of the present incident, and he was never disciplined by the police departments where he worked.

Respondent was not aware of the consequences to his law license of his criminal conviction at the time he entered his no contest plea. During the

1. 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.)*

2. Although not articulated by the hearing judge, we note that the record indicates that approximately 12 people either telephonically testified or wrote letters on respondent's behalf. They included several police or reserve police officers that had worked with respondent, two attorneys from the law firm where respondent works, several family friends, and respondent's wife.

pendency of the criminal matter respondent was assured that if he was convicted of the charges, the District Attorney would not seek jail time. On the day of his trial, he was informed that the District Attorney would seek eight years jail time if he was convicted. However, he was told that if he accepted a plea the District Attorney would recommend a sentence that would allow respondent to participate in a work furlough program, and that respondent could have his felony conviction reduced to a misdemeanor within a year. Considering all the circumstances, respondent accepted the plea even though he believed he was not guilty, because it was in the best interest of his family to do so.[3]

Respondent's felony conviction was reduced to a misdemeanor in March 1993 pursuant to Penal Code section 17.[4] Respondent has incurred a huge financial burden as a result of the incident. He is remorseful and has suffered considerable anguish over having caused the injury.

B. Aggravating Circumstances

No aggravating circumstances were found by the hearing judge. She rejected the State Bar's request to consider the harm to the victim and respondent's status as a police officer as aggravating circumstances. She concluded that these factors were considered by the review department in deciding culpability and it would be duplicative to consider them also as aggravating circumstances.

C. Hearing Judge's Conclusions

In determining the appropriate discipline in this case, the hearing judge considered the following: The "overwhelming" mitigating circumstances; the reduction of the felony conviction to a misdemeanor; respondent's good character and lack of prior discipline; his expression of remorse; the negative impact of the conviction on respondent in regard to his capacity as a reserve police officer and in regard to the financial burden; the "lengthy" period of interim suspension; the fact that the misconduct did not involve the practice of law and did not harm any clients; the fact that the crime occurred under frightening and emotionally tense circumstances in which respondent honestly believed that his life was in danger; and the evidence which "strongly" supported respondent's claim of self-defense. The hearing judge concluded based on the above that it was "highly improbable" the misconduct would recur.

DISCUSSION

In urging an increase in the discipline, the State Bar asserts in detail that the hearing judge erred in her findings regarding the mitigating and aggravating circumstances, and in her discipline recommendation.

A. Mitigation/Aggravation

[1a] The State Bar first argues that the hearing judge improperly admitted telephonic character evidence. Approximately 10 witnesses testified by telephone regarding respondent's good character. The hearing judge also admitted into evidence letters written by these witnesses on the same issue. The State Bar contends that the telephone testimony should not have been allowed under Evidence Code section 711 and that the letters should not have been admitted because they were hearsay. Evidence Code section 711 provides that witnesses can only be heard in the presence of and subject to the examination of all the parties.

[1b] We agree that the objections to the evidence are well taken. The hearing judge explained that she was permitting the telephonic testimony to minimize the inconvenience to the witnesses, and that she had not found it "really crucial to observe the demeanor and conduct of a witness that was testifying on the character of a particular person." While we sympathize with the inconvenience that can result to the witnesses, there was no legal basis to admit the telephonic testimony and the hearsay letters over the objection of the State Bar. (See *In re Ford* (1988) 44 Cal.3d 810, 818, character reference letters excludable from State Bar Court hearing as hearsay absent

3. Respondent testified that he believed that although he had "good opportunity to prevail at trial, the risk wasn't worth it."

4. In January 1995, respondent's conviction was set aside pursuant to Penal Code section 1203.4.

a stipulation to the contrary].) Character evidence is important on the issue of the degree of discipline, and the credibility of the witnesses should be weighed the same as any other witness. Accordingly, this evidence was improperly admitted by the hearing judge. Nevertheless, as explained below, we find respondent's pro bono activities to be an extraordinary demonstration of good character.

The State Bar next argues that the evidence relating to respondent's childhood and college days is remote and not relevant to respondent's present good character; that the evidence bearing on respondent's pre-misconduct behavior has little bearing on his present good character; that agreeable demeanor is not a recognized mitigating factor; and that the mitigating value to respondent's reserve police activities is diminished because he received some limited compensation. **[2]** We agree that evidence regarding respondent's traits which is remote in time is of limited value in assessing his current character. We also agree with the State Bar that agreeable demeanor is not a recognized factor in mitigation. However, the hearing judge found that respondent had an agreeable demeanor and was not violent or aggressive. In the context of this case, where respondent committed a violent crime, we find respondent's potential capacity for future violence a relevant factor to consider in determining the degree of discipline.

We also disagree that respondent's police activities should be discounted. Respondent devoted considerable time and energy to his reserve police activities, well beyond any amount of compensation he received. The area in which he worked had significant crime problems at a time when the city experienced severe budget cuts. Consequently, the need for more police presence on a restricted city budget was great. Respondent's reserve police activities were therefore not only substantial in regard to the amount of time he devoted, but also in regard to the benefit conferred on the community. We find his police work to be an "extraordinary demonstration of good character." (See standard 1.2(e)(vi), Standards for Atty. Sanctions for Prof. Misconduct (standards), Rules Proc. of State Bar, Title IV; *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 529.)

The State Bar next argues that the hearing judge erred in finding in mitigation that respondent had many years of blemish-free practice because the judge should not have considered respondent's three years of practice after the misconduct. The hearing judge found that respondent's seven years of pre-misconduct practice combined with the three years of post-misconduct practice was a "significant" mitigating circumstance. The State Bar asserts that respondent has been under the scrutiny of the criminal probation department and State Bar during the post-misconduct time period and therefore his lack of discipline during this period should not be considered.

In many cases a disciplinary proceeding would be pending against the attorney for a large portion of any post-misconduct time period. *In Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316-317, the Supreme Court considered five years of post-misconduct practice as a mitigating circumstance even though the State Bar proceeding had been pending against the attorney for a significant part of that time. Similarly, in *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 12, we viewed the attorney's post-misconduct practice as a mitigating circumstance even though criminal proceedings were pending for a part of that time.

In any event, we do not find respondent's years of practice as a "significant" mitigating circumstance. The seven years of pre-misconduct practice is "not a strong mitigating factor." (*In re Naney* (1990) 51 Cal.3d 186, 196.) In addition, as a result of the interim suspension, respondent actually practiced law for a little over two years post-misconduct. We do not view this period of time as sufficiently long that it demonstrates an "ability to adhere to acceptable standards of professional behavior." (*Rodgers* v. *State Bar, supra,* 48 Cal.3d at p. 317.)

The State Bar next argues that the hearing judge should not have considered the circumstances surrounding respondent's entry of a plea to the criminal charges as a mitigating circumstance. We agree. The hearing judge found that respondent had very little time to consider the plea as it was offered on the day of his criminal trial.

The conclusions the hearing judge derived from this circumstance are not clear from the decision. She seems to have used this finding to support a conclusion that respondent had a valid defense to the criminal charges and he only pled because of the circumstances surrounding the entry of the plea. However, as pointed out in the concurring opinion in our original opinion in this matter, respondent had a year and three months to consider the strengths and weaknesses of his case prior to entering his plea. (*In the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 592, conc. opn. of Stovitz, J.) Despite the last minute offer from the prosecution, respondent's testimony indicates that he accepted the plea after balancing the risks of trial versus the risks of a guilty verdict. The choices respondent faced differed little from the choices faced by any criminal defendant.

We also note that the hearing judge cited no authority and our research reveals none indicating that the circumstances surrounding the entry of a plea can negate the conclusiveness of the conviction. As we previously held, the conclusiveness of respondent's conviction precludes consideration of a self-defense claim. (*In the Matter of Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 589.)

Nevertheless, the hearing judge found that in the freeway incident respondent had a good faith belief that he was in imminent danger of being shot at again. This finding alone is a substantial factor in determining the degree of discipline, regardless of whether respondent's actions were legally in self-defense.

The State Bar next argues that the hearing judge erred in considering respondent's voluntary resignation from the police department as a mitigating circumstance. Although the hearing judge made such a finding, the subject matter of the paragraph containing the finding dealt with respondent's inability to continue his pro bono activities because he moved and his commute did not allow him time for pro bono activities. In any event, we find nothing in the hearing judge's decision or the record that demonstrates that respondent's resignation should be considered as a mitigating circumstance, especially since his conviction would have precluded him from continuing as a reserve police officer even if he had not resigned.

[3] The State Bar next argues that the hearing judge erred in considering as a mitigating circumstance the reduction of respondent's felony conviction to a misdemeanor. To the extent that the reduction is an indication of the criminal court's view of the seriousness of the criminal conduct, the evidence is relevant to the issue of the appropriate discipline. (See *In re Larkin* (1989) 48 Cal.3d 236,24 4 [nature of the offense is considered in determining discipline]; cf. *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 470 [the fact that the crime has been reduced to a misdemeanor is a factor in determining whether good cause exists to vacate an order of interim suspension].)

The State Bar next argues that the financial hardship incurred by respondent as a result of the conviction was not adequately proved. We agree. We have considered the negative impact a conviction has had on an attorney in determining the appropriate discipline. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 754.) Nevertheless, as with all mitigating circumstances, respondent bears the burden of proof. (Std. 1.2(e).) The only evidence on this issue was general testimony that respondent incurred a huge financial hardship. No evidence was introduced regarding the amount of money involved in either the criminal or civil matters. Although no contradictory evidence was introduced, we do not find this general testimony to amount to clear and convincing evidence establishing that respondent incurred a "huge" financial burden.

[4] The State Bar next argues that the hearing judge should not have found as a mitigating circumstance that no client was harmed by respondent's misconduct. We disagree. The lack of client harm is a relevant mitigating circumstance in the context of a criminal conviction. (See *In the Matter of DeMassa, supra*, 1 Cal. State Bar Ct. Rptr. at p. 752.)

The State Bar next argues that the hearing judge erred in finding in mitigation that respondent was remorseful. The State Bar asserts that respondent's remorse was not sincere because he continued to insist that the passengers in the other car, one of which was the victim, were at fault. We find no

reason to modify the hearing judge's finding. Respondent expressed remorse for the incident and for the injury that resulted and the hearing judge found this testimony sincere. Respondent continues to insist that he acted in self-defense, but under the circumstances of this case, which indicate that respondent honestly believed he was in danger, we do not view that as a failure to accept culpability.

The State Bar next argues that the hearing judge erred in not considering harm to the victim and respondent's status as a police officer as aggravating circumstances. The hearing judge concluded that these factors were considered by the review department in deciding culpability and it would be duplicative to consider them also as aggravating circumstances.

[5] As part of his plea in the criminal case, respondent admitted that he caused great bodily injury to another person. (See Pen. Code, § 12022.5, subd. (b).) Thus, the crime for which respondent was convicted necessarily involved severe injury and it would be duplicative to consider harm to the victim as a separate aggravating circumstance. However, respondent's status as a police is appropriately considered as an aggravating circumstance.

In any event, the harm to the victim, respondent's status as a police officer, and respondent's honest belief that he was in danger, are all part of the facts and circumstances surrounding the criminal conduct. It is axiomatic that the facts and circumstances surrounding the criminal conduct are appropriately considered on the general issue of discipline. "The degree of discipline ultimately imposed must, of necessity, correspond to some reasonable degree with the gravity of the misconduct at issue." (*In re Nevill* (1985) 39 Cal.3d 729, 735; see also *In re Larkin, supra*, 48 Cal.3d at24 4 ["There is no fixed formula guiding our determination . . . of the appropriate sanction. (Citation omitted.) We examine the totality of circumstances presented by the particular case, including mitigating circumstances (citation omitted), as well as the nature of the offense itself."].)

In a somewhat related argument, the State Bar next asserts that the hearing judge erred in declining to consider as a factor in aggravation the potential harm to others because of the criminal conduct, citing *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 61. The cited passage in Stewart refers to Stewart's indifference to the potential harm to others. Nevertheless, we considered the potential harm to others in our prior opinion in this matter (*Respondent O, supra*, 2 Cal. State Bar Ct. Rptr. at p. 591) on the issue of the recklessness of respondent's conduct. Thus, the potential harm is an indication of the seriousness of the misconduct and therefore is an appropriate factor to consider in determining discipline, but is not a separate factor in aggravation over and above the crime itself.

B. Discipline

The State Bar argues that the discipline should be increased to three years stayed suspension, three years probation, and one year actual suspension. According to the State Bar, this discipline recognizes the seriousness of the misconduct, the injury to the victim, the negative impact of a conviction of this type on the "reputation" of the legal profession, the lack of compelling mitigation, and is consistent with comparable case law, citing *In re Larkin, supra*, 48 Cal.3d 236.

In re Larkin involved an attorney convicted of misdemeanor assault with a deadly weapon and conspiracy to commit it. Larkin conspired with a client to cause the boyfriend of his estranged wife to be assaulted. In furtherance of the conspiracy, Larkin provided the client with personal information about the boyfriend that Larkin had obtained through his contacts with county law enforcement agencies and through a subpoena duces tecum that Larkin issued under false pretenses. Thereafter, the client and another person struck the boyfriend on the chin with a metal flashlight, causing him to bleed. Compelling mitigating circumstances were found, including lack of prior discipline. However, the Court found that the misconduct was serious, and it adopted the State Bar's recommended discipline of three years stayed suspension, three years probation, and one year actual suspension.

The State Bar asserts that Larkin's criminal conduct was less serious than respondent's because

of the harm to the victim and the potential harm to others in the present case. Despite this difference, Larkin entered into a premeditated and conspiratorial plan to cause the victim injury and in furtherance of the conspiracy he obtained private information regarding the victim in what was essentially an illegal manner. Respondent on the other hand reacted to an emotionally tense situation in a compressed time frame in which he believed his life was in danger. This is a far different circumstance than was present in Larkin. However, Larkin's conviction was a misdemeanor, whereas respondent's was a felony.

The State Bar also asserts that the mitigation in the present case is not as compelling as Larkin's. We disagree. The circumstances of the respondent's crime alone provide compelling mitigation. Respondent's reserve police activities, and sincere remorse further support the conclusion that significant mitigation exists in the present case.

We noted in *In the Matter of Stewart, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 60-61, that past disciplinary cases involving attorneys convicted of assaultive crimes have generally resulted in actual suspension of varying lengths.[5] We cited *Larkin, supra*, 48 Cal.3d 236; *In re Hickey* (1990) 50 Cal.3d 571 [three years stayed suspension, three years probation, and 30 days actual suspension for repeated acts of violence toward wife and others coupled with failure properly to withdraw from legal representation in another matter, no prior record, conduct arose from repeated abuse of alcohol]; *In re Otto* (1989) 48 Cal.3d 970 [two years stayed suspension, two years probation, and six months actual suspension for felony conviction for serious assault and corporal injury on a cohabitant of the opposite sex]; and *In re Mostman* (1989) 47 Cal.3d 725 [five years stayed suspension, five years probation, two years actual suspension for felony conviction for solicitation to commit a serious assault on a former client which was found to involve moral turpitude]. In *Stewart*, we recommended two years stayed suspension, two years probation, 60 days actual suspension for misdemeanor battery on a police officer which resulted from an altercation with police after the attorney refused to leave his estranged wife's apartment.

Certain aspects of the criminal conduct in the present case are distinguishable from the conduct in the above cases. As indicated, respondent found himself in a very difficult and emotional situation where he honestly believed he was in danger. He considered his escape options before he fired his weapon, he fired only once as safely as he could, and he did not intend to injure the victim.

Nevertheless, respondent was not blameless. Despite his training and experience as a police officer, respondent did not use his car telephone to inform the police about the erratic and illegal driving of the other car. 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 other car, 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. Respondent's unlawful conduct resulted in substantial injury to the victim. Indeed, that death or more serious injury to human life did not occur is fortuitous. Thus, other aspects of respondent's criminal conduct are as egregious as the criminal conduct in the above cases.

As stated by the Supreme Court, "Where an attorney's criminal act involves actual physical harm to a particular individual, the necessary showing of mitigating circumstances increases accordingly." (*In re Nevill, supra*, 39 Cal.3d at p. 735.) The mitigating circumstances here, though significant, do not outweigh the seriousness of respondent's felony conviction which resulted in serious injury to the victim.

5. As noted by the Supreme Court, there are relatively few reported decisions in which an attorney caused physical injury to another to which we can look for direction on the appropriate discipline. (*In re Larkin, supra, 48 Cal.3d at p.24 4.)*

[6] Although we agree with the hearing judge that the record indicates that respondent is not likely to commit similar misconduct in the future, the discipline system also has a responsibility to preserve the integrity of the legal profession. (*In re Aquino* (1989) 49 Cal.3d 1122, 1129; *Porter* v. *State Bar, supra*, 52 Cal.3d at p. 528.) That concern persuades us that public discipline, including a period of suspension, is warranted in this case. Ordinarily, we would consider recommending a period of actual suspension. However, given the totality of the circumstances, including the fact that respondent has already been suspended for ten and one-half months as the result of this conviction, and the comparable case law cited above, we do not believe that a period of prospective actual suspension is necessary. (See *In re Leardo* (1991) 53 Cal.3d 1, 18.) Accordingly, we recommend a period of stayed suspension along with a period of probation with the conditions specified below.

RECOMMENDATION

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

1. 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;

2. 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 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;

3. That respondent shall be referred to the Probation Unit, Office of Trials, 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;

4. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Unit 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;

5. 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 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;

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

7. That at the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two years (2) shall be satisfied and the suspension shall be terminated.

We also 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 order in this matter and furnish satisfactory proof of such passage to the Probation Unit within said time. Finally, we recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

I concur:

STOVITZ, J.

PEARLMAN, P.J. concurring:

This case originated as a criminal referral of a felony conviction for assault with a firearm (Pen. Code, §245, subd. (a) (2)) enhanced by the admitted discharge of a firearm at an occupied motor vehicle, causing great bodily injury. (Pen. Code § 12022.5). As a result, respondent was interimly suspended for ten and one-half months prior to his first disciplinary hearing. That hearing took place pursuant to our standard referral order for felonies which may or may not involve moral turpitude. The order incorporated the traditional language that the Supreme Court also used in its referrals, instructing the hearing judge to determine whether the felony "involved moral turpitude or other misconduct warranting discipline, and if so found, the discipline to be imposed."

The hearing judge found extraordinarily mitigating circumstances and concluded that no misconduct warranting discipline had occurred. She ordered the matter dismissed. On the State Bar's request for review we reversed (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581) and remanded for further proceedings based on the conclusive effect of the respondent's plea to a felony involving the use of a firearm and aggravating circumstances including great bodily injury to a victim and respondent's status as a police officer. We expressed no opinion on what that discipline should be.

The hearing judge on remand followed our instructions in determining culpability, but obviously assumed that if compelling mitigation were shown, the lowest form of permanent discipline could still remain available—a private reproval.[1] The State Bar had itself stipulated in the Hearing Department to a private reproval following interim suspension by the Presiding Judge of an attorney for felony drunk driving, a case which involved serious injuries to children. I agree with my colleagues that the disciplinary recommendation must be increased

1. The Review Department may have inadvertently helped foster the hearing ju dge's assumption that any of the full panoply of disciplinary outcomes might be appropriate in this case by declining to use respondent's name in the proceeding because we did not reach the issue of discipline. (*In the Matter of Respondent O, supra,* 2 Cal. State Bar Court Rptr. 581, 585, fn. 1). Only if the ultimate result were dismissal, admonition, or private reproval would the State Bar not affirmatively disseminate respondent's name in connection with the discipline imposed. It was our intent simply not to prejudge the discipline one way or the other, just as the referral order generally contemplates any outcome from dismissal to disbarment. In retrospect, I would have published respondent's name, since it had already been publicized by the State Bar in connection with his interim suspension. The situation presented by interlocutory review of disciplinary proceedings against convicted felons which carry with them a conclusive presumption of guilt is thus distinguishable from original proceedings where no culpability of misconduct has yet been determined.

because of the violent nature of the crime and the inherent danger it posed.[2] I believe that for the future guidance of litigants and hearing judges we should categorically hold that violent felonies are crimes which cannot result in private reprovals regardless of compelling mitigation.

Because felony convictions are considered extremely serious, since 1985, the Legislature has authorized interim suspension of any attorney convicted of a felony whether or not it involved moral turpitude. "[T]he 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. . . ." *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608, 613.)

In providing for interim suspension for attorneys convicted of any felony, the Legislature made a strong policy decision favoring public protection prior to a disciplinary hearing on the merits in order to promote confidence in the profession and the integrity of the profession. For good cause, in the interest of justice, interim suspension may be vacated "with due regard . . . to maintaining the integrity of confidence in the profession." (Bus & Prof. Code, § 6102 subd.(a).) Respondent sought and was denied relief from interim suspension by the Review Department in the instant proceeding until after the disciplinary hearing was conducted and disputed factual issues were resolved in his favor. Meanwhile, his interim suspension was made public and disseminated by the State Bar.

The private reproval ultimately ordered below was actually the lowest form of permanent *public* discipline which could have been determined against respondent's license to practice law.[3] Interested persons could still discover that respondent had a record of discipline upon calling State Bar membership records but respondent's name was not affirmatively publicized by the State Bar.[4] A "private" reproval also does not give rise to cost recovery by the State Bar. (Bus. & Prof. Code, § 6086.10, subd. (a) [permitting costs to be awarded the State Bar for a public reproval or greater discipline unless good cause is shown by the attorney for relief from the imposition of costs].)

The Legislature actually has only made express reference to the availability of reprovals for rule violations (Bus. & Prof. Code section 6077); it is Supreme Court precedent and State Bar practice which has historically made them available in conviction referral proceedings for misdemeanors which may or may not involve moral turpitude or the practice of law. The State Bar Court Executive Committee has long since gone on record requesting the State Bar to consider sponsoring legislation to abolish court-approved private reprovals in disci-

2. Respondent's actual suspension for ten and one-half months appears adequate for State Bar disciplinary purposes, together with stayed prospective suspension and standard probation conditions to which respondent must adhere. While the State Bar argues against us taking into account the time spent on interim suspension, the Supreme Court has held 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." (*In re Leardo* (1991) 53 Cal. 3d 1, 18.) The Supreme Court has also taken into account in determining the appropriate discipline against an attorney's license whether the conviction has already had a devastating impact on the attorney's practice. (See *In re Chira* (1986) 42 Cal. 3d 904, 909 [declining to impose actual suspension upon an attorney who had just begun to rebuild his practice after a lengthy hiatus following his criminal conviction for tax fraud].)

3. Had the Supreme Court or this court squarely addressed this issue previously, the hearing judge in this proceeding would have had a basis for deciding that there was a "floor" below which misconduct of this nature could not be mitigated. This case provides us with a vehicle for so informing hearing judges and litigants prospectively.

4. See Rules Proc. State Bar, Title II, State Bar Court Proceedings, rule 270(c) ("A private reproval imposed on a respondent is part of the respondent's official State Bar membership records and is disclosed in response to public inquiries unless the private reproval was imposed as the result of a stipulation approved by the Court prior to the initiation of a State Bar Court proceeding. The complainant shall be advised of the imposition of any private reproval.").

plinary proceedings as a potentially misleading anachronism.[5] Although they are denominated by statute as "private reprovals" (Bus. & Prof Code, § 6077), they are no longer "private" since State Bar disciplinary proceedings are no longer confidential (Bus. & Prof. Code, § 6086.1) and the State Bar Court records remain available to the public following a public hearing. "Private" reprovals reduce the faith of the public in the disciplinary system and deny the State Bar recovery of its costs on behalf of the membership which pays for the disciplinary system, despite the fact that the State Bar has proved the respondent's culpability of a violation of the State Bar Act.

As the hearing judge noted, the crime occurred in a very short time frame in which the respondent honestly believed he was acting in self-defense. Respondent appears genuinely remorseful and an unlikely candidate for repeating his criminal conduct. Nonetheless, preservation of public confidence in the legal profession is a separate factor to be considered in assessing the appropriate discipline. (Rules Proc. of State Bar, Title IV, Standards for Attorney Sanctions for Professional Misconduct ("standards"), standard 1.3). Attorneys are sworn to uphold the law. (Bus. & Prof. Code §§ 6067, 6068, subd. (a).) It is difficult to believe that public confidence can be maintained if an attorney convicted of a felony receives only a private reproval on his permanent membership record in the State Bar. Indeed, if the felony involves moral turpitude either as an element of the crime or in the facts and circumstances, the presumptively appropriate discipline is disbarment. (Standard 3.2).

The Legislature has decreed that all felony convictions in the state of California constitute a presumptive basis for interim suspension because of the seriousness of the crime even if it does not involve moral turpitude. This appears particularly true of violent felonies committed with firearms which involve great harm to others as was the crime respondent was convicted of committing. Violent crimes have been particularly noted as a type of crime for which lawyers should be professionally answerable. (See In the Matter of *Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 270-271 and cases cited therein.) The finality of the criminal conviction is conclusive of an attorney's guilt of the elements of the crime; the legislative determination that convicted felons generally warrant interim suspension militates in favor of the ultimate discipline being at a minimum some form of suspension. For the reasons stated above, I concur in the majority opinion herein.

5. Respondents have sometimes been confused and disappointed when they discover that the discipline ordered by the court is not in fact private. Their confusion stems not only from the nomenclature, but from the fact that an identically named, confidential "private reproval" is available to respondents with whom the Office of the Chief Trial Counsel enters into a stipulation to such discipline prior to the issuance of a notice to show cause. (See Rule Proc. State Bar, Title II, rule 270 (d). However, it may be admitted as part of the record of any subseqnent proceeding as evidence of a prior record of discipline. The Office of the Chief Trial Counsel also has the power at any time to divert a proceeding by entering into an agreement in lieu of discipline. Such agreements are confidential and by definition do not constitute discipline against the attorney's license, but may result in discipline if breached. (Bus. & Prof. Code, § 6068, subd. (l).)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STANLEY WAYNE MCKIERNAN

A Member of the State Bar

Nos. 91-O-04645

Filed October 26, 1995

SUMMARY

In a single matter, the hearing judge found that respondent repeatedly misused and neglected his client trust account, and issued two checks when he knew that there were insufficient funds to cover them. The hearing judge recommended that respondent be suspended from the practice of law for two years, that such suspension be stayed, and that he be placed on two years probation on conditions, including ninety days actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, arguing that the discipline was too severe, and that no actual suspension was warranted. The review department concluded that the hearing judge's findings of fact were supported by the record, and although it modified some of the conclusions of law, it concluded that the discipline recommended by the hearing judge was appropriate.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: R. Gerald Markle

HEADNOTES

[1] **280.00 Rule 4-100(A) [former 8-101(A)]**
When respondent accepted money on behalf of a third party who was not his client, he had a duty not to misuse the money. Nevertheless, no authority provides that respondent was required or allowed under rule 4-100, Rules of Professional Conduct, to funnel the non-client's business funds through respondent's client trust account.

[2 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
By placing a non-client's funds in his trust account for the purpose of allowing the trust account to be used by the non-client as a business account, and by failing to maintain and supervise the account, respondent violated both the letter and the spirit of rule 4-100(A) of the Rules of Professional Conduct.

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

[3] **221.00 State Bar Act—Section 6106**

An attorney's practice of issuing checks which he knows will not be honored violates the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice. Such conduct involves moral turpitude. Nevertheless, a justifiable and reasonable belief that a check will be honored is a defense to this charge.

[4] **221.00 State Bar Act—Section 6106**
591 Aggravation—Indifference—Found

An attorneys failure to repay borrowed money, even if the attorney had funds to pay at least part of the money, without more, does not amount to moral turpitude. However, the failure to pay at least part of the money owed under these circumstances is a factor in aggravation as a demonstrated indifference toward rectification and atonement for respondent's misconduct.

[5] **715.50 Mitigation—Good Faith—Declined to Find**

The hearing judge's finding in mitigation that respondent's actions were in good faith because he did not believe at the time that it was improper for him to allow a non-client to use his client trust account as a business account was rejected by the review department because it was not appropriate to reward respondent for his ignorance of his ethical responsibilities.

ADDITIONAL ANALYSIS

Aggravation

Found but Discounted

563.90 Uncharged Violations

Mitigation

Found but Discounted

710.33

Standards

824.10 Commingling/Trust Account Violations
833.90 Moral Turpitude—Suspension

Discipline

1013.08 Stayed Suspension—2 Years
1015.03 Actual Suspension—3 Months
1017.08 Probation—2 Years

Probation Conditions

1024 Ethics Exam/School

Other

173 Discipline—Ethics Exam/Ethics School
175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge that respondent, Stanley Wayne McKiernan, be suspended from the practice of law for two years, that such suspension be stayed, and that he be placed on two years probation on conditions, including ninety days actual suspension. The recommendation is based on respondent's misconduct in a single matter which involved his repeated misuse and neglect of his client trust account, and his issuance of two checks when he knew that there were insufficient funds to cover them.

Respondent requested review, arguing that the discipline is too severe, and that no actual suspension is warranted. The State Bar argues in reply that we should adopt the hearing judge's decision in its entirety.

We have independently reviewed the record and conclude that the hearing judge's findings of fact are supported by the record. Although we modify some of the conclusions of law, we conclude that the discipline recommended by the hearing judge is appropriate.

FACTS AND FINDINGS

Except for two minor findings objected to by respondent, the parties agree with the hearing judge's findings of fact.[1] As indicated, we adopt the findings, but set forth in this opinion only those facts necessary for our disposition of the case.

Respondent was admitted to the practice of law in California on January 9, 1969, and has not previously been disciplined. Respondent's work primarily consists of financial planning for international petrochemical projects and some banking litigation. Eddie Fujimori was respondent's long-time friend, but was not and had never been a client. During 1990, respondent had an agreement with Fujimori in which respondent allowed Fujimori to use his law firm's client trust account for Fujimori's business purposes.[2]

Fujimori had a part-time travel business. For a number of reasons, he did not want his primary employer, Japan Airlines (JAL), to know about his "moonlighting"; so he did not have a business bank account.

Fujimori used respondent's client trust account to deposit funds received from his travel clients and to issue checks to hotels, carriers, and other vendors in connection with his travel business. Fujimori deposited funds into respondent's client trust account in several ways: personally, by electronic transfer from other sources, or by giving the funds to respondent's staff to do so. He would access the funds by informing respondent or a member of his staff that he needed a check written for a specific amount. The check would be prepared for respondent's signature.

Prior to the fall of 1990, Fujimori deposited approximately $20,000 in respondent's client trust account. Around this time, respondent was experiencing cash flow problems at his firm. Fujimori did not need the $20,000 immediately and allowed respondent to borrow the funds. Respondent agreed to repay the money by early November 1990 so that Fujimori could pay Maxim's Hotel in Las Vegas (Maxim's) the balance due for his travel clients. There was no written agreement for the loan.

Respondent maintained the borrowed funds in his client trust account. From October 1990 through November 1991, respondent issued or caused to be

1. We reject respondent's contentions regarding the two findings he disputes. Both of the findings (that respondent did not know whether Fujimori's travel business violated Fujimori's employment contract with his primary employer, and that respondent did not know definitely whether any client funds in respondent's trust account were lost) involved the resolution of issues pertaining to witness credibility. Accordingly, we are required to give these findings great weight. (Rule 305(a), Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings.) Respondent's contrary testimony is not sufficient to cause us to modify these findings.

2. Respondent's law firm consisted of several attorneys. He testified that he "own[ed] 99 percent of the law firm."

issued numerous client trust account checks for his personal and business expenses. Client funds were in the client trust account during this time period.

At Fujimori's request, respondent issued in November 1990 two client trust account checks to Maxim's totaling some $17,000. At the time respondent issued the checks he knew there were insufficient funds in the trust account to cover payment. Respondent expected that a case would settle and that his firm would receive approximately $30,000 from the settlement. However, he was aware that there were problems with the settlement.

Respondent executed the checks to Maxim's but held them for several days to allow for the receipt of the settlement funds. After he was told that those funds were on the way, he had the checks sent to Maxim's. The settlement money did not arrive until much later than respondent expected; and when it did, respondent's then law partner took the firm's share for himself. The bank rejected both of respondent's checks to Maxim's due to insufficient funds. Although Maxim's redeposited the checks, the bank returned them again for insufficient funds. Maxim's honored the two tour groups' reservations.

Maxim's pursued respondent, not Fujimori, to collect payment of the returned checks. In January 1991, respondent agreed with Maxim's that he would pay the money in four installments commencing in February and ending in May 1991. As of June 1991, when Maxim's filed a complaint with the State Bar, respondent had not made any payments to Maxim's. Respondent made sporadic payments over the next couple of years and made the final payment in August 1993. Respondent did not pay, and Maxim's did not charge, interest on these funds.

Respondent's long-time bookkeeper managed the firm's accounts. She retired between 1986 and 1988.[3] From 1986 to 1993 no one on respondent's staff was assigned the responsibility for the firm's bookkeeping, and respondent did not regularly review and reconcile the client trust account. From October 1990 through June 1991, respondent's bank debited his client trust account on at least 30 occasions for checks dishonored due to insufficient funds. However, all checks drawn on respondent's client trust account were honored on the first or second presentment, except for the two checks to Maxim's and another check. From October 1990 through September 1991, respondent's client trust account showed a negative balance or was overdrawn at least eleven times.[4]

Respondent testified that he did not believe that any client funds that may have been in the trust account were lost. However, there was no way for him to know that definitely, since there were no client ledger or other bookkeeping controls during the relevant time period.

To remedy the problems with his trust account, respondent tried several approaches that were not effective. Ultimately, respondent obtained a computer accounting program and a certified public accountant. Due to the nature of his practice, respondent is out of the country most of the time. Consequently, he has turned over all of the accounts and bookkeeping functions to his law firm partner. However, respondent now personally reviews the accounting system.

The notice to show cause in this matter charged that respondent violated section 6106 of the Business and Professions Code,[5] and former rule 4-100(A) of

3. The hearing judge found that for the 18 years respondent's law firm was profitable (1972-1990), no one managed respondent's trust account system because there were no problems. Respondent so testified at trial. We infer that no one except the bookkeeper managed the system and adopt the finding on that basis.

4. Respondent's trust account statements show negative balances in October and December 1990. The statements also indicate that the trust account was overdrawn in June 1991, by $10,911.12 and $11,691.12, and in September 1991, by $544.90 and $863.90.

5. All further references to sections are to the Business and Professions Code, unless otherwise noted. Section 6106 provides that an attorney's commission of any act of moral turpitude, dishonesty, or corruption, whether committed in the course of the practice of law or otherwise, constitutes cause for disbarment or suspension.

the California Rules of Professional Conduct.[6] The hearing judge concluded that respondent violated section 6106 by issuing the two checks to Maxim's knowing that there were insufficient funds to cover them; by failing to make timely restitution to Maxim's; and by his gross neglect in failing to maintain and supervise his client trust account.

The hearing judge also concluded that respondent violated rule 4-100(A) by retaining personal funds in his client trust account, and by failing to supervise and properly maintain his client trust account in that he allowed Fujimori to place funds in the account and use it as his personal business account. However, the hearing judge did not increase the recommended discipline on account of the rule 4-100(A) violation because she viewed it as based on the same material facts as the section 6106 violation.

In aggravation, the hearing judge found that respondent's misconduct involved multiple acts of wrongdoing and a pattern of misconduct in that he repeatedly misused his trust account over a prolonged period of time (std. 1.2(b)(ii), Stds. for Atty. Sanctions for Prof. Misconduct, Rules Proc. of State Bar, Title IV (standard[s])); that respondent's misconduct was surrounded by other uncharged ethical violations in that the repeated negative balances in respondent's trust account supported a finding of misappropriation (std. 1.2(b)(iii)); and that respondent demonstrated an indifference toward rectification or atonement for his misconduct in that he did not make at least partial restitution to Maxim's even though he had funds to do so (std. 1.2(b)(v)).

In mitigation, the hearing judge found that respondent had no prior discipline over many years of practice in that respondent practiced law blemish-free for over 21 years before the beginning of his misconduct in 1990 (std. 1.2(e)(i)); that respondent exhibited good faith in that he did not think at the time that it was improper to permit Fujimori to use his client trust account as a business account (std. 1.2(e)(ii)); that respondent was candid and cooperative with the State Bar during its investigation and during the disciplinary proceeding (std. 1.2(e)(v)); that respondent's three character witnesses and respondent's pro bono activities were entitled to limited weight in mitigation as a demonstration of good character (std. 1.2(e)(vi)); and that respondent took objective steps demonstrating remorse and recognition of wrongdoing in that he stipulated to facts leading to culpability and repeatedly acknowledged his culpability for issuing the checks to Maxim's and for his misuse of his client trust account, and has taken steps to correct his trust account procedures (std. 1.2(e)(vii)).

DISCUSSION

Respondent argues on review that it was not improper for him to keep Fujimori's money in his client trust account; that his issuance of the two checks to Maxim's did not rise to the level of moral turpitude; and that although he is culpable of misconduct in the mismanagement of his client trust account, no actual suspension is warranted.

Respondent first asserts that when he accepted funds from Fujimori to hold for the benefit of Fujimori that a fiduciary relationship was created and he was therefore required to place the funds in his client trust account. According to respondent, the hearing judge's contrary finding is in error; and his discipline should be decreased as a result.

[1] When respondent accepted Fujimori's money to hold for Fujimori, he had a duty not to misuse the money. (See *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156 ["When an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party. Thus

6. All further references to rules, 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. Rule 4-100(A) of those rules provided in relevant part that all funds received or held for the benefit of clients, including advances for costs and expenses, shall be deposited in one more identifiable bank accounts labelled "trust account" or other such term and that no funds of the attorney or law firm shall be deposited in that account or otherwise commingled therewith except funds reasonably sufficient to pay bank charges, funds as to which there is a dispute between the attorney or law firm and a client or funds to which an attorney's or law firm's interest has not yet become fixed. The current rule 4-100(A) is unchanged.

the funds in his possession are impressed with a trust, and his conversion of such funds is a breach of the trust."].) Nevertheless, respondent cites to no authority, and our research reveals none, which provides that respondent was required or allowed under rule 4-100 to funnel Fujimori's business funds through his client trust account.[7]

This case is reminiscent of *Mack* v. *State Bar* (1970) 2 Cal.3d 440, in which the Supreme Court concluded that Mack misused his trust account both to protect key clients from creditors and for his own personal use. In that case, in explaining some of his misconduct, Mack "testified that he represented Western Transistor Corporation, which was his largest single client; that the corporation was in financial difficulty and was being constantly subjected to attachments and levies; that he used his trust account for the corporation and one of its officers, who was also in financial difficulty; that he also ran collections on behalf of the corporation through his trust account; that this made it extremely hard for him to balance the account, and he gave up trying to do so; [fn. omitted]; and that he expected to receive substantial fees for permitting the use of his trust account for the business purposes of the corporation and its officer.

"Although [Mack] was the only person authorized to make withdrawals from the account, he maintained no specific ledger sheet or other record to explain his withdrawals or his deposits. He stated that he had no procedure to determine the source of deposits except his own memory and discussion with his secretary. Under the circumstances, petitioner's designation of his bank account as a 'trust account' was nothing more than a sham compliance with [the rule governing trust accounts]." (*Id.* at pp. 444-445.)

Mack's total misconduct, which included deliberate deceit and failure to make restitution to his client, resulted in two years actual suspension. While the totality of Mack's misconduct was far more egregious than respondent's, the Mack case illustrates that respondent's attempt to liken Fujimori to a client and insist that once respondent agreed to assist Fujimori, the funds "belonged" in his client trust account, is without merit. A client has no right to request an attorney to commingle the client's general operating account with the attorney's client trust account, and the attorney has an independent professional obligation not to allow his or her trust account to be so misused.

[2a] In any event, the purpose for which the funds were deposited into the trust account, the manner in which the account was supervised, and the commingling of personal money in the trust account, fully support respondent's culpability of the charged misconduct. By allowing Fujimori to deposit and withdraw money in the trust account without at the very least supervising those transactions, and by failing to supervise the trust account in general, respondent in effect relinquished control of his trust account to Fujimori.[8]

[2b] Respondent was charged with violating rule 4-100, and the purpose of that rule is to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that commingling of personal funds with client funds will result in the loss of client money. (*Hamilton* v. *State Bar* (1979) 23 Cal.3d 868, 876.) The rule is violated merely by an attorney's failure to deposit and manage trust account money in the manner designated by the rule. (*Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 858.) Furthermore, while an attorney cannot be held

7. *In the Matter of Respondent H*, (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 242-243, does not support respondent's argument. Rather, that case and *Shalant* v. *State Bar* (1983) 33 Cal.3d 485, 489, indicate that not all funds claimed by, or belonging to, a non-client third party that are in the possession of an attorney have trust status within the meaning of rule 4-100. In both cases, the accused attorneys had settled a case and disbursed the settlement proceeds even though a prior attorney claimed a part of the settlement proceeds as attorneys fees for past services. The issue in both cases was whether the funds in possession of the accused attorneys were impressed with trust status under rule 4-100 on account of the non-lien claim by the prior attorneys. Both cases held that the funds were not.

8. In light of respondent's admitted lack of knowledge of the money that was being deposited into the trust account, we do not view his signature on the trust checks as adequate supervision of the account.

responsible for every detail of office operations, he or she has a "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795.) We are persuaded that by placing Fujimori's funds in his trust account for the purpose of allowing the trust account to be used by Fujimori as a business account, and by failing to maintain and supervise the account, respondent violated both the letter and the spirit of rule 4-100(A).

Respondent's prolonged inattention to his trust account and his virtual relinquishment of control of the account demonstrate why strict adherence to the rule is necessary to prevent the dangers that the rule was designed to protect against. Respondent testified that at the time he borrowed the money from Fujimori, he did not even know that Fujimori "had money on deposit with us," and that he was "pleasantly surprised" at finding out that Fujimori's $20,000 was in his trust account. Respondent's inattention to the amounts deposited into the account coupled with his failure to regularly review and reconcile the account created a great risk that the amounts Fujimori withdrew from the account would exceed the amounts deposited.[9] Thus, not only did Fujimori's use of the trust account cloak his business transactions with the soundness represented by the trust account, but, more significantly, respondent's inattention put client funds in the account in outright jeopardy. These are both contrary to the purpose of rule 4-100. (Cf. *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.)

Furthermore, by keeping the money he borrowed in the trust account, respondent commingled his personal funds with client funds and used the trust account to pay his own personal and business expenses. Such personal uses of a client trust account are also clear violations of rule 4-100(A). (*Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 22-23 ["The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit."]; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 625.) We therefore conclude that the hearing judge's culpability conclusion that respondent violated rule 4-100(A) is supported by the record.

Respondent next argues that he had an honest but unreasonable belief that funds would be available to cover the Maxim's checks before he sent them. Therefore, respondent asserts that his conduct does not rise to the level of moral turpitude.

[3] An attorney's practice of issuing checks which he knows will not be honored violates "'the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice.'" (*Alkow* v. *State Bar* (1952) 38 Cal.2d 257, 264, quoting *Tatlow* v. *State Bar* (1936) 5 Cal.2d 520, 524.) Such conduct involves moral turpitude. (*In the Matter of Heiser*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 54.) Nevertheless, we have noted that a justifiable and reasonable belief that a check will be honored is a defense to this charge. (*In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 411.)

In the present case, by respondent's own admission, he did not have a reasonable belief that the check would be honored upon presentment. This admission is also supported by other facts in the record. Respondent was aware that there were problems with the settlement and that his firm's relationship with the client had deteriorated due to a lack of trust. In addition, the timing of settlement and receipt of settlement money in personal injury cases is inherently unreliable. Under these circumstances, it was unreasonable for respondent to send the Maxim's checks before he received the settlement money. At best, respondent's actions were the result of his gross negligence and therefore involved moral turpitude in violation of section 6106. (See *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.)

9. Respondent also testified that his son, who did research projects for the firm, was authorized to sign trust account checks when respondent was out of the country. At trial, respondent could not explain why some money was withdrawn from the trust account because his son had signed the checks. This practice could only increase the risk to client funds.

Respondent's final argument that the discipline should not include a period of actual suspension rests on his analysis of his misconduct in relation to comparable case law. Before we turn to that issue, we address other modifications to the hearing judge's legal conclusions.

First, we note that the hearing judge concluded that the same material facts which supported the section 6106 violation also supported the rule 4-100(A) violation and therefore the latter violation was duplicative. The section 6106 violation is founded on respondent's prolonged inattention to his nondelegable duty to maintain and supervise his client trust account and on his gross neglect in issuing the Maxim's checks. The rule 4-100 violation is founded on respondent's relinquishment of control of his trust account coupled with his failure to supervise and maintain the account, along with his commingling of his personal funds with client funds in the account and his use of the account to pay personal and business expenses. While we agree that there is some overlap, we view enough distinction between inattention and failure to supervise the account and gross neglect in issuing checks on the one hand, and active commingling and personal use of the account on the other, to support separate violations.

[4] We also reject the hearing judge's conclusion that respondent's failure to make restitution to Maxim's is a ground for concluding that his misconduct involved moral turpitude. No cases are cited in support of this conclusion; and our research reveals no authority holding that failure to repay borrowed money, even if the attorney had funds to pay at least part of the money, without more, amounts to moral turpitude. However, we agree with the hearing judge that under the circumstances respondent's failure to pay at least part of the money owed is a factor in aggravation as a demonstrated indifference toward rectification and atonement for respondent's misconduct. (Std. 1.2(b)(v).)

Next, the hearing judge found in aggravation that respondent's misconduct was surrounded by other uncharged ethical violations in that the repeated negative balances in respondent's trust account supported a finding of misappropriation. (Std. 1.2(b)(iii).) We find this aggravating factor to be duplicative of our conclusion that respondent is culpable of violating section 6106 on account of his prolonged mismanagement of his trust account. There was no evidence of misappropriation other than the negative balances, and our culpability conclusion is based partly on the negative balances. We therefore give this factor no additional weight in determining the proper discipline.

Next, the hearing judge found in mitigation that respondent practiced law without prior discipline for over 21 years prior to the start of his misconduct in 1990. We note that respondent stipulated that his inattention to the maintenance and supervision of his trust account began in at least 1986. Furthermore, the hearing judge found that for some 18 years no one (except presumably the bookkeeper) managed respondent's trust account system. We therefore find that respondent's misconduct began well before 1990. Accordingly, we discount the weight to be accorded respondent's years of practice as a mitigating circumstance.

[5] Finally, we disagree with the hearing judge's finding in mitigation that respondent's actions were in good faith because he did not believe at the time that it was improper for him to allow Fujimori to use his client trust account as a business account. (Std. 1.2(b)(ii).) We do not believe it is appropriate to reward respondent for his ignorance of his ethical responsibilities.

Turning to the degree of discipline, the hearing judge cited standards 2.2(b) and 2.3, and *In the Matter of Heiser*, *supra*, 1 Cal. State Bar Ct. Rptr. 47, *In the Matter of Koehler*, *supra*, 1 Cal. State Bar Ct. Rptr. 615, and *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, in support of her discipline recommendation. Respondent distinguishes his case from the above three and argues that although a period of probation is appropriate, no actual suspension should be imposed because of the "substantial mitigation" present in his case.

Standard 2.2(b) requires a minimum of three months actual suspension, regardless of mitigating circumstances, for an attorney found culpable of commingling, not amounting to wilful misappro-

priation, in violation of rule 4-100. Standard 2.3 requires actual suspension or disbarment for an attorney found culpable of violating section 6106, depending upon the extent of harm to the victim of the misconduct and depending upon the magnitude of the misconduct and the degree to which it relates to the practice of law. As recognized by the hearing judge, the standards are not mandatory sentences imposed in a blind or mechanical manner. (*Gary* v. *State Bar* (1988) 44 Cal.3d 820, 828.) However, even though the standards are merely guidelines, they should not be deviated from absent a compelling reason to do so. (*Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 291.) We must also consider whether the recommended discipline is consistent with prior cases that had similar facts. *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

In *In the Matter of Heiser, supra*, 1 Cal. State Bar Ct. Rptr. 47, the attorney was suspended from the practice of law for one year, stayed, and placed on two years probation on conditions, including actual suspended for six months. During an 11-month period, Heiser issued seven dishonored checks to satisfy personal debts. Some of the checks were drawn on his client trust accounts, which during the relevant times were either closed or without sufficient funds. Heiser had practiced law without prior discipline for 16 years, but he had not answered the State Bar's formal charges, and his default had been entered. (*Id.* at p. 56.)

In *In the Matter of Koehler, supra*, 1 Cal. State Bar Ct. Rptr. 615, the attorney was suspended for three years, stayed, and placed on five years probation on conditions, including actual suspension for a period of six months. Koehler had repeatedly used his client trust account as a personal account, failed to refund unearned cost advances promptly in two instances, and failed to perform services competently in one matter. In aggravation, Koehler committed an act of moral turpitude by keeping his personal funds in his trust account in order to conceal them from the Franchise Tax Board, and had a record of prior discipline, having been privately reproved based on client inattention in four matters. We concluded that Koehler's disregard of his duties warranted imposing at least the minimum three months actual suspension provided for by standard 2.2(b), irrespective of the mitigating circumstances. (*Id.* at p. 628.) Other factors in the record caused us to conclude that a longer suspension was appropriate. (*Id.* at pp. 628-629.)

In *In the Matter of Bleecker, supra*, 1 Cal. State Bar Ct. Rptr. 113, the attorney was suspended for two years, stayed, and placed on two years probation, on conditions including sixty days actual suspension. Bleecker had commingled personal funds with client funds in his client trust account, misappropriated $270 advanced by a client for costs, and used his trust account to hold personal funds in order to avoid a tax levy. We found that the nature of the misconduct, which occurred over a relatively short duration, coupled with other mitigating circumstances, established that a lesser sanction than that called for by standard 2.2(a) was appropriate. (*Id.* at pp. 126-127.)

Respondent cites *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, in support of his argument that his discipline should be reduced. Whitehead was suspended for one year, stayed, and placed on five years probation on strict conditions, including forty-five days actual suspension. Whitehead had commingled personal funds with client funds in one matter, failed to perform services competently one matter, failed to communicate in one matter, and failed to cooperate with the State Bar in its investigation of his misconduct. In light of the circumstances of the misconduct, which indicated that the actual danger to client funds proved minimal and occurred under extenuating circumstances, and the extensive mitigating circumstances, we concluded that the application of standard 2.2(b) was not necessary. (*Id.* at p. 371.)

There are many circumstances of the present misconduct which vary from the misconduct involved in the above cases. Nevertheless, respondent's misuse of his trust account was serious and prolonged, and put client funds in the account in outright jeopardy. As noted, it also appears that respondent never exercised the control and supervision of his trust account required by the Rules of Professional Conduct in the many years he has practiced law. Thus, the weight to be accorded to his many years of blemish-free practice is reduced. Given this, the nature of the misconduct, and the lack of other mitigating circumstances of sufficient weight to

counter the aggravating circumstances, we find no compelling reason to depart from the three months minimum suspension called for by standard 2.2(b).

In addition, we conclude that the discipline recommended by the hearing judge is proportionate to the discipline imposed in the above comparable cases. Although respondent's misconduct is not as extensive as the misconduct in *In the Matter of Heiser*, *supra*, 1 Cal. State Bar Ct. Rptr. 47, *In the Matter of Koehler*, *supra*, 1 Cal. State Bar Ct. Rptr. 615, and *In the Matter of Bleecker*, *supra*, 1 Cal. State Bar Ct. Rptr. 113, it was far more protracted. Furthermore, the actual danger to client funds in the present case was great and did not occur under the extenuating circumstances present in *In the Matter of Whitehead*, *supra*, 1 Cal. State Bar Ct. Rptr. 354. Thus, on balance, actual suspension between the 45 days and 6 months imposed in these cases is warranted here.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for a period of two years, that execution of the order of suspension be stayed, and that he be placed on probation for a period of two years on the conditions of probation recommended by the hearing judge, including the condition that respondent be actually suspended from the practice of law for a period of ninety days. 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.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MURRAY DONALD KATZ

A Member of the State Bar

No. 91-O-04707

Filed November 1, 1995

SUMMARY

A hearing judge found respondent culpable of endorsing a client's false financial statement in connection with the client's purchase of a business, misrepresenting that a client's company was a successful business, filing a Chapter 11 bankruptcy petition for a client in bad faith, and failing to obey a court order. The hearing judge recommended a stayed suspension, probation, and 90-day period of actual suspension. (Hon. Alan K. Goldhammer, Hearing Judge.)

The State Bar requested review. The review department affirmed each of the hearing judge's culpability determinations, reinstated and sustained two dismissed charges, and substantially increased the recommended discipline to include a two-year period of actual suspension and restitution totaling $16,538.

COUNSEL FOR PARTIES

For State Bar: Andrea Teper Wachter

For Respondent: No Appearance

HEADNOTES

[1 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
Respondent's endorsement of a client's false financial statement and misrepresentation that one of a client's companies was a successful business were willful violations of his duty to employ only such means as are consistent with the truth when representing clients, and were dishonest acts involving moral turpitude. However, to the extent that the facts underlying both violations were the same, the review department gave no additional weight to the duplication in determining discipline.

[2] **204.90 Culpability—General Substantive Issues**

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.

220.00 State Bar Act—Section 6103, clause 1

Respondent violated his duty to obey court orders when he intentionally failed to comply with two bankruptcy court orders directing him and his client to produce various documents to an examiner appointed by the bankruptcy court. It was no defense that the documents were ultimately determined to be of no use to the examiner.

[3 a, b] **194 Statutes Outside State Bar Act**
204.90 Culpability—General Substantive Issues
213.30 State Bar Act—Section 6068(c)
490.00 Miscellaneous Misconduct

Respondent violated his duty to maintain only just causes and abused the bankruptcy process by filing and maintaining a Chapter 11 bankruptcy proceeding for an insolvent client when he knew that the client's only assets were nine residential lots in which there was no equity and that the client had neither the ability nor the intention of making adequate protection payments to the lienholders on the nine lots in accordance with the law. Even if respondent was unaware of these facts, he would still be culpable. Under applicable federal rules of procedure, respondent's signature on the Chapter 11 petition as attorney of record for debtor was a certification that to the best of his knowledge and belief, formed after a reasonable inquiry, the petition was well founded in fact and warranted by either existing law or a good faith argument for the modification of existing law.

[4] **204.90 Culpability—General Substantive Issues**
213.20 State Bar Act—Section 6068(b)

Respondent violated his duty to maintain respect for courts by failing to appear as counsel of record at hearings and court-ordered meetings in his client's bankruptcy proceeding. Respondent's repeated failures to appear were not tantamount to a voluntarily dismissal of his client's bankruptcy petition. Once respondent signed and filed his client's Chapter 11 petition, he submitted to the bankruptcy court's jurisdiction and had a duty to appear and participate at hearings and court-ordered meetings in good faith, withdraw as counsel of record, or have the bankruptcy court dismiss the petition.

[5] **221.00 State Bar Act—Section 6106**

Respondent committed acts involving moral turpitude when he filed and knowingly maintained a client's meritless bankruptcy proceeding in bad faith.

[6] **511 Aggravation—Prior Record—Found**

Aggravating circumstance of prior misconduct was magnified by fact that respondent committed the current misconduct while on probation in prior disciplinary proceeding.

[7] **171 Discipline—Restitution**

Sanction orders based upon specific out-of-pocket losses directly resulting from respondent's misconduct are proper subjects of restitution order.

[8] **171 Discipline—Restitution**

Bankruptcy laws do not prohibit State Bar Court from recommending or Supreme Court from ordering a respondent to make restitution for an indebtedness arising from misconduct related to his practice of law even though the indebtedness has been discharged in bankruptcy.

[9] **171 Discipline—Restitution**

Generally, restitution should be made in an amount consistent with the loss attributable to the respondent's misconduct. Thus, restitution for theft, misappropriation, or embezzlement should include interest. Where the debt which gave rise to the restitution did not provide for interest, the review department recommended that the restitution include interest at the legal rate (10 percent per annum) from the effective date of the Supreme Court disciplinary order.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.21 Section 6068(b)
- 213.31 Section 6068(c)
- 213.41 Section 6068(d)
- 220.01 Section 6103, clause 1
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 221.19 Section 6106—Other Factual Basis

Aggravation

Found

- 521 Multiple Acts
- 584.10 Harm to Public
- 586.11 Harm to Administration of Justice
- 591 Indifference

Mitigation

Declined to Find

- 740.52 Good Character
- 740.53 Good Character
- 740.59 Good Character

Standards

- 802.61 Appropriate Sanction
- 802.30 Purposes of Sanctions
- 833.90 Moral Turpitude—Suspension

Discipline

- 173 Ethics Exam/Ethics School
- 175 Rule 955
- 176 Standard 1.4(c)(ii)
- 1013.11 Stayed Suspension—5 Years
- 1015.08 Actual Suspension—2 Years
- 1093 Substantive Issues re Discipline—Inadequacy

Probation Conditions

- 1021 Restitution
- 1024 Ethics Exam/School
- 1030 Standard 1.4(c)(ii)

Other

- 178.10 Costs—Imposed

OPINION

PEARLMAN, P.J.:

I. INTRODUCTION

The State Bar's Office of the Chief Trial Counsel (State Bar) seeks review of a hearing judge's dismissal of two charged disciplinary violations and his recommendation of 90-day actual suspension for the remaining proved charges.[1] Respondent, who has a prior record of discipline, was found culpable of endorsing his client's false financial statement in connection with the purchase of a business in violation of Business and Professions Code sections 6068, subdivision (d), and 6106.[2] Respondent was also found culpable of filing a Chapter 11 bankruptcy petition in bad faith and failing to obey bankruptcy court orders in violation of sections 6068, subdivision (c), and 6103, respectively.

Respondent appeared and participated in this proceeding before the hearing department, but was precluded from appearing at oral argument on review since he did not seek review of the hearing judge's decision or file an appellee's brief in response to the State Bar's appellant's brief. (Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings (eff. Jan. 1, 1995), rule 303(a).)

First, we review and adopt the hearing judge's findings of fact and culpability determinations under count one of the second amended notice to show cause. Next, we adopt the hearing judges findings of fact and culpability determinations as to the section 6068, subdivision (c), and section 6103 violations charged in count two and address the State Bar's contention that the hearing judge improperly dismissed two other charged violations in count two.[3] Finally, we address the State Bar's contention that the hearing judge's discipline recommendation is inadequate in light of the standards and Supreme Court precedent.

The State Bar urges us, based on a number of precedents, to recommend to the Supreme Court that respondent be actually suspended for two years and until he proves rehabilitation, present learning and ability in the law, and fitness to practice law and makes restitution totaling $15,538. Upon our de novo review, we reinstate and sustain the two disciplinary charges that the hearing judge dismissed; and after modifying a number of findings on mitigating and aggravating circumstances, we increase the level of recommended discipline to two years of actual suspension and until respondent complies with standard 1.4(c)(ii). We also recommend that respondent be required to make restitution totaling $16,538 prior to resumption of the practice.

II. DISCUSSION

A. Count One

On our de novo review, we adopt the hearing judge's essential findings of fact and culpability determinations under count one.

Respondent was admitted to the California bar in 1953. Throughout his legal career, respondent has limited his practice to representing a small number of businesses, usually no more than ten clients at any given time. In 1982, he began representing businessman James Zetz and various members of Zetz's family. He also served as corporate counsel for almost all of Zetz's companies and real estate development ventures. Zetz paid respondent both by the hour and, when he negotiated loans for Zetz or one of

1. This recommendation followed reconsideration of the hearing judge's original disciplinary recommendation. Respondent had filed a motion for reconsideration on the ground that the discipline was too severe. In response, the State Bar requested substantially greater discipline. Stating that respondent had not demonstrated any genuine contrition, the hearing judge increased his initial discipline recommendation of 75 days of actual suspension to 90 days of actual suspension and compliance with rule 955, California Rules of Court.

2. Unless otherwise indicated, all future references to sections are to the Business and Professions Code.

3. As it indicated in its pre-trial statement, the State Bar did not proffer any evidence with respect to count three, the last count in the second amended notice to show cause. Accordingly, the hearing judge dismissed count three in the interests of justice, and we affirm that dismissal.

his business ventures, by a percentage of the loan amounts. Respondent was also an officer and principal in the Paint Station, a company in which Zetz was also a principal. As a result, respondent had extensive knowledge of Zetz's business and financial affairs.

Respondent described himself during the 1980's, as Zetz's "personal" attorney. During that time, Zetz was a very important client from whom he earned a substantial portion of his income. At one time, respondent even had his law office at the offices of Paint Station. In addition, he drove a new Lincoln Continental Mark VII, which was leased to and paid for by another one of Zetz's companies.

In early 1986, Zetz employed respondent to assist in drafting a purchase and sale agreement by which Zetz and Zetz's friend Joseph Webb would purchase all of the stock in Hi Line Paint Manufacturing Company, Inc., (Hi Line Paint) from Stanley Blumenfeld and James Elrick. It is undisputed that Blumenfeld and Elrick wanted to sell Hi Line Paint because it was poorly managed and had an expensive problem disposing of inferior paint that Hi Line's customers were returning for refund. In addition, it is undisputed that Hi Line was in very poor financial condition.

At the time Zetz employed respondent to assist in drafting the agreement, the parties had already agreed to most of the terms of the purchase, and the transaction quickly closed in early April 1986. Under the terms of the final agreement, Zetz acquired a two-thirds interest in Hi Line, and Webb acquired a one-third interest. Because of Hi Line's poor financial condition, Zetz and Webb were not required to make, and did not make, a cash downpayment. In fact, Blumenfeld loaned $110,000 to Zetz and Webb to provide them with some initial operating capital and closing costs.

The final agreement also provided that Zetz and Webb were jointly (1) to execute two promissory notes totaling $100,000 in favor of the sellers, (2) to assume a number of Hi Line's substantial debts so that Blumenfeld's personal liability on them would be released, and (3) to give the sellers a five-year option to repurchase a one-third interest in Hi Line for $100,000.

In order to obtain these favorable terms, Zetz gave Blumenfeld a financial statement showing his personal net worth as $990,108. When Zetz gave the financial statement to Blumenfeld, it was almost nine months old. After Zetz and Webb took over Hi Line Paint's operation, but before the transaction closed, there was a meeting of Blumenfeld, Blumenfeld's attorney, Zetz, and respondent. During that meeting, Blumenfeld's attorney expressed his view that the transaction was fairly risky for Blumenfeld and that the transaction was one in which Blumenfeld was relying a great deal upon the financial strength of the buyers (Zetz and Webb). Moreover, the parties discussed Zetz's financial statement, and respondent was asked whether it was accurate. Respondent testified that he responded by saying something to the effect that Zetz was, in fact, worth about "a million bucks." The hearing judge rejected that testimony and found, based on the prior testimony from respondent's bankruptcy proceeding, that respondent stated that he had represented Zetz for some time and that he knew that Zetz's financial statement was correct. The hearing judge further found that respondent knowingly lied when he endorsed Zetz's false financial statement because respondent knew that it was false and grossly exaggerated Zetz's net worth.

Before the transaction closed, respondent also assured Blumenfeld and Blumenfeld's attorney that the Ryan Paint Company, which was another paint company owned by Zetz, was a successful business. The hearing judge found that assurance to be misleading.

After the transaction closed, Hi Line's financial condition got worse. It became insolvent and "went out of business" in either January or February 1987. Shortly thereafter, Zetz sued Blumenfeld and his partners in superior court alleging that they defrauded him in the Hi Line transaction. Blumenfeld filed a cross-complaint against Zetz and respondent alleging that they defrauded him in the Hi Line transaction by giving him the false financial statement of Zetz.

Zetz filed for bankruptcy in 1987, and respondent filed for bankruptcy in 1988. In May 1989, Blumenfeld filed an adversary proceeding in bank-

ruptcy court to determine the dischargeability of his fraud claim against respondent. After a two-day bench trial, the bankruptcy court entered a nondischargeable judgment against respondent in favor of Blumenfeld in the amount of $8,038.04 plus interest thereon from the February 15, 1990, date of judgment until paid.

[1a] The evidence in the record below clearly supports the hearing judge's conclusion that respondent willfully violated his duty under section 6068, subdivision (d), to employ only such means as are consistent with the truth when representing a client. Respondent breached that duty by endorsing Zetz's false financial statements and misrepresenting Ryan Paint as a successful business to Blumenfeld and his attorney. Likewise, the evidence clearly supports the hearing judge's conclusion that respondent's endorsement and misrepresentation to Blumenfeld and his attorney were dishonest acts involving moral turpitude in violation of section 6106.[4] **[1b - see fn. 4]**

B. Count Two

The State Bar contends that the hearing judge improperly dismissed two of the disciplinary violations charged in count two, but does not dispute any of the hearing judge's factual findings. The State Bar asks us to affirm the hearing judge's determinations that respondent violated his duty to maintain only just causes under section 6068, subdivision (c), and that respondent violated a court order in violation of his duty under section 6103 by not producing documents as ordered by the bankruptcy judge. On de novo review, we adopt the hearing judge's essential findings of fact and his culpability determinations that respondent violated sections 6068, subdivision (c), and 6103.

In May 1985, respondent's client Zetz purchased nine undeveloped residential lots in Hayward, California. Zetz purchased these nine lots in his individual capacity with the intent to develop them into a subdivision named La Esquella. The sales price was $165,000. At closing, Zetz made a $55,000 cash downpayment and gave the seller a promissory note for the remaining balance of $110,000. The $110,000 promissory note was secured by a deed of trust on the nine lots.

That same month, Zetz obtained a $680,000 construction loan to develop the lots from Sacramento Savings & Loan. The $680,000 construction loan was also secured by a deed of trust on the nine lots. As Zetz's personal attorney, respondent represented Zetz in both purchasing the lots and obtaining the $680,000 loan.

After making only one monthly payment, Zetz defaulted on the $110,000 note to the seller, who filed a notice of default. By June or July 1985, Zetz began having serious difficulty developing the nine lots. He had problems with the building plans and vandalism. By November 1985, these problems were causing substantial cost overruns.

In March 1986, Zetz halted work on the project because of problems with construction and funding. Work did not resume until late April 1986, but was halted again in June 1986 because the project continued to be plagued by construction problems and cost overruns. At that point, Zetz simply could not resume work without additional capital. Therefore, beginning in May 1986, respondent began a series of meetings with all of the lenders holding deeds of trust on the nine lots in an attempt to work out an agreement that would forestall any foreclosure on the lots. In addition, respondent began looking for additional capital with which to finish the construction.

By late fall 1986, respondent and the lenders were able to reach an agreement, and respondent located and negotiated an additional construction loan of $90,000 from Breen & Co., Inc. That $90,000 loan was also secured by a deed of trust on the nine lots. With this $90,000 loan, Zetz was finally able to

4. **[1b]** Insofar as the facts showing culpability under section 6068, subdivision (d), are the same as the facts showing culpability under section 6106, we give no additional weight to such duplication in determining the appropriate discipline. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose served by duplicative allegations of misconduct]; *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221.)

resume work on the project in January 1987. But, in April 1987, Zetz defaulted on the $90,000 loan, and shortly thereafter, Breen & Co. began the process of foreclosing on its deed of trust. It duly noticed a foreclosure sale for September 22, 1987.

In early August 1987, Zetz demanded that the local electric company return to him the $15,000 construction deposit. In addition, Zetz also demanded that the county return to him the $500 construction deposit. None of the lenders were aware, at that time, that Zetz was withdrawing these deposits. Respondent denied knowing that Zetz was withdrawing them until sometime in October 1987, but the hearing judge resolved that fact issue against him. Without these deposits, neither the electric company nor the county would continue installing facilities or providing services to the project.

Also in early August 1987, Zetz executed a deed transferring the nine lots to Hi Line even though Zetz had no equity in them. Since Hi Line was insolvent, it did not pay any cash for them. None of the lenders were aware that Zetz was transferring title to the nine lots at that time. In fact, Zetz did not even record the grant deed until September 1987. Thus, Zetz not only withdrew the electrical and county deposits that were necessary for work to be done on the project, he did not infuse any capital into Hi Line to enable it to replace those deposits so that work on the project could be resumed. Accordingly, Zetz effectively "killed" the project by withdrawing these deposits.

Four days before the September 22, 1987, foreclosure sale, Hi Line filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code for the express purpose of forestalling the foreclosure sale. As its corporate counsel, respondent filed Hi Line's Chapter 11 petition and represented it throughout its bankruptcy proceeding. Respondent admits that he advised Zetz that filing for reorganization under Chapter 11 to avoid the imminent foreclosure sale was proper and not a bad faith filing.

In November 1987, two of Hi Line's creditors filed a motion seeking the appointment of an examiner to investigate and report upon allegations of fraud, dishonesty, mismanagement, and transfers of Hi Line's assets in fraud of its creditors. That motion was substantiated by two detailed declarations, one of which was by Hi Line's accountant and covered the period from May 1986 through January 1987, when Zetz shut Hi Line down. The bankruptcy court granted the motion and appointed an examiner in an order filed January 26, 1988. In its January 1988 order, the bankruptcy court unequivocally ordered Hi Line, its agents, and attorney to turn over to the examiner all books, records, documents, and information of any kind relating to Hi Line that was in their possession or under their control.

Neither Zetz nor respondent produced Hi Line's records to the examiner even though the examiner wrote respondent two letters asking him to produce Hi Line's records in accordance with the bankruptcy court's order. Approximately five boxes of Hi Line's records were in respondent's physical possession at his law office, which was in the Paint Station's offices at the time. In early 1988, the Paint Station was in bankruptcy, and in April 1988, the bankruptcy court appointed an interim trustee over the Paint Station. That trustee took possession of the Paint Station's offices pursuant to the bankruptcy court's order. The trustee allowed respondent temporarily to keep his law office at the Paint Station.

Respondent asked the trustee for permission to remove Hi Line's records from his office, and on April 22, 1988, the trustee gave respondent permission to remove all five boxes. After he was given permission to remove all five boxes, respondent asked if he could leave four of the boxes in the office, stating he had no place to store them. Respondent was given permission to store the four boxes in his (the Paint Station's offices) and was free to retrieve them at any time. He took the fifth box with him. Respondent admits that he did not give the fifth box he took with him to the Hi Line examiner and that he gave it to Zetz instead. Zetz did not give the box to the examiner.

Thereafter, Elrick, as a creditor of debtor Hi Line, filed a motion for an order to produce and sanctions against Hi Line, Zetz, and respondent for not producing all of Hi Line's records to the examiner in accordance with the January 1988 order. The bankruptcy court granted Elrick's motion in an order

filed May 27, 1988. In that May 1988 order, the bankruptcy court (1) found that Hi Line, Zetz, and respondent willfully disobeyed its January 1988 order to turn all of Hi Line's records over to the examiner; (2) ordered them again to produce the records to the examiner; and (3) ordered them to pay as sanctions $1,000 in attorney's fees to Elrick. Respondent did not comply with this May 1988 order for approximately seven months.

In the latter part of 1987, Breen & Co. filed a motion for a finding of bad faith filing and sanctions against Hi Line, Zetz, and respondent. The bankruptcy court granted the motion in an order filed March 8, 1988, because it found (1) that Hi Line's Chapter 11 petition was filed in bad faith and an abuse of the bankruptcy process and (2) that respondent willfully failed to appear at several hearings and court-ordered meetings. Accordingly, the bankruptcy court awarded Breen & Co. $7,500 in sanctions and partial compensation for its losses (e.g., attorney's fees) against Hi Line, Zetz, and respondent, jointly and severally.

[2] We conclude that the evidence clearly establishes that respondent willfully chose to violate the bankruptcy court's January 1988 order by not giving any of Hi Line's records to the examiner. Furthermore, the evidence clearly establishes respondent willfully chose to violate the order a second time by giving the fifth box of records in his physical possession to Zetz. Furthermore, the evidence clearly establishes that respondent failed to comply with the bankruptcy court's May 1988 order. Respondent contends that the five boxes of records were ultimately determined to be of no use to the examiner, but this is no defense to knowingly and willfully violating two court orders in contravention of his duty under section 6103.

[3a] We conclude that the evidence is clearly sufficient to sustain the hearing judge's determinations that respondent willfully violated his duty under section 6068, subdivision (c), to maintain only just causes by filing and maintaining Hi Line's Chapter 11 proceedings. When respondent filed Hi Line's Chapter 11 petition, the nine lots were Hi Line's only assets, and there was no equity in them. Accordingly, when respondent filed the Chapter 11 petition, he knew that Hi Line had no reasonable prospects of rehabilitation from insolvency or of refinancing the project. In addition, when he filed the petition, respondent knew that Hi Line was insolvent and had neither the ability nor the intention of making adequate protection payments to the lienholders on the nine lots as required in Chapter 11 proceedings.

[3b] Moreover, even if respondent did not know these things when he filed Hi Line's Chapter 11 petition, he should have known them. Respondent's signature on the Chapter 11 petition was a certification that "he [had] read [the petition]; that to the best of his knowledge, information, and belief *formed after reasonable inquiry* [the petition was] well grounded in fact and [was] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it [was] not interposed for any improper purpose, such as to harass, *to cause delay*, or to increase the cost of litigation." (Fed. Bankr. Rules, rule 9011, 11 U.S.C., italics added.) The filing of the Chapter 11 petition for Hi Line was an abuse of the bankruptcy process.

[4] Moreover, we agree with the State Bar that the evidence clearly establishes that respondent willfully violated his duty under section 6068, subdivision (b), to maintain the respect due the bankruptcy courts by repeatedly failing to appear as counsel of record for the debtor at hearings and court-ordered meetings. Respondent contends that his failures to appear on behalf of his client are not disciplinable because they were tantamount to voluntarily seeking the dismissal of Hi Line's bankruptcy petition. This position is meritless. Once respondent submitted to the jurisdiction of the bankruptcy court by signing and filing Hi Line's Chapter 11 petition, he had a duty to participate in good faith as counsel of record for the debtor in the bankruptcy proceedings, to withdraw as Hi Line's counsel of record, or to have the bankruptcy court dismiss Hi Line's Chapter 11 petition. He did none of these things.

[5] We also agree with the State Bar that the evidence clearly establishes that respondent's misconduct surrounding Hi Line's bankruptcy proceeding involved moral turpitude in violation of section 6106. Our review of the record convinces us that the evidence clearly supports the hearing judge's

finding that respondent filed and knowingly maintained Hi Line's meritless bankruptcy proceeding in bad faith.

C. Aggravating Circumstances

We agree with the State Bar position that the aggravating circumstances found below should be augmented. **[6]** Respondent has one prior record of discipline. (Rules Proc. of State Bar (eff. Jan. 1, 1995), Title IV, Stds. for Atty. Sanctions for Prof. Misconduct, (stds.), std. 1.2(b)(i).) In 1985, the Supreme Court placed respondent on a one-year stayed suspension and two-year probation (with no actual suspension) for violating section 6106 by knowingly writing thirteen insufficiently funded checks totaling $12,673.21 over a period of one and one-half years. This serious aggravating circumstance is magnified by the fact that respondent committed the current misconduct during his prior two-year disciplinary probation.

Respondent committed multiple acts of misconduct. (Std. 1.2(b)(ii).) In addition, respondent's misconduct significantly harmed both the public and the administration of justice. (Std. 1.2(b)(iv).) His knowing refusal to comply with the bankruptcy court's discovery orders, standing alone, seriously delayed and hampered the court-appointed examiner in Hi Line's bankruptcy proceeding from investigating the allegations that Zetz, respondent, and others operated Hi Line and the Paint Station in a manner that defrauded Hi Line's creditors.

Respondent has demonstrated indifference toward rectification of the consequences of his misconduct. (Std. 1.2(b)(v).) He has made only one or two small payments to Blumenfeld on the $8,038.04 nondischargeable judgment. In addition, respondent's testimony before both the bankruptcy court and the State Bar Court lacked candor.

Finally, we conclude that respondent's meritless defenses and contentions in the present proceedings clearly demonstrate that respondent lacks insight into the wrongfulness of his actions. (Cf. *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 958.) Respondent does not fully comprehend his professional responsibilities. Section 6068, subdivision (d), "requires an attorney to refrain from misleading and deceptive acts without qualification. [Citation.] It does not admit of any exceptions." (*Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 315.)

The Supreme Court has repeatedly rejected assertions that an attorney's misconduct is less culpable because he or she was representing and protecting a client's interests. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090; *Codiga* v. *State Bar* (1978) 20 Cal.3d 788, 793 ["[D]eceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive or personal gain."].) Zealous representation of clients does not include practicing deceit on the client's behalf. It is the attorney's duty to counsel the client not to engage in misrepresentation. Further, the attorney must withdraw from representing the client if the attorney knows or should know that the client is bringing an action or conducting a defense without probable cause or the attorney knows that the attorney's continued employment will result in a violation of the Rules of Professional Conduct or the State Bar Act. (Rules Prof. Conduct, rule 3-700 (B).)

D. Mitigating Circumstances

In the disciplinary portion of the hearing, respondent presented three witnesses (one client and two attorneys) who testified as to his good character. The hearing judge, however, found that respondent had not established good character as a mitigating circumstance under standard 1.2(e)(vi), which requires an extraordinary demonstration of good character from the testimony of a wide range of references in the legal and general communities. We agree. Respondent's character evidence did not come from a wide range of references. Nor did it come from individuals who are aware of the full extent of his prior or current misconduct.

E. Disciplinary Recommendation

In determining the appropriate level of discipline, we first look to the standards for guidance. (*Drociak* v. *State Bar*, *supra*, 52 Cal.3d at p. 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal.

State Bar Ct. Rptr. 615, 628.) Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (See also *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111.)

When two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards, the discipline imposed should be the most severe of the different applicable sanctions. (Std. 1.6(a).) In the present case, the most severe applicable sanction is found in standard 2.3, which provides that an attorney's culpability of an act of moral turpitude shall result in actual suspension or disbarment depending upon the extent of harm, the magnitude of the act, and the degree to which it relates to the attorney's practice of law.

Next, we look to decisional law for guidance. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) During the disciplinary portion of the hearing, respondent argued, without any supporting authority, that the appropriate discipline is "probation with a short, stayed suspension." Respondent further asserted that "any actual suspension would be unduly punitive and unnecessary to protect the public." The hearing judge did not find these unsupported contentions persuasive, and neither do we.

In making his discipline recommendation, the hearing judge nevertheless discounted respondent's misconduct in count one because, in his view, (1) respondent was put on the spot by an unexpected and apparently impromptu question as to whether Zetz's financial statement was correct and (2) respondent was dishonest in support of a client rather than for personal gain. However, neither of these reasons diminishes the seriousness of respondent's misconduct. Indeed, respondent had ample opportunity in the ensuing months to reflect upon and correct his "impromptu" response to the sellers and instead compounded his misconduct with further lack of candor in opposing the fraud charge in the bankruptcy proceedings and at the disciplinary hearing in the State Bar Court.

In addition, the hearing judge gave virtually no weight to the misconduct he found against respondent under count two. The hearing judge stated that respondent's misconduct "was minor and added little to the appropriate sanctions." We conclude that the misconduct the hearing judge found under count two was serious. Plus, we hold respondent culpable of two additional charged violations.

Based on fewer culpability determinations than we have found, the hearing judge determined that respondent's misconduct was comparable to the misconduct by DePew in *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139 and, accordingly, used as a guide the 45-day actual suspension which we recommended for DePew and which the Supreme Court adopted. We disagree. DePew's misconduct was far less egregious than respondent's misconduct. DePew acted at the direction of another attorney, who received two years' actual suspension for elaborate deception of a corporation in connection with which DePew committed two acts of deceit on behalf of the other attorney's wholly owned company. Unlike respondent, no real harm resulted because DePew voluntarily disclosed the deceit and disgorged the $3,500 to the victim. A number of other mitigating circumstances were found in DePew's favor, including the fact that DePew had a discipline-free record before and after his misconduct and that DePew's deceit was aberrational. No aggravating circumstances were found against DePew while many were found against respondent.

Citing *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d 300; *Crane* v. *State Bar* (1981) 30 Cal.3d 117; *Athearn* v. *State Bar* (1977) 20 Cal.3d 232; and *Glickman* v. *State Bar* (1973) 9 Cal.3d 179, the State Bar argues that the hearing judge's discipline recommendation is inadequate and that a period of actual suspension much greater than 90 days is the appropriate discipline for respondent's misrepresentations and deceitful conduct. In our view, the most similar case cited by the State Bar is *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d 300. In *Rodgers*, the Supreme Court imposed a five-year stayed suspension and a five-year probationary period with conditions including a two-year actual suspension. Among other things, Rodgers entered into an improper business transaction

with a client by failing to disclose his prior business and professional relationship with another individual involved in the transaction, misled a probate court by intentionally failing to file an inventory of an estate, ignored the probate court's orders, and misled others to believe that loans were secured by his own assets. The aggravating circumstances were multiple acts of misconduct, significant harm, dishonesty, lack of candor, and lack of insight into the wrongfulness of actions. Rodgers also commingled funds, as respondent did in the past. The extent of the misconduct in *Rodgers* was greater, but the mitigating circumstances in *Rodgers* were also greater since a significant period of time elapsed between the misconduct and the Rodgers disciplinary proceeding during which Rodgers practiced law without suffering additional charges of misconduct. Also, Rodgers practiced law with no prior record of discipline for almost 20 years.

We also conclude that respondent should be required to make restitution of the $8,038.04 judgment and the $7,500 and $1,000 sanction orders. **[7]** It has long been held that "[r]estitution is fundamental to the goal of rehabilitation." (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1094.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Id.* at p. 1093; *Brookman* v. *State Bar* (1988) 46 Cal.3d 1004, 1009, quoting *Kelly* v. *Robinson* (1986) 479 U.S. 36, 49, fn. 10.) Without question, sanction orders are for specific out-of-pocket losses directly resulting from respondent's misconduct and, therefore, proper subjects of a restitution order. (*Sorensen* v. *State Bar* (1991) 52 Cal.3d 1036, 1045.)

As we noted above, the $8,038.04 judgment against respondent is a nondischargeable debt. **[8]** According to respondent, both the $7,500 and $1,000 sanction orders against him in Hi Line's bankruptcy proceeding are dischargeable debts that were discharged in his bankruptcy proceeding. Nevertheless, because an attorney's responsibilities differ from those of a layman, an attorney may "be required to make restitution as a moral obligation even when there is no legal obligation to do so." (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674, citing *Brookman* v. *State Bar*, *supra*, 46 Cal.3d at p. 1008.) Moreover, because restitution serves the state's interests of protecting the public and rehabilitating errant attorneys, the federal bankruptcy laws[5] neither interfere with our ability to recommend nor prohibit the Supreme Court from ordering, in a disciplinary proceeding, restitution for an indebtedness arising out of an attorney's misconduct related to his practice of law even though the indebtedness has been discharged in bankruptcy. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1093; *Brookman* v. *State Bar*, *supra*, 46 Cal.3d at p. 1008; but see *Kwasnik* v. *State Bar* (1990) 50 Cal.3d 1061, 1072-1974 [moral character proceeding with facts distinguishable from the facts of *Hippard*, *supra*, and *Brookman*, *supra*].) Accordingly, respondent may be ordered to pay the sanction orders as restitution in this proceeding.

[9] The amount of restitution should generally be made in an amount consistent with the loss attributable to one's professional or other misconduct. Accordingly, one's restitution for theft, misappropriation, or embezzlement should include interest to compensate the victim for the lost use of his property or money. (See *Martin* v. *State Bar* (1991) 52 Cal.3d 1055, 1064 [The general rule is to order the payment of interest.].) In that regard, we note that Blumenfeld's $8,038.04 nondischargeable judgment against respondent provides for interest. The two sanction orders, however, do not provide for interest. The legal rate of interest in California on unsatisfied money judgments is 10 percent per annum. (Code Civ. Proc., § 685.010, subdivision (a).) We therefore consider that rate of interest appropriate here and recommend that the Supreme Court include in its order interest on the sanctions at 10 percent per annum from the effective date of the Supreme Court's order in this matter.

5. Federal bankruptcy law prohibits a governmental unit from, inter alia, denying, revoking, suspending, or refusing to renew a license and from discriminating with respect to employment against a bankrupt or debtor under the Bankruptcy Act "*solely* because such bankrupt or debtor . . . has not paid a debt that . . . was discharged under the Bankruptcy Act." (11 U.S.C. § 525(a), italics added.)

III. RECOMMENDATION

We recommend:

(1)that Murray Donald Katz be suspended from the practice of law for five years and that said suspension be stayed for five years on the condition that respondent be actually suspended for two years and until (1) he makes restitution and provides satisfactory evidence thereof to the Probation Unit, Office of Trials, Los Angeles, to Stanley Blumenfeld in the sum of $8,038.04 at 10 percent interest from February 15, 1990; to James Elrick in the sum of $1,000 at 10 percent interest from the effective date of the Supreme Court order in this matter; and to Breen & Co., Inc. in the sum of $7,500 at 10 percent interest from the effective date of the Supreme Court order in this matter and (2) he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law in accordance with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;

(2)that, as an additional condition on which respondent's five-year suspension is stayed, respondent be placed on probation for five years on the conditions of probation recommended by the hearing judge with the following modifications: Probation condition number 1 is deleted, and probation condition number 2 is modified to extend the time for respondent to complete the State Bar Ethics School from "within one year of the effective date of the Supreme Court's order" to "during the period of respondent's actual suspension";

(3)that respondent be required to take the California Professional Responsibility Examination as recommended by the hearing judge, but that the time for respondent to complete it be extended from "within one year of the effective date of the Supreme Court's order" to "during the period of respondent's actual suspension";

(4)that respondent be ordered to comply with rule 955 of the California Rules of Court as recommended by the hearing judge; and

(5)that the State Bar be awarded its costs in accordance with Business and Professional Code section 6140.7.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT V

A Member of the State Bar

No. 91-O-07092

Filed November 1, 1995

SUMMARY

A hearing judge found that respondent either authorized or was responsible for the sending of an employment solicitation letter to a potential client by a temporary employee. The hearing judge further found that the solicitation letter was written on letterhead that contained a facsimile of the Great Seal of the State of California and that such a use of the Great Seal violated both the Rules of Professional Conduct's proscription of misleading communications and the Government Code's proscription of commercial use of the Great Seal. The hearing judge ordered that respondent be publicly reproved with conditions attached, including a two-year period of probation. (Hon. David S. Wesley, Hearing Judge.)

Respondent sought review of the hearing judge's decision on numerous grounds. The review department affirmed the hearing judge's culpability determination with respect to the misleading communication violation, but held that the alleged Government Code violation was duplicative of the misleading communication violation. The review department admonished respondent for his misleading communication violation.

COUNSEL FOR PARTIES

For State Bar: Victoria Molloy

For Respondent: Respondent V, in pro. per.

HEADNOTES

[1] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
106.40 Procedure—Pleadings—Amendment

A first amended notice to show cause supersedes both the original notice and any proposed but unfiled first amended notices. The sufficiency of the first amended notice to show cause is determined without reference to either the original notice or any earlier proposed first amended notice.

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] **194 Statutes Outside State Bar Act**
204.90 Culpability—General Substantive Issues
213.10 State Bar Act—Section 6068(a)
253.10 Rule 1-400(D) [former 2-101(A)]

Illegal use of the Great Seal of the State of California on respondent's letterhead was inherently inappropriate even if no one was misled. Fact that no one was misled was only a mitigating circumstance.

[3 a-c] **101 Procedure—Jurisdiction**

Respondent's argument that the State Bar Court lacked jurisdiction because any misconduct occurred in another state was rejected because there is no jurisdictional requirement that alleged misconduct occur in this state.

[4 a-c] **191 Effect/Relationship of Other Proceedings**
195 Discipline in Other Jurisdictions
199 General Issues—Miscellaneous

Respondent's argument that res judicata bars this disciplinary proceeding because a similar matter was dismissed by the state bar of another state was rejected. First, res judicata is applicable with respect to only final judgements rendered on the merits. Second, the State Bar was not a party to the other disciplinary proceeding.

[5] **130 Procedure—Procedure on Review**
159 Evidence—Miscellaneous

On de novo review, entire record is before the review department, and it may rely on evidence introduced at any point in the trail, including the disciplinary phase.

[6 a-c] **253.10 Rule 1-400(D) [former 2-101(A)]**

Because evidence established that respondent was at least reckless in allowing a misleading solicitation letter to be disseminated on his behalf by a temporary employee, he was technically culpable for violating the rule of professional conduct prohibiting misleading advertisements.

[7] **131 Procedure—Procedural Issues re Admonitions**
178.50 Costs—Not Imposed
1094 Substantive Issues re Discipline—Admonition

Since an admonition does not constitute either an exoneration or the imposition of discipline, neither respondent nor State Bar is entitled to an award of costs.

ADDITIONAL ANALYSIS

Culpability
Found
253.11 Rule 1-400(D) [former 2-101(A)]
Not Found
213.15 Section 6068(a)
Mitigation
Found
720.10 Lack of Harm
791 Other

OPINION

PEARLMAN, P.J.:

I. INTRODUCTION

This case involves only one charge: a single instance of a misleading out-of-state solicitation of a potential personal injury client in June of 1991. Respondent[1] contends that the solicitation letter was unauthorized and sent by a temporary employee in Louisiana who wished to discredit him and that he had no knowledge of it until several months later after the employee was terminated. The State Bar did not challenge the contents of the letter which the recipient characterized as "ridiculous" but solely the alleged use of letterhead on the solicitation letter that contained a facsimile of the Great Seal of the State of California in contravention of California Government Code section 402 and, therefore, a violation of respondent's duty to uphold California law under Business and Professions Code section 6068 (a)[2] as well as violating the proscription against misleading communications under rule 1-400(D)(2) of the California Rules of Professional Conduct.

Respondent unsuccessfully sought to have the matter dismissed on several grounds and then to have it terminated by admonition under Rule 415 of the Transitional Rules of Procedure on the ground that no intentional violation occurred, no pecuniary loss occurred and the alleged violation did not constitute a serious offense.[3] In response, the State Bar characterized the solicitation letter as involving "a serious offense" even though an identical complaint had been dismissed by the Louisiana Bar and even though the State Bar sought only a reproval if respondent were found culpable. (Cf. *Leoni* v. *State Bar* (1985) 39 Cal.3d 609 [public reproval ordered for two years of mailings of 83 versions of misleading letters and pamphlets to 250,000 California recipients].) The State Bar's characterization of a single out-of-state solicitation letter with no proof of harm to the recipient as a "serious" charge appears also to reflect a major change in policy. In the past, it has used agreements in lieu of discipline ("ALDs") to obtain attorneys' agreements to cease certain advertising practices which, unlike admonitions, do not appear at all on the attorneys' record since they do not constitute discipline but are akin to "diversion." (See *In the Matter of Respondent R* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 227, 230.)[4]

The hearing judge originally denied the motion to terminate by admonition as premature. Following trial, he found that respondent either authorized the letter or was responsible under the Rules of Professional Conduct for the temporary employee's conduct due to negligent supervision. The hearing judge declined to impose an admonition as again urged by respondent but instead, as recommended by the State Bar, ordered that respondent be publicly reproved with conditions including two years probation, assignment of a probation monitor, completion of a course in law office management, development of a law office plan, attendance at ethics school and passage of the California Professional Responsibility Examination.

On review, respondent contends that the hearing judge erred by denying his motion to dismiss for lack of jurisdiction. He also argues in his lengthy brief numerous other bases for dismissal including, improper admission of an alleged duplicate copy of the solicitation letter into evidence in lieu of the original. In addition,

1. Respondent is not identified by name herein because we dispose of this case by an admonition. (See *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439,444, fn. 1.)

2. Unless otherwise indicated, all future references to sections are to the provisions of the Business and Professions Code.

3. Respondent was a California practitioner at the time of the incident but reports that he has since returned to Louisiana and is not currently practicing law.

4. As noted by the State Bar's discipline monitor in his Fifth Progress Report of September 1, 1989, ALDs were devised to avoid formal adjudicatory proceedings by "diverting" matters which are not deemed serious offenses likely to result in "meaningful suspension or disbarment." (Fifth Progress Report of State Bar Discipline Monitor (1989) at pp. 46-49.) In commenting, inter alia, upon the use of ALDs for agreements to desist in certain advertising practices, the State Bar Monitor stated "We believe that its use has been judicious and appropriate . . . ." (*Id.* at p. 49.)

respondent contends that the hearing judge's culpability determinations are not supported by the evidence.

The State Bar disputes all of respondent's contentions and asserts that even if respondent did not personally sign the solicitation letter or physically place it in the mail, he was culpable of negligent supervision. Its argument is that even if respondent did not authorize it, he nonetheless wilfully caused the undated letter to be mailed to a couple in Baton Rouge, Louisiana, by inadequate supervision of his temporary employee.

We are obligated to undertake de novo review of the decision below. Having done so, we conclude that the hearing judge properly rejected respondent's arguments: that the court lacked subject matter jurisdiction; that the notice to show cause was constitutionally insufficient; and that res judicata applied due to the dismissal of a similar complaint by the Louisiana State Bar. We uphold the hearing judge's culpability determination, but conclude that the appropriate disposition is an admonition pursuant to Rule 264 of the Rules of Procedure because the violation was not serious or intentional and no harm resulted.

II. FACTUAL BACKGROUND

The following facts found by the hearing judge are undisputed and we have adopted them on our de novo review.[5] In 1991, when he was practicing law in Beverly Hills, California, respondent considered the possibility of opening a law office in Baton Rouge, Louisiana. In June 1991, respondent hired a former girlfriend and the mother of his son, who lived in Baton Rouge, and whom he had known for ten years, to "see what information was available that could be used for advertising purposes in Baton Rouge." He specifically instructed her to obtain lists of persons recently in automobile accidents and lists of persons recently arrested. In June 1991, respondent purchased envelopes with the phrase "legal advertisement" printed on them. Respondent's law clerk (who worked for him at his law office in Beverly Hills) designed, ordered, and purchased letterhead for him. The letterhead had a facsimile of the Great Seal of California on it. Respondent grew up in Baton Rouge and is licensed to practice law in Louisiana.

Respondent's former girlfriend was not hired for any legal duties and did not have any prior experience working in the legal profession. Respondent physically resided and practiced law in California, and she physically resided and worked in Baton Rouge. Respondent, however, spoke with her on the telephone every other day to assign work to her during the short time she was in his employ. Within a month respondent terminated her services and never opened a law office in Baton Rouge. Three months later he was informed by the Louisiana State Bar of an alleged solicitation letter received by a Louisiana resident the prior summer offering respondent's services as a personal injury lawyer. Following investigation that complaint was dismissed.

III. DISCUSSION

We address the various issues raised by respondent in turn.

A. No Reversible Pleading Error

[1] Respondent asserts that the first amended notice is at "prejudicial variance" with the original notice and a proposed first amended notice that was never filed and is too vague to give him adequate notice of the charges against him. Respondent is in error. The first amended notice superseded the original notice and may not be attacked by showing contradictions between them. (See *O'Brien* v. *O'Brien* (1942) 50 Cal.App.2d 658, 660-661.) The sufficiency of the first amended notice is determined without reference to either the original or the proposed first amended notices. (*Ibid.*)

Respondent also contends that the first amended notice does not comport with the pleading standards set forth by the Supreme Court in *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968, fn. 1, *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 931, and *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816.

5. Other key factual findings are disputed and we include our resolution of those in the discussion that follows.

In paragraph numbers one through three of the first amended notice, the State Bar alleges that, in June 1991, respondent caused an employment solicitation letter, which was written on letterhead that contains a facsimile of the Great Seal of the State of California, to be sent to a named married couple in Baton Rouge, Louisiana ("the solicitation letter"). In paragraph number four, the State Bar alleges that the solicitation letter was confusing or misleading because it was written on letterhead containing a facsimile of the Great Seal, which implies that respondent is associated with, endorsed by, or representing the State of California.[6] **[2 - see fn. 6]** In paragraph number five, the State Bar alleges that the solicitation letter was a "commercial use" of the Great Seal in violation of Government Code section 402. In the next paragraph, which is unnumbered, the State Bar alleges that respondent's actions were willful violations of rule 1-400(D)(2) of the Rules of Professional Conduct and section 6068 (a). Finally, a copy of the alleged solicitation letter is attached to the first amended notice as an exhibit.

Respondent is correct that the first amended notice improperly recites the factual allegations separately from a catch-all charging paragraph that does not relate the citation of the statutes and rules allegedly violated to the alleged misconduct. (*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 185; see also Rules Proc. for State Bar, title II, State Bar Court Proceedings, rule 101(b)(3) [Notices of disciplinary charges are to "[r]elate the individual facts set forth to specific statutes, rules, or court orders alleged to have been violated or to warrant the action proposed."].) Nonetheless, respondent must show that this pleading error denied him a fair trial because he did not have adequate notice of the charges against him before we will reverse and remand this matter for a new hearing. (*In the Matter of Varakin*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 186; see also *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, 634 [Respondent's "only due process entitlement is a 'fair hearing. . . .'"].)

"[A]dequate notice requires only that the attorney be fairly apprised of the precise nature of the *charges* before the proceedings commence." (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929, original italics.) The facts and charges recited in the first amended notice are neither complicated nor vague. Therefore, we do not find respondent's claim that he was confused as to the nature of the charges pleaded against him in the first amended notice convincing.[7] Second, and more importantly, we note that the State Bar ultimately specified, in its pre-trial statement, the factual basis for both the rule 1-400(D)(2) and the duplicative section 6068 (a) charges. Accordingly, regardless of whether respondent was in fact confused by the State Bar's pleading deficiencies, he was adequately apprised of the precise nature of the charges against him before trial by the State Bar's pre-trial statement. No reversible error is shown.

B. No Lack of Jurisdiction

[3a] Respondent asserts that the hearing judge erred in not dismissing the first amended notice for lack of jurisdiction. Respondent argues that this court lacks jurisdiction because if any professional misconduct or violation of Government Code section 402 occurred, it occurred solely within Louisiana.

Respondent does not deny that he is a member of the State Bar of California or allege that he was not properly served with a copy of the notice to show

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6. **[2]** By analogy to trademark infringement cases, respondent argued that the State Bar had to prove that the use of a facsimile of the Great Seal of California would reasonably be construed as misleading or confusing to the alleged target audience of Louisiana residents. We conclude that illegal use of the Great Seal is inherently inappropriate and that lack of actual confusion by the target audience is a factor in mitigation.

7. Contrary to respondent's contention, the State Bar was not required to plead the explicit factual details of the misconduct alleged against respondent in the first amended notice. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 173.) If respondent needed or desired to know the explicit details, such as how he allegedly "caused" the solicitation letter to be sent to the Baton Rouge couple who allegedly received it or the exact location from which it was allegedly mailed, he was free to obtain them through discovery.

cause; accordingly, he has not challenged this Court's personal jurisdiction. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 645.)

[3b] This Court has statutory, subject matter jurisdiction in disciplinary proceedings over each charge alleging that a member of the State Bar of California is subject to disbarment, suspension, or other discipline for any cause that is set forth in the laws of the State of California. (Bus. & Prof. Code, §§ 6077, 6078, 6086.5; see also Bus. & Prof. Code, § 6044.) In addition, as the administrative arm of the California Supreme Court, this Court has inherent, subject matter jurisdiction in disciplinary proceedings over each charge alleging that a member of the State Bar is subject to discipline for any of the causes set forth in article 6 of the State Bar Act (Bus. & Prof. Code, § 6100 et seq.) or is otherwise culpable of misconduct warranting discipline. (See *In re Kelley* (1990) 52 Cal.3d 487, 494-497.) Under this Court's "other misconduct warranting discipline" subject matter jurisdiction, we have in the past exercised jurisdiction over a member who, while inactive and living out-of-state, was convicted of drunk driving (See *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260 [dismissing on the merits as not warranting discipline].)

[3c] Although the State Bar has discretion whether to pursue allegations of alleged misconduct in other states, there is simply no jurisdictional requirement that the alleged misconduct must occur in this state in order to be prosecuted by the State Bar of California. For example, in *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 224, the Supreme Court disbarred the respondent for burglarizing hotel rooms in Las Vegas, Nevada, even though the State of Nevada dismissed its criminal charges against him because of insufficient evidence. Indeed, section 6049.1 provides an expedited procedure for disciplining members of the State Bar of California for misconduct committed and found in another jurisdiction.[8]

The first amended notice pleads sufficient facts to invoke this court's subject matter jurisdiction. The solicitation letter was allegedly mailed to the couple at their home in Baton Rouge, Louisiana, and concerned the availability of respondent's professional employment for any personal injury claims arising from an automobile accident that occurred in Louisiana. At the time the couple allegedly received the solicitation letter, respondent physically resided and practiced law in California. In fact, respondent admits that, at that time, his only law office was in Beverly Hills, California. The only address listed for respondent in the solicitation letter is the address of his Beverly Hills law office and the only telephone number listed for him in it is the telephone number of his Beverly Hills law office. In addition, the letter allegedly sent by respondent invites its recipient to telephone respondent's Beverly Hills law office collect so that she may "be flown to Beverly Hills to be seen by a West Coast Specialist M.D." and then possibly "be referred to the plush [sic] 'Beverly Hills Physical Therapy Group'" and stay "at the legendary Beverly Hills Hotel."

C. Notice to Show Cause is Not Barred by Res Judicata

Respondent asserts that the hearing judge erred in not dismissing the first amended notice because it does not state a disciplinable offense under principles of res judicata. **[4a]** Respondent argues that res judicata principles bar the present proceeding because the Louisiana State Bar investigated and dismissed a complaint made by another individual from Baton Rouge about a solicitation letter that he allegedly received, which was identical to the solicitation letter charged in the notice to show cause.

8. Section 6049.1 provides that, subject to two specified exceptions, any misconduct already found by the disciplinary authority of another jurisdiction is "conclusive evidence that the member is culpable of misconduct in this state." (Bus. & Prof. Code § 6049.1, subd.(a).) The exceptions are whether the culpability found in the other jurisdiction would not warrant the imposition of discipline in this state or the proceeding in the other jurisdiction lacked fundamental constitutional protection. Further, section 6049.1 expressly provides that it does not prohibit the State Bar of California from otherwise instituting non-expedited disciplinary investigations or proceedings against a member *based upon the member's conduct in another jurisdiction* even if the member is also licensed as an attorney in the other jurisdiction. (Bus. & Prof. Code, § 6049.1, subd. (e).)

[4b] This contention is also without merit. First, it is well established that principles of res judicata may be applied only with respect to final judgments rendered on the merits. (See 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 217, p. 654; see also *id.* §§ 218-230, at pp. 655-668 [for discussion of what final judgments are on the merits].) Respondent does not argue that the matter was determined by a final judgment on the merits in Louisiana.

[4c] Second, the underlying principle of res judicata is that "a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so." (Rest.2d Judgments, Chpt. 1, p. 6.) Accordingly, principles of res judicata may not be applied to prevent the State Bar of California from litigating the allegations pleaded in the first amended notice because it was not a party to any proceeding in Louisiana. (Cf. *Siegel* v. *Committee of Bar Examiners* (1973) 10 Cal.3d 156, 178, fn. 25 [The State Bar is not bound by criminal acquittals in disciplinary proceedings because the parties are different, the quantum of proof required is usually different, and the purposes of each proceeding are different.])

D. Notice to Show Cause is Not Barred by Unreasonable Delay

Respondent argues that the hearing judge erred in not dismissing the first amended complaint as barred by "limitations." In support of this contention, respondent argues that "the [State Bar] has not brought this matter to trial in over two and one half years" and that this has caused him "unjustifiable prejudice."

At the time of the proceedings below, there was no statutory limitation period applicable to disciplinary proceedings. (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 449.)[9] Only when accompanied with specific prejudice may the passage of time be a denial of due process or jurisdictional defect. (*Wells* v. *State Bar* (1978) 20 Cal.3d 708, 715.)

Our inquiry is limited to determining whether the State Bar has unreasonably delayed, for an excessive period of time, notifying respondent that a complaint had been filed against him regarding the solicitation letter *or* in initiating and prosecuting the present proceeding against him.

The State Bar of California first received a complaint about the solicitation letter on October 16, 1991. The State Bar notified respondent of the complaint on November 22, 1991. The State Bar then filed the original notice to show cause on June 10, 1992, and served a copy of it on respondent on June 15, 1992. Nothing in the record establishes that the State Bar unreasonably delayed in either notifying or prosecuting respondent for the alleged misconduct.[10]

E. Alleged Section 6068 (a) Violation

Violation of section 6068 (a) alleged in the first amended notice is based upon respondent's alleged commercial use of the Great Seal in the employment solicitation letter sent to the Baton Rouge couple in violation of Government Code section 402. This charge is duplicative of the charge that respondent's use of the Great Seal in the solicitation letter violated the proscription of misleading advertisements in rule 1-400(D)(2) of the Rules of Professional Conduct. (*Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 [If "misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068,

9. Effective March 11, 1995 the State Bar Board of Governors adopted a new rule, Transitional Rule of Procedure 504.1, Rules of Procedure of the State Bar, title III, which sets a five-year period of limitations to complaints and reports received by the State Bar after July 1, 1995.

10. Respondent filed a motion to dismiss the original notice for pleading deficiencies on August 27, 1992. In an order filed April 12, 1993, the hearing judge granted respondent's motion and dismissed the original notice, giving the State Bar leave to file an amended notice. Thereafter, on April 28, 1993, the State Bar timely filed and served a first amended notice correcting the pleading deficiencies. It did not contain any new allegations of misconduct.

The culpability hearing was held on December 13, 1993, and December 14, 1993. Thereafter, the hearing judge made a tentative finding of culpability on January 11, 1994. The discipline hearing was held on February 2, 1994. The hearing judge filed his decision on April 5, 1994.

subdivision (a), and 6103."]; see also *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 369.)

F. The Best Evidence Rule Objection

Respondent contends that the hearing judge erred in admitting a copy of the solicitation letter into evidence over his best evidence rule objection. The best evidence rule provides that, "[e]xcept as otherwise provided by statute, no evidence other the original of a writing is admissible to prove the content of a writing." (Evid. Code, § 1500.)

Respondent listed the issue whether the State Bar could introduce a copy of the solicitation letter in lieu of the original as a disputed issue in his pre-trial statement, a copy of which was served on the State Bar 60 days before trial.[11] At trial, respondent timely asserted his best evidence rule objection to the copy of the solicitation letter the State Bar proffered. At the time this matter was tried, rule 556 of the former Transitional Rules of Procedure of the State Bar, which were effective September 1, 1989, through January 1, 1995, provided that "the rules of evidence in civil cases in courts of record in this state shall be generally followed" in disciplinary proceedings. Accordingly, under Evidence Code section 1500, the hearing judge was required to deny admission of the copy of the letter unless the State Bar established that a specific statutory exception permitted its admission.

Respondent argued at trial that the only statutory exception under which a copy of the letter could be admitted was the lost or destroyed original exception of Evidence Code section 1501. Respondent further argued, and the hearing judge ruled, that the State Bar did not prove the original was either lost or destroyed. The State Bar could not articulate any other possible specific statutory exception. After noting that the State Bar's case depended upon the admissibility of the alleged copy in lieu of the original, the hearing judge declared a 30-minute recess to give the State Bar an opportunity to locate an applicable statutory exception permitting the admission of the copy.

After the recess, the State Bar reported to the hearing judge that it "wasn't able to find anything that would shed any great light on this issue." We believe that the hearing judge had the discretion to deny admissibility of the key document at that point and dismiss the proceeding for failure of proof. The hearing judge, however, concluded, on his own, that the copy was admissible under the "duplicate copy" exception in Evidence Code section 1511. Evidence Code section 260 defines a "duplicate" as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, . . . or by mechanical or electronic rerecording, or by chemical reproduction or by other equivalent technique which accurately reproduces the original." In light of the fact that under Evidence Code section 255 there can be more than *one* original writing (i.e., a duplicate original), we refer to section 260 "duplicates" as "duplicate copies." (See 2 Jefferson, Cal. Evidence Benchbook (2d ed., June 1990 Supp.) § 31.6, p. 404.)

Once a foundation for admission is laid, Evidence Code section 1511 authorizes the admission of a duplicate copy to the same extent as the original unless the opponent of its admission (1) raises a genuine question as to the authenticity of the original or (2) establishes that it would otherwise be unfair to admit the duplicate in lieu of the original. (*In re Crooks* (1990) 51 Cal.3d 1090, 1100; *People* v. *Atkins* (1989) 210 Cal.App.3d 47, 55; *People* v. *Garcia* (1988) 201 Cal.App.3d 324, 329-330; see also Evid. Code, §§ 1400, 1401.)

11. Under rule 1224 of the former Provisional Rules of Practice of the State Bar Court (effective August 18, 1989, through December 31, 1994) ("former Rules of Practice"), respondent was required: (1) to notify the State Bar, before trial, of any objections he had to any of the statements or exhibits that it provided him in accordance with rule 1223 of the former Rules of Practice; (2) to promptly confer with the State Bar to try to resolve his objections; and (3) if he and the State Bar were unable to resolve his objections, to advise the hearing judge of them and make a reasonable effort to present them for a ruling before trial.

"The foundation for admission of a writing or copy is satisfied by the introduction of evidence sufficient to sustain a finding that the writing and copy are what the proponent of the evidence claims them to be." (*People* v. *Garcia*, *supra*, 201 Cal.App.3d at pp. 328-329; Evid. Code, §§ 1400, 1401.) The recipient of the alleged solicitation letter testified that a letter arrived in the mail which she gave to her husband who brought it to his office. She testified that she threw away the envelope, that she was not concerned with the letterhead, and that she thought the content was ridiculous. When shown State Bar Exhibit 1, she testified that the text was an exact copy of the original letter she received in the mail. The husband testified that he took the original to work and gave it to his supervisor and that he did not know if Exhibit 1 was a copy of the exact letter they received in the mail, but it appeared to have the same wording. The key part of the exhibit—and the only part charged as improper—was the letterhead, not the text. Neither witness specifically identified the letterhead or recalled seeing the Great Seal of California on the letter they received.

The State Bar investigator, who was assigned to investigate the solicitation letter matter, testified that she wrote to respondent, providing him with a copy of the alleged solicitation letter, pointing out that it had the Great Seal of California on it and thereafter telephoned respondent on December 17, 1991. She further testified that during the telephone conversation, respondent admitted that he wrote the letter she had written him about. She also received another letter from respondent addressed to the State Bar with the same letterhead, including the Great Seal of California. Respondent denied at the hearing that he had drafted the solicitation letter and argued that there may have been some confusion in the telephone conversation as to what the investigator was referring to and what he said in response. The hearing judge disbelieved respondent and credited the investigator's testimony.

Respondent did not dispute the Baton Rouge couple's testimony, but asserted that the original letter the couple received may have been a combination of two separate documents photocopied by his temporary employee without authorization and mailed to the couple under a forged signature. He asserted that the employee was spiteful and vindictive and sought to discredit him by means of disseminating an absurd solicitation letter. A witness in the disciplinary phase of the trial also attested to hearing the employee announce her intention to make respondent lose his license.[12] **[5 - see fn. 12]** Nevertheless, respondent's testimony was rejected and we defer to the hearing judge's credibility determination.

Respondent's reiteration of his version of the facts on review does not provide us with a basis to disturb the hearing judge's rejection of his testimony. (*In the Matter of Fandey* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 767, 775.) While the hearing judge's rejection of much of respondent's testimony "'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* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265), it supports the finding that a solicitation letter drafted by respondent which had a facsimile of the Great Seal of California on it was sent to the Baton Rouge couple on respondent's behalf.

[6a] While the State Bar argued below and to this court that respondent is responsible for the conduct of his staff, it concedes that an attorney will not be held responsible by the Supreme Court for every detail of office procedures. (See, e.g., *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795.) Respondent contends that failure to supervise his staff was not pled as a basis for his culpability and the evidence does not support the findings.[13] Respondent asserts that he had no clients in Louisiana, nor any law

12. **[5]** The entire record is before us on de novo review, allowing us to rely freely on evidence introduced at any point in the trial. (*In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 258, fn. 4.

13. Although not cited by respondent, we held in *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522, that a respondent was not culpable of negligent supervision simply because his temporary file clerk misplaced a client's settlement draft for just over a month before the error was discovered.

office, and that is a prerequisite for culpability for negligent supervision of his employee.

[6b] The State Bar challenges respondent's contention that culpability for failure to supervise may only be found in the context of a client relationship. The State Bar argues that respondent's duty to supervise staff is independent of his duties to clients. The scope of liability for professional misconduct for unauthorized acts of employees toward nonclients is a broad question which we need not address. The specific question here is an attorney's responsibility for a solicitation letter distributed on respondent's behalf. It appears that whatever respondent's advertising plans were, they were aborted shortly after they were conceived. Respondent terminated the temporary employee within one month and never associated with a personal injury lawyer in Louisiana. The question remains whether, prior to aborting his plans, he directed the solicitation letter to be sent or whether the fired employee sent the undated letter without his approval. Since we conclude that respondent's conduct was at least reckless, we predicate a technical violation on that finding.

We are aware of two Supreme Court cases not cited by either party on the issue of professional culpability of an attorney for advertising distributed by another person allegedly on the attorney's behalf—*Millsberg* v. *State Bar* (1971) 6 Cal.3d 65, and *Belli* v. *State Bar* (1974) 10 Cal.3d 824. Although the United States Supreme Court has since upheld the constitutionality of truthful attorney advertising, including targeted mailings (see *Shapero* v. *Kentucky Bar Ass'n.* (1988) 486 U.S. 466), *Millsberg* and *Belli* still appear controlling on the issue of the type of proof necessary for holding an attorney culpable for unlawful advertising by the attorney's agent.

In *Millsberg, supra,* 6 Cal.3d at p. 75, a bare majority of the Supreme Court found the attorney culpable of violation of rule 2 of the former Rules of Professional Conduct concerning the solicitation of professional employment.[14] The local administrative committee had recommended that the charges be dismissed; the Disciplinary Board ("Board") had recommended that respondent be found culpable of soliciting. The majority of the Supreme Court noted that "'To establish a wilful breach, it must be demonstrated 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. [Citations.] The wilfulness or intent may be proved by direct or by circumstantial evidence. [Citations.]'" (*Millsberg, supra,* 6 Cal.3d at p. 74, quoting *Zitny* v. *State Bar* (1966) 64 Cal.2d 787, 792.)

The majority in *Millsberg* that the evidence established an accomplished plan or design of the San Diego Apartment and Rental Owners Association, Inc. to publicize petitioner and that petitioner was culpable of solicitation through lending himself to such plan. Petitioner "must be deemed to have been aware that he was participating in activity which advertised his skills as a lawyer. For three years prior to his charged misconduct he had been active in the affairs, and for a two-year period of that time had been chief executive officer of the Association. We are thus persuaded that he had become

14. Former Rule 2 provides in pertinent part as follows: "Section a. A member of the State Bar shall not solicit professional employment by advertisement or otherwise.

[¶] Without limiting the generality of the foregoing a member of the State Bar shall not solicit professional employment by [¶] . . . [¶] (2) Using a newspaper, magazine, radio, television, books, circulars, pamphlets, or any medium of communication, whether or not for compensation, to advertise the name of the lawyer or his law firm or the fact that he is a member of the State Bar or the bar of any jurisdiction; nothing herein shall be deemed to prevent the publication in a customary and appropriate manner of articles, books, treatises or other writing. . . . [¶] Section b. Nothing in this rule shall be deemed to prevent the use, in the usual and customary manner, of ordinary professional cards, provided, however, that such use shall not extend to customary publication in newspapers or other media; nor shall this rule prevent listings in classified sections of telephone and city directories or usual and customary listings in conventional legal directories or law lists, provided, however, that a listing in a telephone or city directory shall not be in distinctive type, style or form or contain anything other than name, address, telephone number and designation as an attorney at law. . . . [¶] [N]othing in this rule shall be deemed to prevent a member from circulating among lawyers only, a brief, dignified notice that he is rendering a specialized legal service. . . ."

aware of the nature of the articles and other materials appearing in RON [Rental Owners News], how they were included or excluded from publication in that magazine, the nature of the content of the published materials, to whom the magazine was distributed and its effectiveness in bringing its published materials to the attention of commercially and professionally interested readers. We conclude that petitioner acted or omitted to act purposefully in the publication of the advertising materials, and that the breach of the Rules of Professional Conduct was thus wilful." (*Millsberg* v. *State Bar*, *supra*, 6 Cal.3d at p. 75.) The three judges in dissent found no activity of the petitioner that indicated any intentional solicitation or advertisement. (*Id.* at p. 76.) Millsberg received a public reproval for acts far more extensive than respondent's.

In *Belli* v. *State Bar*, *supra*, 10 Cal.3d 824, the Supreme Court addressed, inter alia, Belli's culpability for activities of his agent, Fulton, who operated under a written contract declaring him to be Belli's "personal representative in all branches of the Lecture-Personal Appearance-Spoken Word Industry." (*Id.* at p. 837.) The Supreme Court upheld Belli's culpability for a trio of letters sent by Fulton to individuals at Time and Newsweek magazines and the New York Times advertising the twentieth anniversary of the Belli Seminars. The high court noted that even if the written contract did not expressly authorize the challenged activity, Fulton testified that he believed he sent Belli copies of the letters either before or after he mailed the original and that Belli failed to register a protest. Although Belli testified to the contrary, the Supreme Court held that it was within the province of the Board to resolve this evidentiary conflict against Belli. (*Ibid.*)

The Supreme Court next addressed Belli's professional responsibility for an advertisement which appeared twice in the New York Times and once in New York Magazine promoting Glenfiddich Scotch. The ad series was arranged for entirely by Fulton without Belli's knowledge. As a consequence, the State Bar had the burden of demonstrating that Fulton's actions fell within the scope of his agency. The high court found no basis for inferring such agency from the written agency agreement which excluded product endorsements. It noted that the record was devoid of evidence that Fulton, with Belli's permission, had undertaken any publicity projects even vaguely similar to the Glenfiddich promotion. It also found that Belli did not explicitly authorize the advertising or know Fulton was arranging it. He was found to be traveling abroad at the time Fulton contracted with the agency and did not return until after the ad was printed. Given these facts, the Supreme Court could infer no agency. (*Id.* at pp. 839-840.)

The Supreme Court differentiated the situation with respect to the third appearance of the Glenfiddich ad. Evidence in the record supported the conclusion that Belli had seen copies of the earlier published ads before the ad appeared for the third time and that, in correspondence to Fulton, he did not protest its publication. The Supreme Court concluded that the Board was justified in finding that Fulton had authority to place the third ad as Belli's agent and that Belli was therefore disciplinable for solicitation of professional employment in violation of former rule 2. (*Id.* at pp. 840-841.) Since Belli's acts were repeated and in direct contravention of the rule against solicitation through a major media advertising campaign, the Supreme Court suspended Belli for one month, rejecting as excessive the Board's recommendation of suspension for one year.

[6c] Here, the evidence established that respondent was at least reckless in allowing the solicitation letter to be disseminated by his temporary employee on his behalf. His use of the Great Seal was wilful, but there was no evidence that respondent specifically intended to represent that he was personally endorsed by the State of California in using his improper letterhead or that the appearance of the Great Seal on the letterhead was so construed. No harm occurred to the Baton Rouge couple. Moreover, respondent's termination of the temporary employee within one month, failure to open any office in Louisiana or to associate with any personal injury lawyer or otherwise prepare to handle any responses to solicitation letters for personal injury clients indicate the very limited circumstances under which this conduct occurred. Respondent has since closed his California office, moved back to Louisiana, and sincerely demonstrated that he has no intention of ever using a facsimile of the Great Seal of California again on his stationery.

CONCLUSION

For the reasons stated above, we admonish respondent pursuant to Rule of Procedure 264 of the State Bar of California. [7] Since an admonition does not constitute either an exoneration or the imposition of discipline, neither the State Bar nor the respondent

is entitled to an award of costs pursuant to Business and Professions Code section 6086.10.

I concur:

STOVITZ, J.

NORIAN, J. concurring:

For the reasons articulated by the majority, I concur that respondent was given adequate notice of the charges filed against him, that this court does not lack subject matter jurisdiction over this matter, that this proceeding is not barred under principals of res judicata, and that this proceeding is not barred by a statute of limitations. I also concur in the disposition of this matter by admonition. However, I disagree with the reasoning articulated by the majority regarding the admission of exhibit 1, respondent's culpability, and the appropriate disposition of this case. I also find some of the majority's discussion not applicable to this case, and some issues that are applicable to this case, not discussed by the majority. Accordingly, I write separately in order to make clear my reasoning regarding these issues.

I conclude that clear and convincing evidence supports the hearing judge's factual findings. Based on those facts, I also conclude that respondent is culpable of violating former rule 1-400(D)(2) of the Rules of Professional Conduct.[1] As the alleged violation of section 6068, subdivision (a), of the Business and Professions Code,[2] is based on the same facts as the violation of rule 1-400(D)(2), I would dismiss the statutory charge as duplicative. Nevertheless, given the minimal nature of the misconduct and the absence of aggravating circumstances, I conclude that an admonition is an appropriate disposition for this matter.

As the majority did not adopt, or set forth, all of the hearing judge's findings of fact, I do so.

FACTS AND FINDINGS

Respondent was admitted to the practice of law in both California and Louisiana in 1989. He has not been previously disciplined.

In June 1991, Mr. and Mrs. B. lived in Baton Rouge, Louisiana. Both Mr. and Mrs. B. worked for insurance companies, he as an investigative specialist, and she as an automobile accident appraiser. Around this time, Mrs. B. was injured in an automobile accident. Instead of hiring a lawyer, she handled the case herself.

Also around June 1991, respondent, who had an office and practiced law in California, hired his former girlfriend, Ms. H., to help him open a law office in Baton Rouge. Ms. H. lived in Baton Rouge. Respondent was aware that Ms. H. had no prior training as a legal secretary or legal assistant, and respondent provided no training to her. Respondent spoke with Ms. H. by telephone every other day. For advertising purposes, respondent instructed Ms. H.

1. All references to rules herein, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar of California, in effect from May 27, 1989 to September 13, 1992. Rule 1-400(D)(2) of those rules essentially prohibited an attorney from soliciting a prospective client for professional employment by a communication or solicitation that contained any matter, or presented or arranged any matter in a manner or format that was false, deceptive, or that tended to confuse, deceive, or mislead the public. Current rule 1-400(D)(2) is unchanged.

2. All further statutory references are to the Business and Professions Code, unless otherwise noted. Section 6068(a) provides in relevant part that it is the duty of an attorney to support the laws of this state. As indicated by the majority, the notice to show cause in this matter charges that respondent violated section 6068(a) by violating section 402 of the Government Code. Section 402 provides in relevant part that any person who for commercial purposes uses or allows to be used any reproduction of the Great Seal of the State in any manner whatsoever is guilty of a misdemeanor.

to obtain lists of persons recently in automobile accidents and recently arrested.

In June 1991, Mrs. B. received a letter in the mail from respondent. The letter contained a facsimile of the Great Seal of the State of California (Great Seal) in the upper left-hand corner, was addressed to Mrs. B., and offered respondent's services as an attorney in connection with her personal injury claim.

Respondent designed, drafted, and sent, or at the very least instructed Ms. H. to send, the solicitation letter to Mrs. B. in an effort to obtain her as a client. Mrs. B. gave the letter to her husband, who in turn gave it to his supervisor at work.[3] Mrs. B. did not respond to the letter.

Based on the above findings, the hearing judge concluded that respondent was culpable of violating section 6068(a) as a result of his use of the Great Seal in violation of Government Code section 402. The hearing judge also concluded that respondent violated rule 1-400 (D)(2) in that the use of the Great Seal on the letterhead of the letter sent to Mrs. B. tended to confuse, deceive, or mislead, in that it implied that respondent was associated with, endorsed by, or represented the State of California.

Even though the hearing judge suggested that some of respondent's testimony lacked candor, he did not find any aggravating circumstances. In mitigation, the hearing judge found that respondent did not have a record of prior discipline, but did not accord that factor mitigating weight because respondent had been in practice approximately two years before the misconduct in this case (see std. 1.2(e)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Rules Proc. of State Bar, Title IV (standard[s]); *In re Naney* (1990) 51 Cal.3d 186, 196); and that there was a lack of harm to Mrs. B. (std. 1.2(e)(iii)). The hearing judge accorded only slight weight to respondent's two character witnesses as such evidence was not an extraordinary demonstration of good character attested to by a wide range of references, as required by standard 1.2(e)(vi).

DISCUSSION

Respondent requested review, asserting that the case should be dismissed for several reasons. In reply, the State Bar argues that the hearing judge's decision should be adopted in its entirety. Among respondent's arguments are the issues indicated above regarding jurisdiction, res judicata, and the notice to show cause. As I agree with the majority's resolution of those issues, I do not address them. In addition, respondent raises several arguments with regard to the applicability of Government Code section 402 to the conduct in question here. As I would dismiss this charge, I do not address those arguments either.

1. Exhibit 1

I disagree with respondent that the copy of the solicitation letter at issue in this proceeding (exhibit 1) was erroneously admitted into evidence by the hearing judge. Both Mr. and Mrs. B. testified in this matter. When shown exhibit 1 at trial, both Mr. and Mrs. B. identified it as an accurate copy of the letter received by Mrs. B., even though it was a poor quality copy. Although neither witness had a clear recollection of physical details of the letter (such as the color of the paper of the original letter), Mr. B. testified that the original letter contained an original signature.

Both witnesses were shown exhibit 1 and both were specifically asked if there was "anything" on exhibit 1 that was not on the letter they received. Both answered that there was not. Both witnesses were specifically asked if there was any information that was in the original letter that was missing from exhibit 1. Both answered that there was not. Exhibit 1 contains a facsimile of the Great Seal of the State of California in the upper left-hand corner.

A State Bar investigator also testified at trial. She testified that she had a telephone conversation with respondent in December 1991 and that during that conversation, respondent admitted that he drafted exhibit 1. On cross examination by respondent, the

3. Mr. B. has not seen the original letter since he gave it to his supervisor.

investigator stated several times that the subject matter of the December 1991 telephone conversation was exhibit 1, which she recalled because the specific issue she discussed with respondent was one of the statements in exhibit 1. The investigator recalled that she began the telephone conversation by referencing the solicitation letter. The investigator also testified on several occasions that respondent told her that he had drafted "the letter."

Around end of 1991, the State Bar was apparently investigating respondent in a matter unrelated to the present case. Respondent sent a letter to the State Bar regarding that investigation. That letter contained the same letterhead, including a facsimile of the Great Seal, that was on exhibit 1. Respondent admitted at trial that at the time, he did not know that there was anything improper in his using a facsimile of the Great Seal on his letterhead.

As noted, respondent objected to the introduction of the copy of the letter on the basis of the best evidence rule. (Evid. Code, § 1500.) The hearing judge admitted exhibit 1 pursuant to Evidence Code section 1511, which provides that a duplicate of the letter is admissible to the same extent as the original unless a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original. The hearing judge held that no genuine question was raised as to the authenticity of the original, nor was it unfair to admit exhibit 1.

As the majority notes, a foundation for the admission of a writing is satisfied by the introduction of sufficient evidence to demonstrate that the writing is what the proponent claims it to be. (Evid. Code, § 1400.) The testimony of Mr. and Mrs. B., found credible by the hearing judge, was sufficient to establish a foundation for the admission of letter. They both testified that exhibit 1 was a copy of the original letter they received.

Neither Mr. or Mrs. B. modified their testimony on cross-examination. Neither witness was asked on cross-examination if only the text of exhibit 1 was a correct copy of the letter they received, nor was either witness asked on cross whether the Great Seal was on the original letter. In any event, the hearing judge, as the trier of fact, was entitled to find the testimony on direct credible and the testimony on cross not credible. (See *People* v. *Bodkin* (1961) 196 Cal.App.2d 412, 414 [where witness testified to events on direct and completely recanted that testimony on cross, it was for the trier of fact to determine which testimony was credible]; 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1771, pp. 1724-1725, and cases cited therein.) Thus, even assuming for the sake of argument that the witnesses did modify their testimony on cross, the hearing judge did not find that evidence credible as he concluded that exhibit 1 was a copy of the original. We must give that determination great weight. (*In the Matter of Fandey* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 767, 774.) Accordingly, there is no credible evidence in the record that suggests that exhibit 1 is not a copy of the original letter.

Although not specifically addressing the requirements of Evidence Code section 1511, respondent argues that an examination of the original letter would have shown that parts of the letterhead were copied and superimposed. The burden is on the opponent of the evidence to raise a genuine issue as the authenticity of the original or to show that under the circumstances it would be unfair to use the duplicate in lieu of the original. (*People* v. *Garcia* (1988) 201 Cal.App.3d 324, 329.) In view of respondent's use of the same letterhead in his letter to the State Bar and his admission that at the time he did not believe that there was anything improper in using it, I agree with the hearing judge that respondent has not met his burden in challenging the admissibility of exhibit 1.

Respondent also argues that exhibit 1 should not have been admitted because it was not an exact copy of the original letter. Respondent introduced into evidence a copy of exhibit 1 (exhibit A). Some wording across the bottom of exhibit A, indicating the states where respondent is admitted to practice law, is not on exhibit 1. However, any evidence that indicates that exhibit 1 is not an exact copy of the solicitation letter sent to Mrs. B. goes to the weight

rather than the admissibility of the letter. (*People* v. *Garcia*, *supra*, 201 Cal.App.3d at p. 329.)[4]

2. Culpability

Respondent argues that there is insufficient evidence to find him culpable of the charged misconduct. I disagree. In essence, respondent asserts that his version of the events was uncontradicted and therefore should have been adopted.

Respondent testified that he did not draft or send the solicitation letter, and that he did not authorize or have any prior knowledge of the mailing of the letter. Respondent also testified that he believed Ms. H. sent the letter in an effort to "tarnish" his reputation. The hearing judge specifically did not find respondent's testimony credible. As indicated above, we are required to give that credibility determination great weight. (*In the Matter of Fandey*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 774.)

Nevertheless, as indicated by the majority, the rejection of respondent's testimony does not reveal the truth or support an inference that the facts are the converse of the rejected testimony. (See *Edmondson* v. *State Bar* (1981) 29 Cal.3d 339, 343.) In order to establish respondent's culpability, there must be clear and convincing evidence in the record separate from the rejected testimony.

Respondent hired Ms. H. to help him open a law office in Baton Rouge. Respondent was aware that Ms. H. had no prior training as a legal secretary or legal assistant, and he provided no training to her. Respondent spoke with Ms. H. by telephone every other day. For advertising purposes, respondent instructed Ms. H. to obtain lists of persons recently in automobile accidents and recently arrested. He was considering a direct mail advertising campaign in Louisiana.[5] Respondent purchased envelopes with the phrase "legal advertisement" printed on them.

Respondent employed a law clerk in his California office. Respondent testified that it was brought to his attention that the letterhead he was using was unprofessional and that his law clerk took it upon himself to obtain letterhead that was more professional. Respondent also testified that it was his idea to have "an ornamental insignia of some description on the letterhead. Whether that might have been the Statue of Liberty or the scale of justice . . . . And I'm not sure whether the Great Seal itself was an idea of [his law clerk] or an idea of someone else." Respondent used letterhead with the Great Seal in his California office. At the time, he did not believe there was anything improper in using that letterhead.

The law clerk drafted several advertisement letters for potential clients in Louisiana. Respondent was aware of and reviewed some of those letters. Some of those letters were sent to Ms. H. Respondent admitted to the State Bar investigator that he drafted the solicitation letter, exhibit 1. The hearing judge specifically found the investigator's testimony credible. Mrs. B. testified that the envelope she received had a California return address, but she could not recall whether it was post-marked as being mailed from California or Louisiana. Both she and her husband thought it was unusual for them to get mail from California.

There is no direct evidence that respondent sent or instructed Ms. H. to send the solicitation letter to Mrs. B. Nevertheless, no other reasonable inference can be drawn from the circumstantial evidence. Respondent's explanation, that Ms. H. sent the letter in order to tarnish his reputation, is simply not reasonable.

The letter informs the prospective client that respondent will fly the client to Beverly Hills to be treated. There is no evidence that the text of the letter was untruthful or misleading, or that respondent would not have complied with the letter if retained by

4. I disagree with the majority that the hearing judge could or should have dismissed this matter because the State Bar did not cite Evidence Code section 1511 as a basis for admitting exhibit 1. The hearing judge was apparently aware of this section, and I do not believe we further the purposes of attorney discipline by requiring or permitting a hearing judge to ignore known law.

5. One of respondent's character witnesses testified that he had extensive conversations with respondent regarding the marketing of law practices.

a Louisiana client. There is nothing in the text of the letter that would, within reason, tarnish the reputation in Louisiana of an out-of-state attorney. There is also no evidence in the record that indicates that Ms. H. knew that the use of the Great Seal could violate a California penal statute and/or a California rule of professional conduct. It is simply unreasonable to infer that Ms. H., with no legal training, would be knowledgeable enough about attorney discipline to know that the letterhead on an otherwise not untruthful letter could possibly result in the loss of respondent's law license.[6] Instead, the only reasonable inference to be drawn from the evidence is that respondent either sent or had Ms. H. send the letter as part of his attempt to open a law office in Baton Rouge.

Rule 1-400(D)(2) prohibits an attorney from soliciting a prospective client for professional employment by a communication or solicitation that contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that tends to confuse, deceive, or mislead the public. The hearing judge concluded that respondent's use of the Great Seal tended to confuse, deceive or mislead, in that it implied that respondent was associated with, endorsed by, or represented the State of California.

As noted by the hearing judge, pursuant to rule 1-400(E), the Board of Governors adopted standards as to communications which are presumed to violate rule 1-400. Standard (6) provides that a communication in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between a member in private practice and a government agency or instrumentality is presumed to violate rule 1-400. The wording on the Great Seal on exhibit 1 states that it is the "Great Seal of the State of California." I agree with the hearing judge that the letterhead implies that respondent has a relationship with the State of California and therefore is presumed to violate rule 1-400.

The presumption set forth in rule 1-400(E) is one affecting the burden of proof as defined in Evidence Code sections 605 and 606. The effect of the presumption is to shift the burden of proof to respondent as to the nonexistence of the presumed fact. (Evid. Code, § 606.) I find that respondent has not met his burden as there was no evidence introduced that demonstrated that the use of the Great Seal did not tend to confuse, deceive, or mislead.

Respondent was charged with violating both rule 1-400, and section 6068(a). As the same misconduct underlies both violations, I conclude that the statutory charge is duplicative. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 ["[L]ittle, if any, purpose is served by duplicative allegations of misconduct. If, as in this case, misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct

6. The majority has considered the testimony of respondent's character witness, who allegedly overheard Ms. H. announce her intention to make respondent lose his license, on the issue of respondent's culpability. I have not done so because I view such consideration as problematic. That testimony was offered at trial on the issue of mitigation. There is no indication in the record that the hearing judge considered it on the issue of culpability. One of the most important functions of the trier of fact is the determination of witness credibility. Where the hearing judge did not consider the evidence on the issue of culpability, as here, we are without benefit of that most significant determination. More importantly, significant due process concerns are present. As the evidence was offered in the aggravation/mitigation phase of the trial, the opposing party was deprived of a meaningful opportunity to question the witness regarding the testimony as it related to the issues involved in determining culpability. (See, e.g., 3 Witkin, Cal. Evidence, Introduction of Evidence at Trial, *supra*, at pp. 1828-1829 ["The right of cross-examination is fundamental, and its denial or undue restriction is frequently held to be reversible error."].) As I have not considered the evidence on the issue of culpability, I need not reach the issue of the appropriateness of doing so. In any event, even if I were inclined to consider this testimony, it would not change my view of the reasonable inferences to be drawn from the evidence. The testimony was hearsay by a witness with an obvious bias in favor of respondent. Accordingly, the evidence would be entitled to little weight in my view.

as a violation of sections 6068, subdivision (a), and 6103."].)[7]

3. Discipline

Respondent is culpable of sending, or causing to be sent, a single letter soliciting employment to an out-of-state potential client which tends to confuse, deceive, or mislead.[8] No aggravating circumstances were found by the hearing judge. In mitigation, no harm occurred to the Mr. and Mrs. B.

No cases with comparable misconduct are cited by the State Bar in support of its discipline recommendation, and my research reveals none. The hearing judge cited to *Leoni* v. *State Bar* (1985) 39 Cal.3d 609, in support of his conclusion that a public reproval with conditions was the appropriate discipline in this case. The Supreme Court publicly reprimanded the two attorneys in *Leoni* who made a mass mailing of some 250,000 letters and informational enclosures concerning the legal aspects of debt relief. The Court found the communications to be misleading, but not to contain false or untrue statements. In mitigation, the attorneys had no prior disciplinary record and made good faith efforts to modify the letters so as to make them truthful and not misleading. Respondent's single letter, which also was misleading but did not contain false or untrue statements, pales in comparison.

The rules of procedure in effect at the time of the trial of this case provided that a matter could be disposed of by admonition if the matter did not involve a client security fund matter or a serious offense, and if the violation was not intentional or occurred under mitigating circumstances and no pecuniary loss resulted. (Former rule 415, Trans. Rules Proc. of State Bar.) A serious offense was defined as dishonest conduct, or acts constituting bribery, forgery, perjury, extortion, obstruction of justice, burglary or offenses relating thereto, intentional fraud, and intentional breach of a fiduciary relationship. (*Id.*) This case does not involve a client security fund matter and no pecuniary loss occurred.

The State Bar characterizes the misconduct here as serious, arguing that it involved deception and dishonesty. I disagree. There is no evidence that respondent intentionally used the Great Seal in order to deceive potential clients into believing that he had a relationship with the State of California. Rather, respondent's purpose seems to have been to have a more professional looking letterhead, believing at the time that there was nothing improper in using the Great Seal. Respondent's culpability is based on wilful, not intentional, misconduct.

This case involves a single letter that implies a relationship between respondent and the State of California and thereby tends to confuse, deceive, or mislead the public. There is no evidence that anyone was in fact harmed or mislead. In light of the minimal nature of the misconduct and the absence of aggravating circumstances, I conclude that an admonition is an appropriate disposition of this case.

As an admonition does not constitute the imposition of discipline (former rule 415, Trans. Rules Proc. of State Bar), the State Bar is not entitled to an award of costs pursuant to Business and Professions Code section 6086.10 (a). In addition, as respondent has not been exonerated of all charges, he is not entitled to an award of costs pursuant to Business and Professions Code section 6086.10 (e).

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7. I disagree with the majority that the hearing judge's culpability determination was based on respondent's failure to supervise his staff. The hearing judge considered that issue only for the sake of argument. In any event, as I conclude that respondent either sent or instructed Ms. H. to send the letter, I do not reach any issues regarding respondent's alleged failure to supervise his staff. In addition, respondent's instruction to Ms. H. placed her actions within the scope of her employment, and clearly indicates his advance knowledge of her actions. I therefore do not find the majority's discussion of *Millsberg* v. *State Bar* (1971) 6 Cal.3d 65, and *Belli* v. *State Bar* (1974) 10 Cal.3d 824, applicable to the facts of the present case. Furthermore, I find respondent's conduct to have been unquestionably wilful, as defined in *Millsberg* v. *State Bar*, *supra*, 6 Cal.3d at p. 74 (wilfulness established by proof by either direct or circumstantial evidence that the person charged acted or omitted to act purposefully, 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).

8. Although there was testimony that approximately 20 solicitation letters were sent by Ms. H., the single letter to Mrs. B. was the only matter charged in the notice to show cause.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DALE K. NEES

A Member of the State Bar

No. 93-O-12593

Filed April 16, 1996

SUMMARY

In representing an incarcerated client, respondent failed to respond to reasonable status inquiries, to provide competent legal services, to turn the client's file over promptly on demand, and to refund promptly unearned, advanced fees. Also, he did not initially cooperate with the State Bar's investigation into his misconduct. The hearing judge recommended a one-year stayed suspension and two-year probation, conditioned on actual suspension for thirty days and restitution within twenty-two months. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar requested summary review of only one matter: the probation condition affording respondent 22 months to complete restitution. The review department held that although prompt, full restitution should have been required, the larger issue was the inadequacy of the recommended discipline. Focusing upon respondent's reckless and protracted failure to perform legal services for an incarcerated client and his failure to return any of the unearned, advanced fees, the review department recommended that respondent be actually suspended for six months and until he completes restitution.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: No appearance

HEADNOTES

[1] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
Where the State Bar raised the question of the amount of respondent's actual suspension in a summary review proceeding, but did so only as a function of respondent's time to make restitution, where prior to oral argument, the review department notified the State Bar (the only party entitled to participate) that it considered the issue of appropriate discipline to be before it and the State Bar agreed, the review department held that the amount of discipline was the larger issue for review.

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] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
Summary review was designed to streamline and reduce the costs of review. Among the matters eligible for summary review are those raising issues concerning the appropriate degree of discipline and those without dispute over the hearing judge's material findings of fact. As these were the issues here, the case was appropriate for summary review.

[3] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
1099 Substantive Issues re Discipline—Miscellaneous
Because an incarcerated client has a limited ability to assist an attorney or to stay apprised of the attorney's efforts, the abandonment of an incarcerated client is a serious matter warranting substantial discipline.

[4] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
Where an attorney retained advanced fees long after failing to perform any legal services and agreeing to refund the unearned portion of the fees, such wrongful retention approached a practical appropriation of the client's property.

[5 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
1091 Substantive Issues re Discipline—Proportionality
Decisions of the Supreme Court and the review department involving abandonment of a client's case where the attorney has no prior record of misconduct have typically resulted in discipline ranging from no actual suspension to 90 days of actual suspension. However, most of the past abandonment cases involved the attorney's inattention in civil matters. Balancing all relevant factors in this case involving an attorney's inattention in a criminal case involving an incarcerated client, and giving weight to, but not relying too heavily on, the State Bar's recommendation of respondent's 90-day actual suspension, the review department concluded that a 6-month actual suspension was appropriate.

[6] **171 Discipline—Restitution**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
Where an attorney retained unearned advanced fees for years and failed to prove factors justifying relief from actual suspension before the completion of restitution, the hearing judge erred in not requiring the attorney to make restitution forthwith.

ADDITIONAL ANALYSIS

Culpability

Found

213.91 Section 6068(i)
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]

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

Aggravation

Found

521 Multiple Acts
582.10 Harm to Client
591 Indifference

Mitigation

Declined to Find

710.53 No Prior Record

Discipline

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

Probation Conditions

1021 Restitution
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

Other

173 Discipline—Ethics Exam/Ethics School
175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

STOVITZ, J.:

After an attorney disciplinary trial at which respondent, Dale K. Nees, defaulted, the hearing judge found him culpable of professional misconduct and recommended that he be placed on one year's stayed suspension and two years' probation on conditions of a thirty-day actual suspension and restitution of $7,000 within twenty-two months on certain terms, set forth, *post*. Pursuant to rule 308, Rules of Procedure for State Bar Court Proceedings,[1] the State Bar's Office of Chief Trial Counsel ("State Bar") requested our summary review only of the condition of disciplinary probation that affords respondent 22 months to complete the specified restitution. Respondent's default was entered by the hearing judge due to his failure to appear at trial.

We designated this matter as one appropriate for summary review; and we hold that although the judge should have required prompt, full restitution, the larger issue for us to resolve is whether the recommended discipline is adequate. Upon our independent review of the record, we decide that greater actual suspension is appropriate based on respondent's protracted failure to perform legal services for an incarcerated client and his failure to return any of the sizeable unearned, advanced legal fees. Accordingly, we shall recommend that respondent be actually suspended from law practice for six months and until he completes restitution, as part of a two-year stayed suspension. As is customary in such an actual suspension recommendation, we shall also recommend that respondent be ordered to comply with the duties of a suspended attorney prescribed by rule 955, California Rules of Court.

I. STATEMENT OF THE CASE

The hearing judge found respondent culpable of two charges of misconduct. In one matter, the judge found that starting in mid-1991, respondent represented a client, one Myers, who had been sentenced to a lengthy federal prison term, in seeking a writ of habeas corpus. Respondent did not enter into a written fee agreement with Myers and offered to seek the relief for a $10,000 "retainer" to be earned at $250 per hour. Myers' relatives paid respondent a total of $7,000. In September 1991, respondent told Myers that he was "vigorous[ly]" researching the matter and promised to give him a legal memorandum, but the client never received one. About one month later, in October 1991, respondent told Myers that he had received the trial transcripts, which had cost the client about $6,500. From November 1991 to October 1992, neither Myers nor a relative who was helping Myers heard from respondent about the status of the writ proceeding, despite their many phone calls to respondent's office. The only communication from respondent during that time was a March 1992 receipt for Myers' payment on account of respondent's fees.

In October 1992 respondent told Myers' relative that he was about half-finished with the habeas corpus petition and would finish it in about 30 days. After more than a month had passed, Myers' relative tried to contact respondent but was unsuccessful. In November 1992, Myers wrote respondent demanding return of his file and unearned fees. Respondent did not reply.

In early 1993, Myers spoke with a friend of respondent. The friend told Myers that respondent was in Hawaii and that Myers' file was in the friend's California apartment. Myers phoned respondent in Hawaii. At first, respondent told Myers that he had taken Myers' transcripts to Hawaii to finish the petition. When Myers told respondent that he could not have been working on his case because respondent's friend had the file in California, respondent admitted that he had not started on the petition and it would be four to six months more before he could complete it. At this time, Myers terminated respondent's employment and demanded the return of his transcripts and fees. Respondent agreed to this

1. Unless noted otherwise, all references to rules are to the provisions of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, effective on January 1, 1995.

and gave Myers the address of his Sacramento office. When someone on Myers' behalf went to that address, office staff told him that respondent did not work there, only came there intermittently to pick up mail, and did not keep any files there.

Until April 1993, Myers' additional letters to respondent and a contact by another attorney on Myers' behalf were unsuccessful. In April 1993, respondent wrote to Myers that he could pick up his file or that it could be mailed to him. Respondent also wrote Myers incorrectly that Myers had paid respondent only $6,000 in advanced fees and respondent's efforts had far exceeded the $6,000. Respondent stated that he would await further word from Myers.

A month later, respondent wrote Myers that as a result of their conversation in early 1993, respondent had ceased work on the case, but again claimed to have read the transcripts of Myers's case while in Hawaii. Respondent gave Myers his office address and asked that Myers tell him where to send Myers' case papers and how much Myers wanted refunded of the $6,000 respondent claimed to have received. Myers replied by stating that he had paid respondent $7,000 and recalled respondent's earlier promises to have completed the work some time ago.

As of October 1994, Myers had not received his file from respondent or any refund of advanced fees.[2] Because of respondent's failure to refund the fees, Myers was unable to hire other counsel to pursue habeas corpus relief.

According to the hearing judge's findings of fact and conclusions, respondent failed to respond appropriately to many of the client's reasonable inquiries as to the status of the matter (see Bus. & Prof. Code, § 6068, subd. (m)),[3] he wilfully and recklessly failed to perform services competently (see Rules Prof. Conduct, rule 3-110(A)), he failed to turn the client's file over promptly on demand (see *id.*, rule 3-700(D)(1)), and he failed to refund promptly the $7,000 of advanced legal fees he had received to represent the client (see *id.*, rule 3-700(D)(2)). In a separate charge, the hearing judge found that respondent had wilfully violated section 6068, subdivision (i) by failing to cooperate with the State Bar investigation into the habeas corpus matter. As to a charge that respondent had deceived the State Bar in November 1993 by falsely representing that he had communicated with Myers at that time and had falsely advised Myers as to work he had performed, the hearing judge noted that the State Bar had moved for dismissal of these charges on the grounds of insufficiency of the evidence. The judged granted this motion.

As circumstances in aggravation of discipline, the hearing judge found that respondent engaged in multiple acts of misconduct over a significant time period and his misconduct caused significant harm to the client. From respondent's failure to return the client's advanced fee or to acknowledge any impropriety regarding his misconduct, the hearing judge found additional aggravation. (See Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b).)

The hearing judge found almost no evidence in mitigation. Appropriately citing *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 658, she expressly found that respondent's brief practice period without prior discipline between his 1987 admission and the 1991 start of his misconduct was not mitigating. The hearing judge assigned nominal mitigating weight to respondent's "belated and limited" cooperation with the State Bar investigation into the charges. However, she also observed that respondent's cooperation was less than candid and that he was under a statutory duty to cooperate, which duty he breached. (See § 6068, subd. (i).)

In arriving at a discipline recommendation, the hearing judge examined the standards, the case law she considered guiding, and the recommendation of the State Bar. The State Bar had recommended a 90-

2. The hearing judge found that a letter which respondent claimed to have written to Myers on November 29, 1993, was not sent to Myers by respondent and that, at most, it showed that respondent had done only minimal work on Myers's petition.

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

day actual suspension as a condition of a one-year stayed suspension and a two-year probation. The hearing judge noted that the State Bar's recommendation was made while the misrepresentation charge, which was later dismissed on the State Bar's motion, was being tried. The hearing judge also noted that respondent's failure to participate deprived the court of significant information regarding the causes of the misconduct which could have been helpful in gauging the appropriate degree of discipline. Yet she concluded that a "moderate actual suspension" was warranted to address respondent's misconduct, which she characterized as "substantial" and as "absolutely inappropriate."

After considering all factors, the hearing judge recommended a one-year stayed suspension and a two-year probation (the same periods urged by the State Bar), but concluded that a 30-day actual suspension was appropriate. She also recommended that respondent be required to take the multistate professional responsibility examination, rather than the one administered by the California Committee of Bar Examiners, since she understood that respondent had moved to Oregon.

As to the only condition of probation contested by the State Bar in this review, that of requiring restitution, the hearing judge recommended that respondent be required to make restitution to the client (or to the State Bar's Client Security Fund if it repaid the client) of the $7,000 of unearned legal fees advanced to respondent, plus 10 percent interest from December 1, 1992, until paid. Monthly payments of at least $350 were required, with the first payment to be made within 60 days of the effective date of the Supreme Court's order. Respondent was also required to report restitution payments on his quarterly probation reports.[4]

II. DISCUSSION

In turn, we analyze these points: the issues before us in this review, whether those issues are appropriate for summary review and the proper resolution and recommendation to the Supreme Court.

A. The Issues Before Us

As noted, the State Bar sought review under rule 308, providing for summary review of limited issues. The narrow issue raised by the State Bar is the length of time the hearing judge has afforded respondent to complete restitution. In the State Bar's view, restitution should be accomplished in full within 30 days of the effective date of the Supreme Court order; respondent should be suspended from practice until he does make restitution; and if respondent is unable to make repayment due to hardship, he should be required to seek promptly a modification of his probation terms. Since respondent's default was entered below, he has not been entitled to participate in this review.

Although we give important deference to the litigants' identification of the issues, it is settled that the review we conduct is independent. The Supreme Court recently reaffirmed that principle in *In re Morse* (1995) 11 Cal.4th 184, 207. (See also rules 305(a), 308(b), 308(f)(1).) **[1]** The State Bar has raised the question of the amount of respondent's actual suspension, but has done so only as a function of his time to make restitution. Prior to oral argument, we notified the State Bar (the only party entitled to participate) that we considered the issue of appropriate discipline to be before us. The State Bar agreed. We now hold that the amount of discipline in this matter is the larger issue for our review.

4. In her decision, the hearing judge included the following about the restitution requirement: "It is appropriate that [r]espondent be ordered to make restitution to [his client] for the fees advanced to respondent, primarily to encourage [r]espondent's rehabilitation by requiring him to fully atone for his misconduct. [Citation.] . . . Respondent has a continuing ethical duty to make restitution to his former client forthwith. Accordingly, he will be expected to exercise his very best efforts in making restitution and to immediately embark upon a decisive course of action designed to timely do so. Since [r]espondent did not participate in these proceedings, I am unaware of his present financial circumstances. If [r]espondent determines he is reasonably unable to make restitution as recommended herein due to limited financial capacity, he should promptly seek modification of his probation conditions in the appropriate forum."

B. Appropriateness of This Case for Summary Review

[2a] As this is the first summary review proceeding we have decided under rule 308, we address briefly the procedures for such review and the eligibility of this case for that review. Rule 308, providing for summary review, was designed to streamline and reduce the costs of review in the very type of proceeding as invoked here by the State Bar.[5] As rule 308(a) provides, summary review is available to review matters "raising limited issues . . . which can be reviewed without necessitating a transcript of the entire record of State Bar hearings or the normal briefing schedule." Among the matters eligible for summary review are those raising issues concerning the appropriate degree of discipline and those without dispute over the hearing judge's material findings of fact. Those factors are present in this case.

[2b] As the State Bar correctly points out, we designated this matter for summary review. (See rule 308(c)(1).) Following review of the State Bar's supporting memorandum, oral argument, and full consideration of the matter on the record presented,[6] we deem this case appropriate for summary review on the issue of the appropriate degree of discipline. As noted, our review of those issues has been independent. (See rules 305(a), 308(b), 308(f)(1). As always, we recognize the plenary authority of the Supreme Court to review the matter independently. (See, e.g., *Hustedt* v. *Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 339). Therefore, should the Supreme Court decide that review of the reporter's transcript of this proceeding is appropriate or necessary, we stand ready to conduct such additional review at the Supreme Court's direction.

C. Appropriateness of the Hearing Judge's Discipline Recommendation

We agree with the overall weight the hearing judge gave to the balance of aggravating and mitigating factors.[7] However, we hold that respondent's misconduct reflected in the hearing judge's own findings shows that it was more serious than she acknowledged. Respondent abandoned the habeas corpus petition of a vulnerable client, one incarcerated on a long sentence. [3] Clients who are incarcerated, even if they have friends or relatives outside of prison to act as intermediaries with the attorney, are necessarily limited in their ability to assist the attorney or to stay apprised of the attorney's efforts. In that regard, the Supreme Court's observation in a case where the attorney abandoned a criminal appeal, *Borré* v. *State Bar* (1991) 52 Cal.3d 1047, 1053, is apt: "[Borré's] abandonment of his incarcerated client was itself a serious matter warranting substantial discipline. [Citation.]." [4] Especially aggravating was respondent's continued holding of Myers' $7,000 of advanced fees long after he failed to perform any proven amount of legal services and long after he agreed to refund the unearned portion. Such wrongful retention, which continues apparently to this day, approached a practical appropriation of Myers' property. (Cf. *Warner* v. *State Bar* (1983) 34 Cal.3d 36, 44 [referring to cases of fraud or overreaching in the charge of a fee for legal services].) We agree with the hearing judge that respondent's misconduct effectively prevented Myers from seeking other counsel.

[5a] Decisions of the Supreme Court and our court involving abandonment of a client's case with no prior record of the attorney's misconduct have

5. Events surrounding the change in the composition of the review department have accounted for additional pendency of this case and a reargument in order to permit all judges of the current department to participate in the decision.

6. The State Bar's memorandum after our designation of this matter for summary review complied with the provisions of rule 308(d)(1). In addition to required attachments, such as the hearing judge's decision, the State Bar's memorandum also included copies of the formal charges, the pre-trial statements, and relevant minute orders and other papers.

7. However, we do not assign any mitigating weight to respondent's belated and limited cooperation with the State Bar's investigation into the charges, as we find that inconsistent with the Hearing Judge's conclusion that respondent violated section 6068, subdivision (i).

typically resulted in discipline ranging from no actual suspension to 90 days of actual suspension. (See *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 206, and cases cited.) Most of the past abandonment cases involved the attorney's inattention to civil matters. While we have found no decision on point, we have found two Supreme Court decisions which are somewhat comparable to the facts and circumstances of this case. In *King* v. *State Bar* (1990) 52 Cal.3d 307, the attorney had practiced without prior discipline for 15 years before his misconduct began. He had been found culpable of two matters of client neglect over a five-year period. In one, the client suffered serious financial injury, and King had failed to make amends or to return client files. The Supreme Court imposed a four-year stayed suspension and four-year probation, conditioned on a three-month actual suspension.

The more serious case is *Borré* v. *State Bar*, *supra*, 52 Cal.3d 1047. There, the attorney had practiced without discipline for 14 years. He was found culpable of abandoning a criminal appeal and not disclosing this to the client until after the appeal had been dismissed. He had also fabricated a letter to deceive the State Bar during its investigation of the abandonment charge. Deeming Borré's deceptive conduct particularly serious, the Supreme Court imposed a two-year actual suspension as part of a five-year probation and stayed suspension.

Especially considering the dismissal of charges in the misrepresentation count, we must view Borré's misconduct as clearly more serious than respondent's. Also respondent's conduct, while very serious, did not extinguish Myers' direct appeal rights. However, this case also shows respondent's culpability of failure to cooperate with the State Bar investigation, a separate disciplinary offense violating section 6068, subdivision (i). **[5b]** Balancing all relevant factors and giving weight to, but not relying too heavily on, the State Bar's recommendation of respondent's 90-day actual suspension (cf. *In re Morse*, *supra*, 11 Cal.4th 184, 207), we conclude that a 6-month actual suspension is appropriate and that that actual suspension should continue until respondent completes restitution and should be part of a 2-year probation and stayed suspension.

There is ample decisional law as to the rehabilitative and public protection purposes served in ordering disciplined attorneys to make restitution in appropriate cases. (E.g., *Sorenson* v. *State Bar* (1991) 52 Cal.3d 1036, 1044, citing *Brookman* v. *State Bar* (1988) 46 Cal.3d 1004, 1008-1009 [cited by the hearing judge]; *Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 685.) We have applied these principles to our own decisions. (E.g., *In the Matter of Klein* (Rev. Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 15, and cases cited.) The State Bar contends that the hearing judge correctly recommended that respondent make restitution to the client here (or the Client Security Fund), and we agree. **[6]** However, considering the length of time in which respondent has wrongfully retained Myers' $7,000, without proof of having earned any measurable portion, it was his burden to prove factors justifying any recommendation other than one requiring restitution prior to being relieved of the actual suspension. He has not done so and instead defaulted. We hold that the hearing judge erred in not requiring respondent to make restitution forthwith.

III. RECOMMENDATION

For the reasons discussed, we recommend that respondent be suspended from the practice of law in this state for two years, that execution of that suspension be stayed, and that respondent be placed on probation for a period of two years on the following conditions: (1) that he be actually suspended for the first six months and until he makes restitution in the sum of $7,000 with interest at the rate of 10 percent per year from December 1, 1992, until paid in full to Mr. Freddie Myers or the State Bar's Client Security Fund; (2) that if respondent's actual suspension lasts for two years or more, such actual suspension shall continue until he proves rehabilitation, present fitness to practice law, and present learning and ability in the general law at a hearing pursuant to standard 1.4(c)(ii); and (3) that he comply with conditions 3 through 10 set forth by the hearing judge in her decision, except that the length of the order of suspension referred to in condition 10 shall be that set forth in the Supreme Court's order.

We recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination either within one year of the effective date of the Supreme Court's order if he is actually suspended for less than one year or prior to the expiration of his actual suspension if he is actually suspended for more than one year.

We also recommend that respondent 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 order. Finally, we recommend that the Supreme Court award the State Bar the costs of this proceeding pursuant to section 6086.10.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN M. RUBENS

A Member of the State Bar

No. 91-O-01225

Filed November 1, 1995

SUMMARY

Respondent committed serious misconduct in two successive personal injury practices dominated by non-attorneys. In the first practice, he failed to communicate with a client and then abandoned the client without providing for the return of the client's file and without giving the client an accounting. In the second practice, he displayed recklessness amounting to moral turpitude. Because he abdicated his responsibility to supervise support staff at the second practice, a client's matter was settled without the knowledge or consent of the client, the client's signature was forged on a release and a settlement check, and the client never received the client's share of settlement funds. The hearing judge recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for two years and until respondent makes restitution and proves rehabilitation. (Hon. Jennifer Gee, Hearing Judge.)

Respondent requested review. He focused on procedural claims and argued against any actual suspension. Although the review department altered a culpability conclusion and some findings of aggravating and mitigating circumstances, it determined that respondent committed serious acts of misconduct surrounded by significant aggravation. Respondent's actions carried a great risk of very serious harm to clients. Given the goals of attorney discipline, the review department adopted the hearing judge's disciplinary recommendation.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Dal Cerro

For Respondent: Donald Ainslie, John M. Rubens, 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-d] 112 **Procedure—Assistance of Counsel**
115 **Procedure—Continuances**
120 **Procedure—Conduct of Trial**
130 **Procedure—Procedure on Review**
136 **Procedure—Rules of Practice**
136.10 **Procedure—Rules of Practice—Division I, General Provisions**
167 **Abuse of Discretion**
169 **Standard of Proof or Review—Miscellaneous**
191 **Effect/Relationship of Other Proceedings**
192 **Due Process/Procedural Rights**

Neither the law nor the facts supported respondent's contention that by denying two continuance requests during the six days of trial, the hearing judge deprived him of a reasonable opportunity to be represented by counsel. An attorney in a disciplinary hearing has no constitutional right to the assistance of counsel. Further, continuances of State Bar Court hearings are disfavored. (State Bar Court Rules of Practice, rule 1131.) To prevail on a procedural argument in a disciplinary matter, an attorney must show both abuse of discretion by the hearing judge and specific prejudice resulting from the alleged procedural error. Respondent proved neither where respondent's counsel set a murder trial for the day before the scheduled start of the disciplinary hearings and failed to provide timely information about this conflict to the State Bar Court, where respondent failed to show that his counsel could not have anticipated or avoided the conflict, and where respondent failed to show that the only proper means of handling the conflict was to grant a continuance.

[2] 139 **Procedure—Miscellaneous**
193 **Constitutional Issues**
199 **General Issues—Miscellaneous**

Where respondent contended that California's disciplinary process violates the commerce clause of the United States Constitution, respondent failed to recognize that the judiciary of each state has the right to regulate the practice of law in that state.

[3 a, b] 139 **Procedure—Miscellaneous**
192 **Due Process/Procedural Rights**
199 **General Issues—Miscellaneous**

No merit was found to respondent's claim that California's disciplinary process violates due process because of the alleged financial interest of State Bar Court judges and State Bar staff in the outcome of disciplinary proceedings and in the collection of disciplinary costs. California provides attorneys subject to discipline with more than constitutionally sufficient procedural due process. The Supreme Court has inherent and plenary authority to regulate and discipline attorneys, and the State Bar serves as its administrative arm to assist with these matters. The Supreme Court appoints the judges of the State Bar Court, and the Legislature sets their salaries comparable to judges of courts of record. The State Bar Court judges are subject to discipline on the same grounds as a judge of any other state court. The annual membership fees of attorneys who belong to the State Bar, not the costs assessed upon the imposition of discipline, pay the salaries of the State Bar Court judges and State Bar staff. Thus, personal financial interest does not dictate the outcome of disciplinary proceedings or the imposition of disciplinary costs.

[4] **125 Procedure—Post-Trial Motions**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
141 Evidence—Relevance
159 Evidence—Miscellaneous

Respondent was not entitled to present evidence for the first time on review that a State Bar official had engaged in improper conduct in a separate civil proceeding against respondent, where respondent had the opportunity to make this allegation and present evidence in support of it at the hearing level. Also, respondent failed to show how such evidence had any bearing on either his culpability of the charges against him or the appropriate discipline for his misconduct.

[5] **221.00 State Bar Act—Section 6106**

Gross negligence or recklessness by an attorney in discharging fiduciary duties involves moral turpitude. Respondent displayed recklessness constituting moral turpitude where his failure to supervise staff for whom he was responsible resulted in the settlement of a client's matter without the client's knowledge or consent, the forging of the client's signature on the release and the settlement check, and the failure to distribute the client's share of the settlement funds to the client.

[6] **280.00 Rule 4-100(A) [former 8-101(A)]**

Respondent wilfully violated the rule of professional conduct which requires that all funds received for the benefit of clients be deposited in a trust account (rule 4-100(A)), where he failed to ensure that a settlement check was made out to the client and himself and was deposited in his trust account.

[7] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**

Respondent wilfully violated the rule of professional conduct which requires an attorney, upon the request of a client, to deliver promptly funds which the client is entitled to receive and which are in the attorney's possession (rule 4-100(B)(4)), where some of respondent's office staff must have possessed the client's funds. Regardless of whether respondent personally possessed these funds, as the client's attorney, respondent was ethically responsible for reasonable oversight of office staff which did possess them.

[8] **750.52 Mitigation—Rehabilitation—Declined to Find**

Where respondent failed to offer clear and convincing proof of rehabilitation, respondent did not establish mitigation under standard 1.2(e)(viii), which requires not only the passage of considerable time since the acts of professional misconduct, but also subsequent rehabilitation.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m)
221.12 Section 6106—Gross Negligence
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)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]

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

Aggravation

Found

511 Prior Record
521 Multiple Acts
561 Uncharged Violations
582.10 Harm to Client
591 Indifference

Mitigation

Found

735.10 Candor—Bar

Discipline

1013.09 Stayed Suspension—3 Years
1015.08 Actual Suspension—2 Years
1017.09 Probation—3 Years

Probation Conditions

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

OPINION

STOVITZ, J.:

This proceeding concerns serious misconduct by respondent, John M. Rubens, in two successive personal injury practices dominated by non-attorneys. He joined the first practice shortly after his admission to the bar in 1989. Nine months later, he left this practice because he realized his lack of appropriate control over non-attorney staff and because he suspected insurance fraud and the use of cappers, although he had no concrete evidence of such. Within a few months, he joined the second practice, where he again failed to exercise proper control over non-attorney staff. He remained at the second practice for eighteen months, twice as long as he stayed at the first practice, although he not only suspected insurance fraud and the use of cappers, but also knew about forgeries and significant misappropriations.

Although the misconduct with which he was charged and which he was proved to have committed was not extensive, focused on harm to two clients, respondent generally failed to appreciate in both personal injury practices that he owed the highest fiduciary duty to his clients. At the first practice, he failed to communicate with a client and then abandoned the client without providing for the return of the client's file and without giving the client an accounting. At the second practice, he displayed recklessness amounting to moral turpitude. Because he abdicated his responsibility to supervise support staff at the second practice, a client's matter was settled without the knowledge or consent of the client, the client's signature was forged on a release and a settlement check, and the client never received the client's share of settlement funds.

The hearing judge recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for two years and until respondent makes restitution and proves rehabilitation. Only respondent sought our review, urging mainly procedural claims and that hé not be actually suspended. Although the record requires us to alter a conclusion of culpability and some findings of aggravating and mitigating circumstances, we agree with the hearing judge that respondent committed significant acts of misconduct toward two clients surrounded by significant aggravation. Respondent's actions in both of the law practices carried great risk of very serious harm to clients. Given the goals of protecting the public, preserving confidence in the legal profession, and maintaining the highest possible professional standards for attorneys, we adopt the hearing judge's disciplinary recommendation.

I. PROCEDURAL HISTORY

In 1993, the State Bar's Office of the Chief Trial Counsel (State Bar) filed a two-count notice to show cause against respondent. The hearing judge held six days of hearings in April and May 1994 and filed her decision in July 1994. After the denial of his requests for reconsideration and a hearing de novo in late August 1994, respondent sought review.

II. DISCUSSION

A. Respondent's Claims on Review

In his brief on review, respondent concedes his culpability of many improper practices over a period of two years. He primarily challenges the hearing judge's decision on procedural and constitutional grounds, although he raises other objections.

[1a] Respondent argues that by denying two continuance requests during the six days of trial, the hearing judge deprived him of a reasonable opportunity to be represented by counsel. According to respondent, his counsel, attorney Donald Ainslie, unexpectedly had to represent a defendant in a murder trial.

The record, however, reveals that on April 18, 1994, eight days before the scheduled start of the disciplinary hearings, the murder trial was set for April 25, 1994, at the request of defense counsel. During a pretrial disciplinary conference held on April 22, 1994, Ainslie did not inform the court of the conflict created four days earlier. Instead, Ainslie indicated his readiness to proceed with the disciplinary hearings.

On April 26, 1994, the first scheduled day of the hearings, Ainslie failed to appear. Respondent told the court about Ainslie's conflict, but consented to the holding of the hearing on that day in order to avoid inconvenience to one of the State Bar's witnesses. In addition, the hearing judge, who resided in northern California, had traveled to Los Angeles in order to preside at the hearings.

On April 27, 1994, the next scheduled day of the hearings, attorney Steven Horton made a special appearance on behalf of Ainslie and orally requested a continuance of the disciplinary hearing on the grounds that Ainslie was handling the murder trial. Horton did not file a written motion or a supporting declaration. Nor did Horton, who also represented the defendant in the murder trial, offer to explain why Horton was not handling the murder trial so that Ainslie could appear at the disciplinary hearing. The hearing judge denied Horton's request because Ainslie had known of a possible conflict in advance and had failed to provide the court with appropriate notification.

On April 28, 1994, the third scheduled day of the hearings, respondent himself made an oral request for a continuance. Like Horton, respondent did not file a written motion or supporting declaration. Nor did respondent indicate why Horton could not handle the murder trial and Ainslie, the disciplinary hearing. The hearing judge denied the oral request of April 28 for the same reason she had denied the oral request of April 27.

[1b] Counsel must treat a scheduled disciplinary hearing date as a definite court appointment. (Former Prov. State Bar Court Rules of Practice (eff. Aug. 18, 1989, to Dec. 31, 1994), rule 1131(a); State Bar Court Rules of Practice (eff. Jan. 1, 1995), rule 1131(a).) A continuance requires a showing of good cause. In general, the need for a continued hearing must result from an emergency which occurs after the setting of the hearing date, which could not have been anticipated or avoided with reasonable diligence, and which can only be properly handled by granting a continuance. (Former Prov. State Bar Court Rules of Practice (eff. Aug. 18, 1989, to Dec. 31, 1994), rule 1131(d); State Bar Court Rules of Practice (eff. Jan. 1, 1995), rule 1131(c).)

[1c] At the disciplinary hearings on April 27 and 28, 1994, respondent and Horton failed to show that Ainslie could not have anticipated or avoided the conflict. Indeed, the record establishes that on April 18, 1994, Ainslie and Horton requested the setting of the murder trial for April 25, 1994, the day before the scheduled start of the disciplinary hearings, and that at the pretrial conference on April 22, 1994, Ainslie failed to inform the State Bar Court of the conflict. Further, respondent and Horton failed to show that the only proper means of handling the conflict was to grant a continuance. In denying the continuance requests of April 27 and 28, 1994, the hearing judge exercised reasonable control over the proceeding (see *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 689, citing *Dixon* v. *State Bar* (1982) 32 Cal.3d 728, 736) and avoided undue delay. (See *In the Matter of Tindall*, (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 661, citing *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 597-598.)

On review, respondent fails to show how the hearing judge's denials of the two continuance requests specifically prejudiced him on April 27 and 28, 1994. Instead, he presents speculative allegations of harm.

On May 9, 1994, the jurors in the murder trial declared that they were unable to reach a verdict. Ainslie, however, did not appear on any of the three remaining days of the disciplinary hearing: May 11, 12, and 13, 1994. Respondent stated that he was appearing on his own behalf on all these days. On none of them did he request a continuance.

On her own initiative, the hearing judge asked respondent at the start of the hearing on May 11, 1994, what had happened to Ainslie. Respondent stated: "All I know is [that Ainslie] has an appearance today, has a trial starting tomorrow, and . . . didn't tell me his intent." The record contains no other information about Ainslie's failure to appear on any of the last three days of hearings.

[1d] Neither the law nor the facts support respondent's contention. An attorney in a disciplinary hearing has no constitutional right to the assistance of counsel. (*Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1116.) Further, continuances of State Bar

Court hearings are disfavored. (Former Prov. State Bar Court Rules of Practice (eff. Aug. 18, 1989, to Dec. 31, 1994), rule 1131(a); State Bar Court Rules of Practice (eff. Jan. 1, 1995), rule 1131(a).) To prevail on a procedural argument in a disciplinary matter, an attorney must show both abuse of discretion by the hearing judge and specific prejudice resulting from the alleged procedural error. (See *Morales* v. *State Bar* (1988) 44 Cal.3d 1037, 1047; *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 845; *In the Matter of Tindall, supra*, 1 Cal. State Bar Ct. Rptr. at p. 661.) Respondent proved neither.

[2] Respondent contends without explanation that California's disciplinary process violates the commerce clause of the United States Constitution because the process can impair his ability to practice law outside California. He does not recognize that the judiciary of each state has the right to regulate the practice of law in that state. (*Hustedt* v. *Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337, citing Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?* (1981) 69 Geo. L.J. 705, 707, fn.4.)

[3a] Respondent further claims that California's disciplinary process violates the due process clause of the Fourteenth Amendment to the United States Constitution.[1] He bases this claim on an alleged financial interest of State Bar Court judges and State Bar staff in the outcome of disciplinary proceedings and in the collection of disciplinary costs.

[3b] Respondent's claim lacks merit. California "provides attorneys subject to discipline with more than constitutionally sufficient procedural due process." (*Rosenthal* v. *Justices of the Supreme Court of California* (9th Cir. 1990) 910 F.2d 561, 565, cert. den. *sub nom. Rosenthal* v. *Broussard* (1991) 498 U.S. 1087.)[2] The Supreme Court has inherent and plenary authority to regulate and discipline attorneys, although the State Bar serves as its administrative arm to assist with these matters. (*Lebbos* v. *State Bar* (1991) 53 Cal.3d 37, 47, quoting *Saleeby* v. *State Bar* (1985) 39 Cal.3d 547, 557.) The cited cases involved the pre-1989 volunteer State Bar Court. The constitutional analysis is fully applicable to the current State Bar Court, which provides even greater independence since it is modeled after courts of record. The Supreme Court appoints the judges of the State Bar Court (Bus. & Prof. Code, § 6079.1, subd. (a)),[3] and the Legislature sets their salaries comparable to judges of courts of record. The State Bar Court judges are subject to discipline on the same grounds as a judge of any other state court. (Cal. Rules of Court, rule 961(b); § 6079.1, subd. (d).) The annual membership fees of attorneys who belong to the State Bar, not the costs assessed upon the imposition of discipline, pay the salaries of the State Bar Court judges and State Bar staff. (See §§ 6086.10, 6140.) Thus, personal financial interest does not dictate the outcome of disciplinary proceedings or the imposition of disciplinary costs.

[4] On review, respondent alleges for the first time that a State Bar official engaged in improper conduct in a separate civil proceeding against respondent by referring the complainant to an attorney to initiate the civil proceedings against respondent. Respondent, however, had the opportunity to make this allegation and present evidence in support of it at the hearing level. Having failed to do so, he is not entitled to present evidence belatedly. (See *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 792; *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 228-229.) Nor does he show how the allegation or the evidence supposedly supporting it has any bearing on either his culpability of the charges against him or the appropriate discipline for

1. Respondent does not argue that the process is thus void. He instead requests that we correct factual findings, clarify mitigating circumstances, and reduce discipline.

2. Although the Ninth Circuit has had before it a due process attack on the new State Bar Court, it declined on abstention grounds to reach the constitutional issue. (*Hirsh* v. *Justices of the Supreme Court of the State of California* (9th Cir. 1995) 67 F.3d 708.)

3. All further references to sections denote provisions of the Business and Professions Code.

his misconduct. Thus, we decline to address the untimely allegation further and to include this irrelevant evidence in the record.[4]

Other contentions by respondent lack merit, are improperly raised, or reveal no significant errors. Respondent observes that two witnesses offered conflicting testimony, but he does not acknowledge the hearing judge's prerogative to weigh such testimony and to make appropriate credibility determinations. He complains on review that a witness who testified on one date did not reappear at a later date for continued cross-examination, although he waived this matter by failing to object during the hearings. He claims that the hearing judge made a mistaken finding based on a witness's testimony. Yet the mistake in the finding was inconsequential. More significantly, other evidence clearly and convincingly established the point at issue (i.e, the existence of an attorney-client relationship). He identifies errors in the transcript of the hearings, but fails to recognize that these errors are minor typographical mistakes. He asserts that lack of time forced him to file an incomplete brief on review, although he filed no motion for extra time to prepare a complete brief.

Finally, respondent requests that no actual suspension be recommended despite his failure to show any significant error in the hearing judge's findings of fact, to dispute the conclusions of culpability, to address the aggravating and mitigating factors, and to analyze the standards and cases applicable to the disciplinary recommendation. The State Bar submits that the hearing judge made an appropriate disciplinary recommendation.[5] Pursuant to our obligation of independent review (Rules Proc. of State Bar, Title II, State Bar Ct. Proceedings, rule 305(a); *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9), we have examined the record and made findings, conclusions, and a disciplinary recommendation, as set forth *post*.

B. Misconduct at 3545 Wilshire Boulevard

Respondent was admitted to practice law in California in June 1989. In early 1990, he took over the law practice of attorney Adelfa Centeno at 3545 Wilshire Boulevard in Los Angeles. Although Centeno was occasionally in the office, she did not supervise him; and respondent seldom spoke to her.

Sarah Montebello, who was not an attorney, was the lessee at 3545 Wilshire Boulevard and ran the office. When respondent's cases settled, she handled the settlement checks. She was responsible for obtaining client endorsements and used a stamp to deposit checks in respondent's trust account. Twice a month, she made payments to respondent for his work.[6] She and a non-attorney assistant reviewed respondent's monthly bank statements and showed respondent ledgers of income and disbursements. Respondent had no key to the office or files, reviewed no bank account statements, and saw no checks. Non-attorney support staff interviewed clients, sent initial letters to clients, responded to status inquiries from clients, and handled all aspects of settlement negotiations.

In the late spring of 1990, respondent began to believe that Montebello was improperly taking attorney's fees; but he did nothing to try to correct this situation. Also, he suspected that Montebello and the staff were sending false claims to insurance companies. Respondent estimated that he dropped

4. Although respondent has filed no motion to augment the record, he seeks to expand the evidence before us with three documents: exhibit A to his reply brief and exhibits B and C to his opposition to the State Bar's motion to strike exhibit A. We construe respondent's reply brief and opposition to the motion to strike as constituting a request to augment the record on review with exhibits A, B, and C. (Cf. Rules Proc. of the State Bar, Title II, State Bar Ct. Proceedings, rule 306(e)(1).) Because the request is untimely and the proffered exhibits are irrelevant, we deny the request (cf. *id.*, rule 306(e)(3) [augmentation of the record permissible only if the record is incomplete or incorrect]) and dismiss the State Bar's motion to strike exhibit A as moot.

5. On review, the main issue is the appropriate level of discipline. This issue received almost no discussion either in respondent's or in the State Bar's review briefs. Given the independent scope of our review (see, e.g., *Morse v. State Bar* (1995) 11 Cal. 4th 184, 207), both parties can aid our task by properly addressing this issue in appropriate future cases.

6. At the disciplinary hearing, respondent denied that these payments constituted a salary.

20 or 30 cases because of his suspicions. Respondent further came to suspect that Montebello used cappers. Respondent testified that he did not have concrete evidence to support his suspicions.

While at the 3545 Wilshire Boulevard office, respondent represented hundreds of personal injury clients, including Lynn Tripp; her husband, Gary Tripp; and their son, Jeffrey Tripp. The only misconduct alleged by the notice to show cause as occurring at 3545 Wilshire Boulevard was the Tripp matter.

One of respondent's paralegals, Joe Guadiz, actually handled the Tripp matter. Guadiz settled the cases of Gary and Jeffrey Tripp in August 1990, but the Tripps did not receive an accounting from respondent. Although Lynn Tripp made many telephone calls about her case to respondent's office, Guadiz returned few of these calls; and respondent, none of them.

In early October 1990, Lynn Tripp sent respondent a letter terminating his representation and requesting her file, but received no response. She was also concerned about her husband's $730 lost wage claim, which was included in the August settlement, but which he had not received from respondent's office. A check for the lost claim was drawn on respondent's trust account in late October and sent to Gary Tripp in early November.

In the middle of October 1990, respondent abandoned his law practice at 3545 Wilshire Boulevard because he realized his lack of proper control over non-attorney staff and suspected illegal practices by Montebello. He did not inform the Tripps or any other clients of his abandonment. Nor did he obtain a list of his clients or file any motions to withdraw. Instead, he relied upon Montebello and attorney Ronald Allen, who represented both Montebello and respondent, to handle matters related to his withdrawal from employment. The record contains no clear and convincing evidence that they either did so or failed to do so.

In January 1991, Lynn Tripp mailed respondent another letter requesting her file. In March 1991, she obtained her file, although the negatives of some photographs were missing from it. She also learned that a lawsuit had been filed on her behalf by attorney Robert Keen, whom she had never retained.

We agree with the hearing judge's culpability determinations about the Tripp matter. By failing to return Lynn Tripp's calls, to ensure Guadiz's proper response to them, and to advise Tripp of his abandonment of his practice at 3545 Wilshire Boulevard, respondent wilfully violated section 6068, subdivision (m), which requires attorneys to respond promptly to reasonable status inquiries from clients and to keep clients reasonably informed of significant developments. By abandoning Lynn Tripp, respondent wilfully violated rule 3-700(A)(2) of the Rules of Professional Conduct,[7] which prohibits withdrawal from employment until an attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to clients' rights, including giving due notice and allowing time for the employment of other counsel.[8] By failing to provide Lynn Tripp with her entire file shortly after she asked for it, respondent wilfully violated rule 3-700(D)(1), which requires an attorney, after termination of employment, to release promptly to clients all their papers and property upon their request. By not supplying any accounting after the settlement of the cases of Gary and Jeffrey Tripp, respondent wilfully violated rule 4-100(B)(3), which requires attorneys to render appropriate accounts to clients.

C. Misconduct at 8383 Wilshire Boulevard

After respondent left 3545 Wilshire Boulevard, he looked for work for several months. In January 1991, he obtained a position doing litigation work for

7. Further references to rules denote the Rules of Professional Conduct effective May 27, 1989, through September 13, 1992.

8. Insofar as the facts establishing culpability under section 6068, subdivision (m), include the facts establishing culpability under rule 3-700(A)(2), we attach no additional weight to such duplication in determining the appropriate discipline. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose served by duplicative allegations of misconduct]; *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221.)

attorney Louis Morelli at 8383 Wilshire Boulevard in Los Angeles. Respondent agreed to supervise staff there because Morelli maintained a principal office elsewhere. In February 1991, Morelli sent one Sam Nemirovsky, a non-attorney, a letter stating that Nemirovsky was to accept no more clients in Morelli's name and that respondent was to be given all Morelli's litigation files and to report to Morelli. Respondent remained at 8383 Wilshire Boulevard until July 1992.

Nemirovsky actually ran the office at 8383 Wilshire Boulevard. Nemirovsky on his own had secretaries assign the names of attorneys to cases at 8383 Wilshire Boulevard. Nemirovsky also handled respondent's trust account; Nemirovsky used a stamp to deposit funds into the account and wrote checks for disbursements from the account. Respondent received biweekly payments from Nemirovsky for working at 8383 Wilshire Boulevard. Non-attorney staff conducted initial client interviews; prepared, sent out, and signed retainer agreements; obtained police reports and collected other information about accidents; contacted insurance companies; referred clients to medical providers; handled correspondence; negotiated settlements; and received and cashed settlement checks. By February 1991, a month after he began working at 8383 Wilshire Boulevard, respondent suspected that the office was committing insurance fraud. Within a few more months, he realized that cappers were being used, that non-attorney staff was assigning his name to cases as counsel without his knowledge and were misusing attorney stationery, that his name was being forged on trust account checks, and that misappropriations were occurring. He also had no access to adequate records showing who his clients were. At the disciplinary hearings, he indicated that about $50,000 had been misappropriated from his trust account in 1991 and that he had made no attempt to determine whose funds had been taken or to repay the funds.

During the disciplinary hearings, respondent testified that he objected to: secretaries putting his name on case files without his knowledge; to the misuse of stationery; to the settlement of cases without authority; and to Nemirovsky's control over, and misuse of, his client trust account. His testimony, however, also reveals that he made inadequate efforts to stop these abuses. For example, he took his client trust account checkbook away from Nemirovsky only to return it to Nemirovsky a short time later. Further, he accepted increased payments from Nemirovsky in exchange for continuing to work at 8383 Wilshire Boulevard and turning a blind eye to suspected illegal practices. Although at one point Nemirovsky threatened him with a gun, he decided not to press charges after the police told him that he would have to reveal the details of his relationship with Nemirovsky.

In late March 1991, Antonette Apostal retained respondent to represent her in a personal injury matter. During the disciplinary hearings, respondent asserted that Apostal was Morelli's or Lopez's client. In addition, respondent suggested that Apostal was really the client of paralegal Jesse Parades, who usually negotiated settlements for respondent's cases. Respondent also conceded that Apostal may have been his "putative client," but was not his "veritable client." We agree with the hearing judge that clear and convincing evidence shows Apostal to have been respondent's client. The notice to show cause as to 8383 Wilshire Boulevard dealt only with respondent's misconduct in the Apostal matter.

From March to August 1991, attorney Edward Lopez leased office space at 8383 Wilshire Boulevard. By April 1991, Morelli no longer came into the office at 8383 Wilshire Boulevard on a regular basis. During 1991, respondent and the staff whom he was responsible for supervising used the stationery of Morelli and Lopez.

On April 23, 1991, a secretary whom respondent supervised sent Apostal a letter acknowledging her as a client and requesting information about her accident. This letter was signed on behalf of respondent's law office and written on stationery with respondent's name, followed by "Law Offices of Louis A. Morelli" and the address.

On April 30, 1991, another secretary whom respondent supervised sent the insurance company involved in Apostal's claim a letter stating that Apostal had retained respondent's law office to represent her. The letter was signed on behalf of

respondent's law office and written on stationery with only respondent's name, followed by the address.

On October 7, 1991, respondent sent the insurance company a demand letter on Lopez's stationery for the settlement of Apostal's claim. Respondent testified that he signed the letter.

During her medical treatment and the pendency of her claim, Apostal and her mother telephoned respondent's office to inquire about the status of her case. Although respondent's staff said that they took messages and that respondent would reply, he did not do so. Respondent testified, however, that he received no messages from Apostal or her mother.

At the end of October 1991, someone at 8383 Wilshire Boulevard other than respondent settled Apostal's claim for $8,500. On November 4, 1991, a release was executed with what purported to be Apostal's siguature. A secretary whom respondent was responsible for supervising signed the release as a witness. On November 7, 1991, the insurance company issued a settlement check to Apostal and Lopez. This check was cashed, and the back of the check has signatures purporting to be those of Apostal and Lopez. Neither Apostal nor Lopez, however, knew about the settlement or signed the check. Further, the check was not deposited in Lopez's trust account.

In letters to the State Bar, respondent stated that Apostal's case was settled without his knowledge or consent and that he did not see or negotiate the settlement check, receive any of the settlement funds, or know what became of the funds. His testimony during the hearings was consistent with these statements. The record fails to establish who cashed the check or what happened to the settlement funds.

Eventually, Apostal's medical provider told her that her bill had been paid. Apostal's mother then telephoned respondent's office and asked whether Apostal's case had been settled. Respondent's staff did not answer this question.

Later, respondent's staff called Apostal, informed her of the settlement, and asked her to collect her check. She drove with her mother to respondent's office and met with an unidentified staff member, who told her that her file could not be located and who offered her a partial payment. Apostal rejected this offer and never received any part of the settlement funds.

At the disciplinary hearings, Lopez testified that he did not employ respondent, assign any cases to respondent, ask Morelli for respondent's help, authorize respondent's use of his stationery, or know anything about the Apostal matter. Lopez terminated his lease at 8383 Wilshire Boulevard in August 1991, before the settlement of Apostal's case.

Respondent stated that he supervised Lopez's cases. Although respondent admitted that he signed the demand letter of October 7, 1991, he asserted that he did so as Lopez's associate; and he denied that he was responsible for Apostal's case. This denial lacks credibility.

[5] We agree with the hearing judge that in the Apostal matter respondent violated section 6106, which makes an act of moral turpitude, dishonesty, or corruption a cause for suspension or disbarment. Gross negligence or recklessness by an attorney in discharging fiduciary duties involves moral turpitude. (See *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 475; *Simmons* v. *State Bar* (1970) 2 Cal.3d 719, 729; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.) By abdicating his responsibility for the Apostal matter to support staff, respondent displayed recklessness constituting moral turpitude. As a result of his failure to supervise staff for whom he was responsible, Apostal's matter was settled without her knowledge or consent, her signature was forged on the release and the settlement check, and her share of the settlement funds was not distributed to her.

Also, we agree with the hearing judge that respondent violated section 6068, subdivision (m), by failing to reply to Apostal's reasonable status

inquiries and to inform her of such significant developments as the settlement offer, the resolution of her case, and the receipt of her settlement funds. We further agree that respondent violated rule 3-110(A), which prohibits the intentional, reckless, or repeated failure to provide competent legal services.[9]

The hearing judge concluded that in the Apostal matter respondent did not violate rule 4-100(A), which requires that all funds received for the benefit of clients be deposited in a trust account. The notice to show cause alleged that respondent made it possible for Apostal's settlement not to be deposited in his trust account. According to the hearing judge, respondent is not culpable on the grounds that the settlement check was made payable to Lopez and Apostal and thus could not have been deposited in respondent's trust account.

[6] As Apostal's attorney, respondent was responsible for the proper handling of her settlement. Because he signed the demand letter on October 7, 1991, after the end of Lopez's lease at 8383 Wilshire Boulevard, he should have been aware of his duties to Apostal. Nevertheless, he failed to ensure that the settlement check was made out to Apostal and himself and deposited in his trust account. This latter failure was a wilful violation of rule 4-100(A).[10]

We agree with the hearing judge that in the Apostal matter respondent wilfully violated rule 4-100(B)(1), which requires prompt notification of a client upon the receipt of the client's funds. As a result of respondent's reckless failure to ensure the correct handling of Apostal's case, Apostal did not receive such notification.[11]

[7] The hearing judge concluded that in the Apostal matter respondent wilfully violated rule 4-100(B)(4), which requires an attorney, upon the request of a client, to deliver promptly funds which are in the attorney's possession and which the client is entitled to receive. The hearing judge concluded that some office staff at 8383 Wilshire Boulevard must have possessed Apostal's funds, and respondent was responsible for paying Apostal her share of these funds upon her request. We uphold this conclusion. Whether or not respondent personally possessed Apostol's funds, as Apostol's attorney, he was ethically responsible for reasonable oversight of office staff which did possess them.[12]

D. Mitigation and Aggravation

Although the hearing judge found no mitigating circumstances, the record establishes one such circumstance addressed by neither the court nor the parties. Respondent cooperated with the State Bar during its investigation of his misconduct and the disciplinary hearings.[13] (Rules Proc. of State Bar, Title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(v); former Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(v).)

[8] On review, respondent suggests that the change of his workplace and the lack of complaints against him since he left the office at 8383 Wilshire Boulevard, as well as his completion of a one-year probation in September 1994 for a prior disciplinary offense, are mitigating circumstances. We disagree. Under standard 1.2(e)(viii), credit for mitigation is appropriate if an attorney not only shows the passage of considerable time since the acts of professional misconduct, but also proves subsequent rehabilitation. Respondent failed to offer clear and convincing proof of rehabilitation. (See std. 1.2(e) [burden of attorney culpable of misconduct to provide clear and

9. As discussed *ante*, respondent recklessly failed to supervise staff properly in handling Apostal's case. Insofar as the facts showing a violation of section 6106 include the facts showing violations of section 6068, subdivision (m), and rule 3-110(A), we attach no additional weight to the latter violations in determining the appropriate discipline.

10. In reaching a disciplinary recommendation, we accord the rule 4-100(A) violation no additional weight insofar as it rests upon facts covered by the section 6106 charge.

11. In determining the appropriate discipline, we give no additional weight to the rule 4-100(B)(1) charge insofar as it rests upon facts covered by the section 6106 charge.

12. In determining the proper discipline, we accord the rule 4-100(B)(4) violation no additional weight insofar as it rests upon facts covered by the section 6106 violation.

13. Respondent met with investigators and provided information to them.

convincing evidence of mitigation]; cf. *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939 ["It is not enough that petitioner kept out of trouble while being watched on [criminal] probation; he must affirmatively demonstrate over a prolonged period his sincere regret and rehabilitation."].)

We agree with the hearing judge that respondent's prior private reproval was an aggravating circumstance. (Std. 1.2(b)(i).) Respondent, who was also admitted to practice law in Nevada, employed a non-attorney, Hugh Rodgers, to manage his Las Vegas law office in July 1991, about six months after he started work at 8383 Wilshire Boulevard and a year before he left there. Two months later, Rodgers solicited a Nevada client, who believed Rodgers to be an attorney working for respondent. Respondent learned of this development when the Nevada client told respondent that the client was discharging respondent's firm because of Rodgers' failure to respond to the client's inquiries. Respondent stipulated that by failing to supervise Rodgers adequately, he violated rule 1-300(A), which prohibits aiding in the unauthorized practice of law, and rule 3-110(A), which prohibits intentional, reckless, or repeated failure to provide competent legal services. Respondent's misconduct in Nevada occurred during the same time as his misconduct at 8383 Wilshire Boulevard. As the hearing judge observed, it is significant that respondent established his Las Vegas office after being contacted by State Bar investigators about his misconduct at 3545 Wilshire Boulevard and after being warned by a Nevada attorney that the State Bar of Nevada was pursuing Rodgers. Thus, respondent's misconduct in Nevada reflected reckless disregard of his duty to provide proper supervision of non-attorney staff.

Also, we agree with the hearing judge that additional aggravating circumstances shown by the record include uncharged fee-splitting with Montebello and Nemirovsky in wilful violation of rule 1-320(B) (std. 1.2(b)(iii)); uncharged failure to inform the State Bar promptly of his change of address after he left the law office at 8383 Wilshire Avenue in wilful violation of section 6068, subdivision (j)[14] (std. 1.2(b)(iii)); significant harm to Apostal, who never received any portion of the $8,500 settlement (std. 1.2(b)(iv)); failure to take adequate steps to halt the improper practices at 3545 and 8383 Wilshire Boulevard[15] (std. 1.2(b)(v)); and failure to make any effort to pay restitution to Apostal (std. 1.2(b)(v)). We further find that respondent's misconduct involved an aggravating circumstance specifically addressed by neither the hearing judge nor the parties: multiple acts of wrongdoing. (Std. 1.2(b)(ii).)

E. Discipline

The hearing judge recommended a three-year stayed suspension and a three-year probation, conditioned on actual suspension for two years and until respondent makes restitution to Apostal and proves rehabilitation, present fitness to practice law, and present learning and ability in the general law pursuant to standard 1.4(c)(ii). Respondent requests the exclusion of any actual suspension from the disciplinary recommendation. At the hearing level, the State Bar recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until respondent pays restitution and complies with standard 1.4(c)(ii). On review, the State Bar supports the hearing judge's recommendation.

The determination of the appropriate discipline begins with the standards, which provide guidance. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Under standard 1.3, discipline primarily serves to protect the public, courts, and legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession. The standard suggesting the most severe discipline for respondent's misconduct is standard

14. Like the hearing judge, we attach minimal weight to this violation because of the absence of harm to any client.

15. Although we disagree with the hearing judge's assertion that respondent made no efforts to halt illegal practices, we find that his efforts were woefully inadequate.

2.3, which calls for the actual suspension or disbarment of an attorney culpable of an act of moral turpitude.

The determination of the appropriate discipline also requires a comparison of the recommended discipline with the discipline imposed in similar proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In *In re Arnoff* (1978) 22 Cal.3d 740, Arnoff entered into an oral agreement with a non-attorney who referred personal injury claims to Arnoff. Under this agreement, the non-attorney established an office and hired staff for Arnoff, who shared fees equally with the non-attorney after deductions. Although Arnoff knew that the non-attorney employed cappers, he made no effort to stop the capping for at least one year and perhaps two years. Arnoff also made extensive use of fraudulent medical reports under circumstances revealing at least gross negligence by Arnoff. At all times, the non-attorney effectively controlled Arnoff's office. The record thus demonstrated that Arnoff was culpable of moral turpitude and of violating fiduciary duties and rules of professional conduct. In mitigation, Arnoff had 20 years of discipline-free law practice before his association with the non-attorney and 5 years of successful law practice after his misconduct, was candid and cooperative with the authorities, displayed remorse, was threatened with physical violence by the non-attorney, suffered from serious domestic and family problems at the time of his wrongdoing, sought help, and presented psychiatric testimony that he was no longer susceptible to the kinds of influence imposed by the non-attorney. Nevertheless, the Supreme Court ordered Arnoff's actual suspension for two years.

As respondent acknowledged at the end of the disciplinary hearings, his basic problem was his failure to exercise proper control and supervision over non-attorney staff. This failure led to the misconduct in the Tripp matter and was so reckless by the time of the Apostal matter as to amount to moral turpitude. Although respondent's failure to control non-attorney staff resulted in less serious misconduct than Arnoff's, Arnoff showed impressive mitigating circumstances, whereas the current proceeding reveals minimal mitigation and strong aggravation.

The gravamen of *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, 421, was Jones's almost complete abdication of his professional duties to a non-attorney, Yue Lok. Jones agreed with Lok to set up a law corporation and split fees with Lok, who acted without proper supervision for over two years. Lok handled a personal injury practice by himself, solicited clients illegally, collected over $600,000 of fees in Jones's name without the performance of any services by an attorney, and misused nearly $60,000 withheld from client settlements for payment to medical providers. Although he knew of Lok's illegal solicitations, Jones took no realistic steps to end them. Jones eventually reported Lok to the police and himself to the State Bar and fully cooperated in Lok's criminal prosecution and in his own disciplinary proceeding. In aggravation, Jones committed multiple acts of misconduct and caused considerable harm to medical lienholders. In mitigation, Jones cooperated with the police, State Bar, and victims; established good character and community activities; and paid $57,000 of his own funds in restitution to lienholders. We recommended, and the Supreme Court ordered, a three-year stayed suspension and three-year probation, conditioned on actual suspension for two years and until compliance with standard 1.4(c)(ii).

Jones's failure to supervise non-attorney staff resulted in more serious misconduct than respondent's. Yet respondent's mitigation was less than Jones's; and respondent's aggravation, greater.

In determining the appropriate discipline, we must consider all relevant factors (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 35) and are constrained by no rigid formula. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316.) The main goals of discipline are the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standards for attorneys. (*Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1055, quoting *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 132.)

Respondent's acts of misconduct at 3545 and 8383 Wilshire Boulevard and in his prior disciplinary matter reveal a protracted obliviousness to his

fiduciary obligations to his clients, especially his duty to exercise proper control and supervision over non-attorney staff. Moreover, there was great risk of harm to many clients beyond the two specifically involved in this proceeding. Respondent's relative inexperience in law practice did not excuse his many basic failures to adhere to fundamental duties. Disturbingly, respondent has shown no rehabilitation and made no effort to atone for the consequences of his wrongdoing. Given the goals of discipline and the facts of the current proceeding, the hearing judge's disciplinary recommendation is appropriate. Significant actual suspension, as ordered in *Arnoff* and *Jones*, is warranted here.

III. RECOMMENDATION

Like the hearing judge, we recommend that respondent be suspended from the practice of law in the State of California for a period of three years, that execution of the order for such suspension be stayed, and that respondent be placed upon probation for a period of three years, conditioned upon actual suspension for two years and until respondent makes restitution to Apostal prescribed by the hearing judge and complies with standard 1.4(c)(ii). We adopt all of the hearing judge's probation conditions, except that we delete the final sentence of paragraph 4 of these conditions and add at the end of paragraph 4 the following new sentence: "Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule Transitional Rule of Procedure 614.5, Rules of Procedure of the State Bar, Title III." We recommend that John M. Rubens be required to take and pass the California Professional Responsibility Examination during the period of his actual suspension. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Finally, we adopt the hearing judge's recommendation that respondent be ordered to comply with rule 955 of the California Rules of Court and to pay costs to the State Bar pursuant to Business and Professions Code section 6140.7.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

EDMUND C. IKE

A Member of the State Bar

No. 93-C-13476

Filed May 28, 1996

SUMMARY

Respondent fraudulently concealed his arrest and pending trial on 11 felony charges from the State Bar's Committee of Bar Examiners by not updating his initial application for admission to practice law. After his admission to the bar, respondent was convicted on two of those felony charges. Thereafter, he properly reported his guilty plea to the State Bar. The hearing judge found that the facts and circumstances surrounding respondent's conviction established that he was manifestly unfit to practice law. The hearing judge recommended that the order admitting respondent to the practice of law be vacated, or in the alternative, that respondent be disbarred. (Hon. David S. Wesley, Hearing Judge.)

Respondent requested review contending that the hearing judge's license cancellation recommendation was inappropriate, and that his alternative disbarment recommendation was excessive. The review department adopted both of the hearing judge's recommendations.

COUNSEL FOR PARTIES

For State Bar: Victoria R. Molloy, David C. Carr

For Respondent: Diane L. Karpman

HEADNOTES

[1] **191 Effect/Relationship of Other Proceedings**
199 General Issues—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues

The only prerequisite to initiating a conviction referral proceeding against an attorney in the State Bar Court is a guilty plea by the attorney or a guilty verdict rendered against the attorney.

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] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**

Respondent's criminal conviction of theft and conspiracy to commit theft, standing alone, established that he lacked the essential qualities of honesty and trustworthiness; and at least initially, the conviction established that he was unfit to practice law.

[3] **551 Aggravation—Overreaching—Found**
691 Aggravation—Other—Found

Aggravating circumstances were found where respondent conspired to steal and stole from a school while he was working for it. Respondent's participation in the conspiracy to steal and theft were not only criminal acts, but also brazen breaches of the fiduciary duties an employee owes his employer. Observance of such fiduciary responsibility is central to the practice of law. Moreover, that respondent committed these felonies while he was in law school was also a factor of grave concern.

[4] **691 Aggravation—Other—Found**

Respondent's argument that his employer's action in forcing him to become the supervisor of employees that the employer knew were stealing from the employer was the equivalent of entrapment, was found to be meritless and an aggravating circumstance because it patently demonstrated that respondent lacked insight into the wrongfulness of his actions and that he had not accepted responsibility for them.

[5] **214.50 State Bar Act—Section 6068(o)**
795 Mitigation—Other—Declined to Find

As respondent was under a duty to report his criminal guilty plea to the State Bar under Business and Professions Code section 6068, subdivision (o)(5), his action in doing so was not a mitigating circumstance.

[6] **745.51 Mitigation—Remorse/Restitution—Declined to Find**

Respondent's prompt compliance with a criminal restitution order was not a mitigating circumstance. An attorney is not entitled to any mitigation for restitution made as a matter of expediency or under pressure.

[7] **191 Effect/Relationship of Other Proceedings**
795 Mitigation—Other—Declined to Find
1699 Conviction Cases—Miscellaneous Issues

Criminal court's lenient sentence did not change the nature of respondent's convictions of felony conspiracy to commit theft and theft for disciplinary purposes and was therefore not a mitigating circumstance.

[8] **106.20 Procedure—Pleadings—Notice of Charges**
106.90 Procedure—Pleadings—Other Issues
130 Procedure—Procedure on Review
136.30 Procedure—Rules of Practice—Division III, Review Department
192 Due Process/Procedural Rights
199 General Issues—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues

Respondent waived any due process violation resulting from the State Bar's failure to notify him in the notice of hearing that the cancellation of his license to practice law would be an issue at the trial where he did not allege in his appellant's brief, with supporting references to the record, that he presented his lack of notice objection to, and obtained a ruling on it from, the hearing judge.

[9 a-d] **101 Procedure—Jurisdiction**
199 General Issues—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues
2690 Moral Character—Miscellaneous

Even though statutes authorizing conviction referral proceedings authorize only the disbarment or suspension of attorneys convicted of crimes, the State Bar Court still had jurisdiction in conviction matter to recommend to the Supreme Court that it cancel respondent's license to practice law.

[10 a-d] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
2690 Moral Character—Miscellaneous

The failure to disclose a material fact on an application for admission is deemed willful whenever the application calls for disclosure with reasonable clarity. Respondent's arrest on felony charges of conspiracy to commit theft (which occurred after he filed his initial application for admission to practice law, but before he admitted to practice) and his pending trial on those charges were material facts that respondent was required to disclose, under the plain language of his initial application by updating his initial application. Thus, respondent's failure to do so was willful.

[11] **199 General Issues—Miscellaneous**
2690 Moral Character—Miscellaneous

An applicant's continuing duty to update his answers to the moral character questions in his initial application for admission is an absolute duty that requires a high degree of frankness and truthfulness on the applicant's part.

[12 a, b] **101 Procedure—Jurisdiction**
199 General Issues—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues
2690 Moral Character—Miscellaneous

Respondent's willful failure to disclose his arrest and pending trial on felony charges by updating his answers to the moral character questions on his initial application for admission to practice law was a fraud upon the Supreme Court because it allowed him to admitted without adequate consideration of his moral character. Thus, the State Bar Court may recommend that his license to practice be revoked without addressing the nature of his crimes or the facts and circumstances surrounding them.

[13 a-c] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
1610 Conviction Matters—Discipline—Disbarment
1699 Conviction Cases—Miscellaneous Issues

Unless the most compelling of mitigating circumstances clearly predominate, disbarment is the appropriate discipline in cases involving convictions of serious crimes involving moral turpitude. The nature and extent of respondent's felony conviction of conspiracy to commit theft and theft, alone, established his unfitness to practice law. Likewise, the facts and circumstances surrounding his crimes, the numerous aggravating circumstances, and the lack of any substantial mitigating circumstance further convinced the review department that respondent remained unfit to practice unless and until he established by clear and convincing evidence in a reinstatement proceeding that he was rehabilitated. Accordingly, disbarment was recommended.

ADDITIONAL ANALYSIS

Aggravation

Found

531 Pattern

541 Bad Faith, Dishonesty

Mitigation

Found

735.10 Candor—Bar

Other

178.10 Costs—Imposed

OPINION

STOVITZ, J:

I. INTRODUCTION

In this conviction referral proceeding, respondent, Edmund C. Ike, seeks review of a hearing judge's recommendations to the Supreme Court that it vacate its order admitting respondent to the practice of law or, in the alternative, that it disbar respondent. The hearing judge's recommendations are based upon his conclusions (1) that respondent fraudulently concealed his arrest and pending trial on 11 felony charges from the State Bar's Committee of Bar Examiners during the admission process and (2) that the facts and circumstances surrounding respondent's post-admission conviction on 2 of those felony charges establish that respondent is manifestly unfit to practice law.

The facts in this proceeding are not in dispute. Except for the testimony of two character witnesses called by respondent, the hearing proceeded solely on the parties' stipulation of facts and nine exhibits proffered by the State Bar.

On review, respondent asserts four points of error. We find each of respondent's points without merit. In our view, the only significant issue presented is whether it is appropriate to recommend that respondent's law license be revoked in this conviction referral proceeding under Business and Professions Code sections 6101 and 6102.[1] For the reasons discussed *post*, we conclude that it is; and, therefore, we affirm and adopt the hearing judge's recommendation that respondent's license to practice law be cancelled. We also affirm and adopt the hearing judge's alternative recommendation that respondent be disbarred should the Supreme Court deem this case one for attorney discipline instead of license cancellation.

II. RESPONDENT'S FELONY ARREST AND CONVICTION

Respondent was admitted to practice law in June 1992. About 18 months earlier, in January 1991, he was arrested on a criminal complaint filed against him and three others in Los Angeles County. The complaint charged respondent with eleven felony counts: one count of conspiracy; one count of grand theft; and nine counts of forgery.

In February 1992, four months prior to respondent's admission to practice, the complaint was superseded by an information filed in Los Angeles County Superior Court. This information not only contained the same 11 felony counts charged against respondent in the complaint, but also added a special allegation of theft of more than $25,000.[2]

In March 1993, respondent pled guilty to two of the counts in the information: one count of felony grand theft; and one count of felony conspiracy to commit grand theft. Presumably, the remaining nine counts were dismissed. Then, in July 1993 respondent was sentenced to 90 days in the county jail, placed on probation for 5 years, and ordered to make restitution of $23,317.48. The next month Respondent made full restitution.

By the time of his arrest, respondent had taken, unsuccessfully, the California Bar Examination eight times. Thereafter, he passed the February 1992 examination and was admitted to the practice of law in June 1992. Even though respondent was arrested and awaiting trial on these felony charges well before he was admitted to practice law, he never notified the State Bar's Committee of Bar Examiners of them as required by the Rules Regulating Admission to Practice Law in California ("Rules Regulating Admission").

However, after his admission to practice, he did comply with his duty, as an attorney, to notify the

1. Unless otherwise noted, all future section references are to the provisions of the Business and Professions Code.

2. This fact is based solely on the parties' stipulation, in which they stipulate that the special allegation in the complaint was for "theft of more than $25,000." We note, however, that the certified copy of the information the State Bar transmitted to us contains only a special allegation for theft of more than $100,000.

State Bar of his guilty plea within 30 days. (§ 6068, subd. (o)(5).) [1] Although the present proceeding was not initiated until after a judgment of conviction was entered on respondent's guilty plea and after that judgment became final, there is no requirement that either of those steps occur before a conviction referral proceeding may be initiated under sections 6101 and 6102.[3] The only prerequisite to initiating a conviction referral proceedings is a plea or verdict of guilty. (§ 6101, subd. (e).)

III. FACTS AND CIRCUMSTANCES SURROUNDING RESPONDENT'S CONVICTION

Respondent attended law school in the Los Angeles area from June 1983 through December 1987. Throughout his law school career, respondent worked for a medical school.

During the first six months of his employment by the school, respondent worked as a budget analyst. Then, for the next one and one-half years, he worked as senior accountant in charge of the school's accounts receivables. Thereafter, respondent was the supervisor of the school's payroll department until he was laid off in December 1987.

While payroll supervisor, respondent supervised two clerks. Before respondent was transferred to the payroll department, these two clerks were stealing money from the school by using a number of different schemes. For example, they stole blank payroll checks, made them payable to themselves, signed them with the signature facsimile stamp of the school's finance director, and cashed them. In addition, they stole and cashed payroll checks that were made out to former employees whose names had not been removed from the computer program that generated all of the school's payroll checks. After respondent became the payroll department supervisor, the two payroll clerks continued stealing money from the school. Eventually, respondent conspired with them to steal and stole money from the school. Like the two clerks, respondent stole blank payroll checks, made them payable to himself, signed them with the facsimile stamp of the finance director's signature, and cashed them.

In the fall of 1987, the school hired an outside accounting company to audit some of its accounts, including its payroll account. From that audit, it was determined that, over a four-year period ending in either November or December 1987, the two payroll clerks and respondent stole a total of 181 checks and cashed them for a combined total of $172,489.95. Respondent stole and cashed 17 of those 181 checks. By cashing those 17 checks, respondent individually obtained $23,317.48. Presumably, respondent stole and cashed those 17 checks between August 25, 1987, and December 24, 1987, as alleged in the criminal complaint.

[2] Respondent's criminal conviction of theft and conspiracy to commit theft, standing alone, established that respondent lacked the essential qualities of honesty and trustworthiness; and at least initially, the conviction established that he was unfit to practice law. (*In re Mostman* (1989) 47 Cal.3d 725, 736-737; see also *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 60 [When an attorney steals, he violates "“"the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless . . ." [citation].'"].)

IV. AGGRAVATING CIRCUMSTANCES[4]

Respondent's crimes were surrounded by several aggravating circumstances. With minor modifications and additions, we adopt the hearing judge's findings of aggravating circumstances.

3. The State Bar's Office of Trials did not transmit to us the record of respondent's conviction until about 10 months after the entry of his guilty plea. This delay was apparently due in part to the convicting court's loss or misplacement of the file in respondent's case. While understandable, given the very large number of cases judged by the Los Angeles Superior Court, the loss of the court's file was unfortunate given the statutory mandate that convicting courts transmit the record of an attorney's guilty plea to the State Bar within 48 hours. (§ 6101, subds. (c) & (e).)

4. This section and sections V and VIA are pertinent to the hearing judge's and our alternative recommendation of disbarment.

Respondent committed multiple acts of misconduct (i.e., he stole and cashed 17 payroll checks). (Former Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii) [now Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii)] ["standard"].)

[3] In addition, respondent conspired to steal and stole from the school while he was working for it. (Std. 1.2(b)(iii) [Overreaching is an aggravating circumstance.].) Respondent's participation in the conspiracy to steal and theft are not only criminal acts, but also brazen breaches of the fiduciary duties an employee owes his employer. (Cf. *Paramount Mfg. Co.* v. *Mohan* (1961) 196 Cal.App.2d 372, 373-374 ["'An employee is bound to the exercise of good faith towards his employer . . . .' [Citations.]"]; *Southern Cal. Disinfecting Co.* v. *Lomkin* (1960) 183 Cal.App.2d 431, 444.) Moreover, respondent's actions breached the special trust which the school placed in him, and which he freely accepted, as the payroll supervisor. Observance of such fiduciary responsibility is central to the practice of law. Moreover, that respondent committed these felonies while he was in law school is alone a factor of grave concern. (Cf. *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933, 938 [Cocaine trafficking was particularly egregious when committed by a former law enforcement officer and law school graduate.].)

Respondent did not disclose his January 1991 arrest and pending criminal trial to the Committee of Bar Examiners as required by the Rules Regulating Admission. (Std. 1.2(b)(iii) [Concealment is an aggravating circumstance.].)

[4] During his closing arguments, respondent asserted that the school knew all long that the clerks in the payroll department were stealing and that the school forced him to become the supervisor of the payroll department.[5] He then argued that the school's action in "forcing" him to become the payroll supervisor with its alleged knowledge of the stealing was the equivalent of entrapment, which should be viewed as an extenuating or mitigating circumstance. This meritless argument is an aggravating circumstance because it patently demonstrates that respondent lacks insight into the wrongfulness of his actions and that he has not accepted responsibility for them. (*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 958; *Beery* v. *State Bar* (1987) 43 Cal.3d 802, 816.)

V. MITIGATING CIRCUMSTANCES

We adopt the hearing judge's finding that respondent's stipulation of facts in this matter is a mitigating circumstance because it demonstrates candor and cooperation with the State Bar. (Std. 1.2(e)(v).)

VI. RESPONDENT'S CLAIMS OF ERROR

We now address respondent's essential alleged points of error.

A. Alleged Errors Regarding Mitigation

Respondent contends that the hearing judge erred in not finding the following five factors to be mitigating circumstances. We disagree.

1. Reporting of criminal conviction

Respondent argues that he should be given mitigating credit for promptly reporting his guilty plea to the State Bar, as did the attorney in *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103. Respondent's reliance on *Chadwick* is misplaced.

In *Chadwick*, the attorney came forward on his own and reported, to his employer and the federal authorities, that he illegally used insider information in securities transactions and that he lied about doing so to the Securities and Exchange Commission. (*Id.* at p. 107.) The Supreme Court held this spontaneous cooperation with the federal authorities to be a mitigating factor. (*Id.* at pp. 111, 112.)

5. Respondent did not present any evidence to support either of these assertions.

In the present case, however, respondent did not come forward on his own and report, to state authorities or the school, that he stole school funds. Instead, respondent's crimes were discovered only after the school audited its payroll account. **[5]** Moreover, respondent may not be given mitigating credit for reporting his guilty plea to the State Bar because, as we noted *ante*, he had a statutory duty to report it to the State Bar within 30 days under section 6068, subdivision (o)(5). The hearing judge correctly declined to give mitigating weight to respondent merely for fulfilling a statutory duty.

2. Restitution

[6] Respondent argues that his prompt compliance with the superior court's $23,317.48 restitution order is a mitigating circumstance under standard 1.2(e)(vii). However, the Supreme Court has repeatedly held that an attorney is not entitled to any mitigation for restitution made as a matter of expediency or under pressure. (E.g., *Warner* v. *State Bar* (1983) 34 Cal.3d 36, 47.) The compliance with a criminal restitution order, no matter how timely, is not a mitigating circumstance. Accordingly, the hearing judge correctly declined to "reward" respondent merely for complying with the superior court's restitution order.

3. Character witnesses

Respondent also argues that the favorable testimony of his two character witnesses is a mitigating circumstance under standard 1.2(e)(vi). Yet the plain language of the standard belies respondent's argument. Under standard 1.2(e)(vi) "an *extraordinary demonstration* of good character of the member attested to *by a wide range of references* in the legal and general communities and who are aware of *the full extent* of the member's misconduct" must be considered as a mitigating circumstance. (Emphasis added.)

First, the testimony of respondent's two character witnesses was not "an extraordinary demonstration of good character." (Std. 1.2(e)(vi).) In fact, their testimony describes nothing more than the normal behavior expected of any member of society. (*Seide* v. *Committee of Bar Examiners*, *supra*, 49 Cal.3d at pp. 937 & 941.) Second, two witnesses hardly constitute the "wide range of references in the legal and general communities" required by the standard.

Finally, even if we were to ignore these first two defects, these witnesses' testimony would weigh very little because respondent did not carry his burden, under standard 1.2(e)(vi), to establish that each of these witnesses was aware of the full extent of his crimes and still believed that he possesses good character. (Cf. *In re Ford* (1988) 44 Cal.3d 810, 818.)

4. Cooperation With the State Bar

Respondent argues that his cooperation with the State Bar during the disciplinary investigation and during the present court proceeding is a mitigating circumstance under standard 1.2(e)(v). Yet, there is no evidence that respondent cooperated with the State Bar during the disciplinary investigation. Moreover, the hearing judge found that respondent's cooperation with the State Bar in entering into the stipulation of facts is a mitigating circumstance. Accordingly, respondent's argument is meritless.

5. Criminal sentence

Finally, respondent urges that the superior court's sentence of "only" a 90-day jail term is a mitigating circumstance. Respondent, however, does not cite any authority to support this argument, and we are unaware of any. We are aware that the Supreme Court has occasionally considered the fact that an attorney has suffered the ignominy of a criminal conviction and served time in a penal institution as a mitigating circumstance.[6] (See, e.g., *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 889.) Yet we do not view such cases as dispositive of the issue before us.

6. The Supreme Court did so in such cases only because the record established that, after the attorney committed the offenses, "he 'recognized their wrongfulness, expressed regret, and cooperated with the investigating [law enforcement] agency.' [Citation.]" (*In re Severo* (1986) 41 Cal.3d 493, 503.)

[7] In our view, the superior court's lenient jail sentence does not change the nature of respondent's crimes for disciplinary purposes and is, therefore, not a mitigating circumstance. (Cf. *In re McAllister* (1939) 14 Cal.2d 602, 603-604 [Regardless of the sentence in a criminal case, the Supreme Court determines in an attorney disciplinary proceeding whether the crime involved moral turpitude.].)

B. Alleged Errors Regarding License Cancellation Recommendation

Respondent contends that we must vacate the hearing judge's recommendation that the Supreme Court cancel respondent's license to practice law on three grounds. Disagreeing with each of them, we affirm and adopt the license cancellation recommendation.

1. Due process

[8] Respondent first contends that the hearing judge violated his right to due process when he made his license cancellation recommendation because the State Bar's Office of Chief Trial Counsel ("State Bar") did not indicate in the notice of hearing that the cancellation of his license would be an issue in the present proceeding. Respondent, however, did not allege in his brief, with supporting references to the record, that he presented this issue to the hearing judge and obtained a ruling on it from him. Accordingly, respondent waived the alleged error of due process.[7] (Cf. State Bar Court Rules of Practice, rule 1320; *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 521-522.)

2. Jurisdiction

[9a] Second, respondent contends that the hearing judge acted in excess of his jurisdiction when he made his license cancellation recommendation because the statutory procedures for conviction referral proceedings do not expressly authorize the cancellation of an attorney's law license.

[9b] It is true that neither section 6101 nor 6102 state or refer to license cancellation. Nevertheless, respondent's assertion that the hearing judge did not have jurisdiction to make his license cancellation recommendation in this conviction referral proceeding is not well founded because the Supreme Court has inherent and plenary jurisdiction over attorney admissions and discipline (*Hustedt* v. *Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336; *Johnson* v. *State Bar* (1935) 4 Cal.2d 744, 758); see also §§ 6064 & 6100). Even though the Supreme Court usually follows the statutory procedures when exercising its statutory disciplinary authority (cf. *Suspension of Hickman* (1941) 18 Cal.2d 71, 74 [suspension terminated because of lack of authority under section 6101 or 6102]), it is not bound to any statutorily prescribed sanctions or dispositions because it retains its inherent power to control all disciplinary proceedings at *any* step. (*Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 224-225; see also § 6087; Cal. Rules of Court, rule 951(g).)

[9c] As the Supreme Court explained in *Stratmore* v. *State Bar* (1975) 14 Cal.3d 887, it "'will disbar an attorney for any reason and *in any manner* prescribed by the Legislature. But a statute cannot limit the inherent power of the court which admitted him to also disbar him for any additional reason which may satisfy the court he is no longer fit to be one of its officers.' [Citation]." (*Id.* at p. 890; italics added.)[8] Similarly, even though sections 6101 and 6102 expressly authorize discipline in conviction referral proceedings only for felonies and other crimes involving moral turpitude, the Supreme Court routinely imposes discipline in conviction referral

7. Although irrelevant in light of our waiver holding, we note that the State Bar stated in its pre-trial statement that it intended to seek, from the hearing judge, a recommendation that the Supreme Court rescind his license to practice law. The State Bar filed its pre-trial statement more than four months before the hearing. Thereafter, respondent filed a supplemental pre-trial statement a week before the hearing. Yet respondent did not raise his lack of notice objection in that supplemental pre-trial statement. Instead, he argued against a license revocation recommendation on the merits.

8. See also *In re Cooper* (1971) 5 Cal.3d 256, a conviction referral proceeding in which the circumstances surrounding the respondent's conviction involved moral turpitude. (*Id.* at p. 257.) Yet, the Supreme Court did not disbar, suspend, or dismiss the proceeding as contemplated by statute. Instead, it ordered the respondent publicly reproved. (*Ibid.*)

proceedings for crimes that are not felonies and that do not involve moral turpitude, but do involve "other misconduct warranting discipline." (*In re Kelley* (1990) 52 Cal.3d 487, 494-495.)

[9d] Moreover, section 6102, subdivision (g) expressly provides that the Supreme Court may "prescribe by rules for the practice and *procedure* in proceedings had pursuant to [section 6102] and section 6101." (Emphasis added.) In that regard, we note that rule 951(a) of the California Rules of Court provides that "The State Bar Court shall impose or recommend discipline in conviction matters as in other disciplinary proceedings." *Goldstein* v. *State Bar* (1988) 47 Cal.3d 937 was just such an "other disciplinary proceeding"[9] in which the Supreme Court did not discipline the attorney, but cancelled his law license. (*Id.* at p. 951.) Accordingly, we conclude that the hearing judge's license cancellation recommendation is authorized under rule 951(a) and the Supreme Court's inherent authority over attorney admissions and discipline.

3. Appropriateness of license cancellation

Finally, we come to the one significant issue in this review: the appropriateness of the hearing judge's license cancellation recommendation. Even though respondent admits that he had "a duty to report any arrest which arises between applications periods," he asserts that, even if the State Bar Court has jurisdiction to make license cancellation recommendations in conviction referral proceedings, the hearing judge's recommendation that his license be canceled is inappropriate. Nevertheless, our review of guiding decisions of the Supreme Court compels us to conclude otherwise.

The courts of this state have long held that "where an attorney at the time of his application for admission has made a false affidavit, knowing it to be untrue, the fraud of the attorney has been established and his license [is to be] revoked. [Citations.]" (*Spears* v. *The State Bar* (1930) 211 Cal. 183, 187.) The Supreme Court applied this long-standing precedent in *State Bar* v. *Langert* (1954) 43 Cal.2d 636 by holding that an attorney's deliberate concealment of a material fact from the Committee of Bar Examiners by falsely answering a question on his verified application for admission justified the revocation of the order admitting him to practice. (*Id.* at pp. 639, 642-643.)

The Supreme Court again applied this remedy in *Goldstein* v. *State Bar, supra,* 47 Cal.3d 937. In *Goldstein* the respondent did not disclose, on either his first or second re-application, that a number of proceedings on moral character were previously held on his initial application and that those proceedings concluded with the Committee of Bar Examiners denying Goldstein certification to practice law. (*Id.* at p. 945.)

There the Supreme Court held that the respondent had a duty to disclose the prior hearings to the committee on his first and second re-applications because the application forms called for their disclosure with reasonable clarity. (*Ibid.*) Moreover, the Supreme Court held that because the applications called, with reasonable clarity, for the respondent to disclose the prior hearing, his "failure to make such disclosure was willful." (*Ibid.*)

Finally, the Supreme Court concluded that the nondisclosed facts were material so that the effect of the respondent's lack of disclosure "was that he was able to prematurely apply for admission to the bar and to be admitted without adequate consideration of his moral character." (*Id.* at p. 951.) Therefore, because Goldstein had not committed any additional misconduct after his admission, the Supreme Court concluded that the most appropriate resolution of the proceeding was to withdraw from the respondent the benefits he had wrongfully obtained by cancelling his law license. (*Ibid.*)

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9. It is clear that *Goldstein* was an "other disciplinary proceeding" for purposes of rule 951(a) because it was initiated by a Supreme Court order referring the matter of attorney Goldstein's conduct to the State Bar Court "'for hearing, report and recommendation as to whether [he] has committed *misconduct warranting discipline.*'" (*Goldstein* v. *State Bar, supra,* 47 Cal.3d at p. 940, emphasis added.)

Respondent contends that the license cancellation holding in *Goldstein* is not applicable to this case because his lack of disclosure did not result in his being able to prematurely apply for admission. That, however, is not a legally distinguishable difference. We reject respondent's strained reading of *Goldstein* and hold that it is sufficiently guiding in the present case. Likewise, we reject respondent's invitation to ignore the long- standing precedent of license revocation set forth in *Goldstein* and previous cases.

[10a] Finally, we reject respondent's contention that the evidence is insufficient to establish that he willfully failed to disclose his 1991 arrest and pending criminal trial to the Committee of Bar Examiners with the intent to conceal them. The critical question in determining whether respondent's failure to disclose was willful is whether any of the nine separate applications he filed with the committee called upon him with reasonable clarity to disclose them. (*Id.* at p. 945.)

[10b] Respondent filed his initial application for admission ("long form application") with the committee on November 2, 1987. Directly under the heading of the section on moral character information of that application, the following directive is prominently printed: "The applicant has a continuing duty to update responses to questions under the moral character section of the application whenever there is an addition to or change in information previously furnished (Rule VII, section 71 [of the Rules Regulating Admission])."[10]

[10c] A question in the section on moral character information expressly required respondent to disclose, by either a "yes" or "no" answer, whether he was awaiting trial for any alleged violation of a law or ordinance, the commission of any felony, misdemeanor, or infraction, no matter how minor the incident. If the response to that question was "yes," the application called for the disclosure of each matter for which he was presently awaiting trial by charge, date, arresting agency, court and case number, counsel, and description of circumstances.

[10d] Under the plain language of respondent's initial application, he had a continuing duty to update his answer to that question and to follow its directive to list each matter in detail. Moreover, after he filed his initial application (the long form application), respondent filed eight "short form" applications. The first six short form applications respondent filed contained, in prominent type, a reminder notice to the applicant that he had a continuing duty to update his responses to the questions in the section on moral character information. Immediately following that reminder is the following statement in bolded prominent type: **"THE QUESTIONS ON THE FOLLOWING THREE PAGES WERE CONTAINED IN YOUR INITIAL APPLICATION. THEY ARE REPEATED HERE TO ASSIST YOU WITH UPDATING YOUR APPLICATION."**[11] On two of those short forms, respondent disclosed that he was arrested in 1989 on insurance fraud charges, and on a third, he disclosed that those insurance fraud charges were dismissed in 1990.

The last two of the eight short form applications respondent filed with the committee did not contain a reminder or repeat the moral character questions contained in his initial application. Respondent argues that, in light of this fact, it is unreasonable to find that his failure to disclose his 1991 arrest and pending trial to the committee was willful instead of merely negligent.

[11] However, respondent's duty to update his answers to the moral character questions on his initial application was not dependent on whether the committee repeatedly reminded him of it. Respondent's duty called "for a high degree of frankness and truthfulness on the part of the attorney making application for admission to practice law in this state, but no good reason presents itself why such a high standard of integrity should not be required. This duty to make a full disclose is an *absolute* duty . . . ." (*Spears* v. *The State Bar*, *supra*, 211 Cal. at p. 187, italics added.)

10. Each of the successors to rule VII, section 71 of the Rules Regulating Admission provided that the applicant had the same duty to update responses.

11. In the sixth short form application, the following phrase was added to the end of the first sentence: "for admission to practice law in California."

[12a] Under the circumstances, respondent's failure to disclose material facts to the committee in response to its clear request for such disclosure in respondent's initial application reflected bad faith and amounted to a fraud upon the Supreme Court. (Cf. *Greene* v. *Committee of Bar Examiners* (1971) 4 Cal.3d 189, 201; *In re Wells* (1918) 36 Cal.App. 785, 790, quoted by *State Bar* v. *Langert*, *supra*, 43 Cal.2d at p. 641; see also *Grove* v. *State Bar* (1965) 63 Cal.2d 312, 315 [There is no difference among concealment, half-truth, and false statement of fact.].)

We are aware, of course, that such a reflection of bad faith or fraud may not arise when an applicant unintentionally fails to disclose a de minimis fact to the committee. (*Hallinan* v. *Committee of Bar Examiners* (1966) 65 Cal.2d 447, 473.) However, respondent did not present any evidence to support his contentions that his nondisclosure was unintentional or an honest mistake. Nor were the facts he failed to disclose de minimis, under any view of this case.

[12b] We affirm and adopt the hearing judge's finding that respondent willfully failed to disclose his 1991 arrest and the pending trial to the committee. In light of this finding, the controlling issue is respondent's conduct in his dealings with the committee. (Cf. *State Bar* v. *Langert*, *supra*, 43 Cal.2d at pp. 639, 642.) Clearly, respondent's nondisclosure allowed him to be admitted "without adequate consideration of his moral character." (*Goldstein* v. *State Bar*, *supra*, 47 Cal.3d at p. 951.) Accordingly, we adopt the hearing judge's license revocation recommendation without addressing the nature of respondent's crimes or the facts and circumstances surrounding them, except to find that the prosecution for the crimes was a material fact which applicant should have disclosed to the committee.

C. Disbarment

[13a] In the event that the Supreme Court should consider this case more appropriate for discipline than for license cancellation, we alternatively recommend, as did the hearing judge, that respondent be disbarred. Under standard 3.2 an attorney who has been convicted of a crime involving moral turpitude shall be disbarred unless the most compelling of mitigating circumstances clearly predominate. (Cf. *In re Bogart* (1973) 9 Cal.3d 743, 748, app. dism. 415 U.S. 903 [Disbarment not suspension is "the rule rather than the exception in cases [involving conviction] of serious crimes involving moral turpitude . . . ."].)

In that regard, we agree with the hearing judge's conclusion that the present case is distinguishable from *In re Dedman* (1976) 17 Cal.3d 229, 233. In *Dedman*, the attorney was not disbarred for his conviction of grand theft and falsifying evidentiary documents because there were numerous mitigating circumstances of substantial significance. In the present case, however, there is but a single mitigating circumstance of modest significance; and a number of aggravating factors predominate.

[13b] Moreover, as we held *ante*, the nature and extent of respondent's crimes, alone, establish that he is unfit to practice law. Likewise, the facts and circumstances surrounding his crimes, the numerous aggravating circumstances, and lack of any substantial mitigating circumstance further convince us that he remains unfit to practice unless and until he establishes by clear and convincing evidence in a reinstatement proceeding that he is rehabilitated.

[13c] Accordingly, we alternatively recommend that respondent be disbarred. (Cf. *In re Bogart*, *supra*, 9 Cal.3d at p. 748.)

VII. RECOMMENDATION

We recommend that the Supreme Court vacate its order admitting Respondent Edmund C. Ike to the practice of law in this state. Alternatively, we recommend that he be disbarred from the practice of law in this state, that his name be stricken from the roll of attorneys, and that the State Bar be awarded its costs in accordance with section 6086.10.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PETER ADRIAN ACUNA

A Member of the State Bar

Nos. 92-O-12405, 92-O-19266, 92-O-19269

Filed June 20, 1996; as modified, August 6, 1996

SUMMARY

Respondent's misconduct in two separate disciplinary proceedings involved seven matters between 1991 and 1992. He wilfully misappropriated trust funds totaling over $9,000 and committed other trust account offenses. He engaged in acts of moral turpitude by practicing law and holding himself out as entitled to practice law when he knew he was suspended. He represented conflicting interests, and he failed to comply with the rules of conduct governing an advance to a client on a future settlement of a personal injury case. In a misappropriation matter, he deliberately misinformed a client about the receipt of a settlement check. In another misappropriation matter, he ignored a client's reasonable inquiries, failed to return her documents upon her request, and failed to reimburse her for a bank charge after he gave her a dishonored reimbursement check. In one of the disciplinary proceedings, the hearing judge recommended a three-year stayed suspension and three-year probation, conditioned on an eighteen-month actual suspension. In the other, the hearing judge recommended disbarment, regardless of the outcome on review of the former proceeding. (Hon. Jennifer Gee, Hearing Judge.)

Respondent sought review in both proceedings, mostly raising constitutional and procedural objections, but also challenging specific findings of fact and conclusions of law. The review department consolidated the two proceedings; concluded that respondent's constitutional and procedural claims lacked merit and that the record supported most of the hearing judge's findings of fact and conclusions of law; and recommended disbarment because of respondent's wide range of misconduct, especially his acts of moral turpitude and dishonesty, coupled with little mitigation and substantial aggravation.

COUNSEL FOR PARTIES

For State Bar: Alyse M. Lazar

For Respondent: Peter Adrian Acuna, 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**
192 Due Process/Procedural Rights

In California, as in all the states, the regulation of the practice of law is a judicial function. The California Supreme Court has original, inherent, and plenary jurisdiction to regulate attorneys in California. The State Bar provides assistance in the area of attorney regulation; it serves as an administrative assistant to or adjunct of the Supreme Court, which nonetheless retains its inherent judicial authority. Thus, contrary to respondent's suggestions, the State Bar Court possesses the jurisdiction to adjudicate attorney disciplinary proceedings as an arm of the Supreme Court.

[2] **103 Procedure—Disqualification/Bias of Judge**
193 Constitutional Issues
199 General Issues—Miscellaneous

Respondent's claim that the State Bar Court is an entity created, owned, and run by the prosecuting party was frivolous. The current State Bar Court is modeled after courts of record. State Bar Court judges are appointed for specified terms by the Supreme Court and are subject to discipline by the Supreme Court upon the same grounds as judges of courts of record. The prosecution does not assign cases to State Bar Court judges, nor do their salaries depend upon finding attorneys culpable of misconduct. Although the Board of Governors of the State Bar is responsible for paying the salaries of State Bar Court judges, these salaries are set by law to equal those of judges of courts of record and come from annual membership fees. Thus, respondent provided no evidence that the State Bar Court is improperly dependent on, or controlled by, the prosecution.

[3] **139 Procedure—Miscellaneous**
192 Due Process/Procedural Rights
193 Constitutional Issues

One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. Accordingly, respondent could not successfully challenge section 6106 of the Business and Professions Code as unconstitutionally vague where he had deliberately misinformed a client about the receipt of a settlement check, misappropriated funds from four clients, and practiced law and held himself out as entitled to practice law when he knew he was suspended.

[4] **106.20 Procedure—Pleadings—Notice of Charges**
106.90 Procedure—Pleadings—Other Issues
192 Due Process/Procedural Rights

Respondent's argument that a new trial was necessary because the notices to show cause did not pair facts with each alleged ethical violation was rejected. Even though the Supreme Court has repeatedly criticized this practice, a defective notice entitles an attorney to relief only if the attorney shows that specific prejudice resulted from the defect. Respondent made no such showing.

[5] **112 Procedure—Assistance of Counsel**
139 Procedure—Miscellaneous
192 Due Process/Procedural Rights

Respondent's suggestion that alleged ineffective assistance of his counsel necessitates a new trial was rejected. A disciplinary proceeding is administrative in nature, not governed by the rules of criminal procedure. Although an attorney in a disciplinary hearing must have a fair hearing, the

attorney has no constitutional right to counsel or effective assistance from counsel. Any mistakes of respondent's counsel thus did not warrant retrial. Nor did the record establish that respondent received an unfair hearing.

[6 a-c] **113 Procedure—Discovery**
192 Due Process/Procedural Rights
194 Statutes Outside State Bar Act

Respondent's claim that the application of the Civil Discovery Act to attorney disciplinary proceedings denied him due process was rejected. State Bar disciplinary proceedings are administrative but of a nature of their own. It has been repeatedly held that they are not governed by the rules of procedure governing civil or criminal litigation although such rules have been invoked when necessary to insure administrative due process. The Supreme Court observed that the Rules of Procedure of the State Bar supply a wide array of procedural safeguards and that pursuant to these rules, the Civil Discovery Act, as adopted and limited by the Rules of Procedure of the State Bar, constitutes the rules of discovery in State Bar disciplinary proceedings. Under Supreme Court case law, such application is constitutional.

[7 a, b] **213.10 State Bar Act—Section 6068(a)**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126

Sections 6125 and 6126 of the Business and Professions Code, which prohibit practicing law or holding oneself out as entitled to practice law by anyone other than an active attorney, are not of themselves disciplinary offenses. The appropriate method of charging disciplinary violations of those sections is by way of adding a charge of a violation of section 6068, subdivision (a), which imposes upon an attorney the duty to support state laws, to sections 6125 and 6126. Even though section 6068, subdivision (a), was not charged, the review department upheld the hearing judge's findings that respondent violated sections 6125 and 6126 where the amended charges made it clear both by text and citation to sections 6125 and 6126 that respondent was being charged with accepting employment from and holding himself out as entitled to practice law while respondent was suspended, and where respondent failed to object and show any evidence of specific prejudice arising from the failure to add section 6068, subdivision (a), to the underlying charges.

[8 a-c] **178.90 Costs—Miscellaneous**
199 General Issues—Miscellaneous

A disciplinarily suspended attorney does not have to pay the costs of the disciplinary proceeding as a condition of reinstatement where the attorney has not also been administratively suspended for failure to pay such costs as part of the attorney's next annual bill for membership fees. No such automatic administrative suspension occurred here and therefore, respondent was not culpable of the unauthorized practice of law for appearing in court as counsel for a client after the date that his actual suspension terminated but before he had paid the disciplinary costs and was reinstated.

[9] **801.20 Standards—Purpose**
822.10 Standards—Misappropriation—Disbarment
831.20 Standards—Moral Turpitude—Disbarment

Where respondent committed acts of moral turpitude and dishonesty and engaged in a wide range of other misconduct without compelling mitigation and with substantial aggravation, disbarment was necessary to protect the public, courts, and legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.12 Section 6106—Gross Negligence
273.01 Rule 3-300 [former 5-101]
273.31 Rule 3-310 [former 4-101 & 5-102]
275.01 Rule 3-500 [no former rule]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
291.01 Rule 4-210 [former 5-104]

Not Found

221.50 Section 6106
230.05 Section 6125
231.05 Section 6126

Aggravation

Found

511 Aggravation—Prior Record—Found
521 Aggravation—Multiple Acts—Found
586.12 Harm to Administration of Justice
591 Indifference

Mitigation

Found

745.10 Remorse/Restitution
765.10 Pro Bono Work

Declined to Find

740.51 Mitigation—Good Character—Declined to Find
740.52 Good Character
760.52 Personal/Financial Problems
760.59 Personal/Financial Problems
795 Other

Discipline

1010 Disbarment

Other

175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

STOVITZ, J.:

Respondent, Peter Acuna, has asked us to review two separate disciplinary proceedings. In the former, the hearing judge recommended a three-year stayed suspension and three-year probation, conditioned on an eighteen-month actual suspension. In the latter, the same hearing judge recommended disbarment, regardless of the outcome on review of the former proceeding. We consolidated the proceedings for all purposes on review.

Much of respondent's attack consists of constitutional objections to the State Bar Court and procedural arguments concerning alleged errors in rulings by the hearing judge. Respondent also challenges specific findings of fact and conclusions of law.

The State Bar's Office of the Chief Trial Counsel (State Bar) opposes respondent's arguments and contends that the hearing judge acted properly. In the former proceeding, the State Bar proposes greater discipline. In the latter proceeding, it recommends adoption of the disbarment recommendation.

Upon independent review, we find that respondent's constitutional and procedural claims lack merit. We also find that the record supports most of the hearing judge's findings of fact and conclusions of law. In our view, the main issue on review is the appropriate degree of discipline to recommend to the Supreme Court in the consolidated proceeding.

The record shows misconduct by respondent in seven matters between 1991 and 1992. In four matters, he wilfully misappropriated trust funds totaling over $9,000 and committed other trust account offenses. In two matters, he engaged in acts of moral turpitude by practicing law and holding himself out as entitled to practice law when he knew he was suspended. In one matter, he represented conflicting interests; and in another matter, he failed to comply with the rules of conduct governing an advance to a client on a future settlement of a personal injury case. In a misappropriation matter, he deliberately misinformed a client about the receipt of a settlement check. In another misappropriation matter, he ignored a client's reasonable inquiries, failed to return her documents upon her request, and failed to reimburse her for a bank charge after he gave her a dishonored reimbursement check. The record reflects minimal mitigation and considerable aggravation, including prior discipline. Thus, we conclude that disbarment is necessary to protect the public, courts, and legal profession; to maintain high professional standards; and to maintain public confidence in the legal profession.

I. PROCEDURAL HISTORY

Respondent was admitted to practice law in California in November 1979.

In early November 1991, respondent stipulated in a prior proceeding (*Acuna I*) that he had engaged in acts of moral turpitude, dishonesty, or corruption in violation of Business and Professions Code section 6106[1] by mishandling client trust funds between June 1987 and February 1988. Effective May 14, 1992, respondent was disciplined by a one-year stayed suspension and four-year probation, conditioned on actual suspension for six months.

In the present matters, the State Bar filed the notice to show cause in case 92-O-12405 in September 1993 and the notice to show cause in case 92-O-19266 in January 1994. In February 1994, these cases were consolidated into one proceeding (*Acuna II*). In a decision filed in February 1995, the hearing judge recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for eighteen months. Respondent requested review of the *Acuna II* decision.

The State Bar filed an initial notice to show cause in case 92-O-19269 in March 1994 and an

1. All further references to sections denote provisions of the Business and Professions Code.

amended notice in April 1995. This proceeding (*Acuna III*) was assigned to the same judge who heard *Acuna II*. In August 1995, the hearing judge filed her decision and recommended disbarment, independent of the outcome on review of *Acuna II*. Respondent sought review of the *Acuna III* decision.

On our own initiative, we ordered the consolidation of *Acuna II* and *Acuna III*. (See Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 108(a).)

II. DISCUSSION

A. Respondent's Constitutional and Procedural Claims

Respondent puts forth an array of constitutional and procedural objections. Pursuant to our obligation of independent review (*id*., rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we have examined these objections and find them meritless.

It is unnecessary to discuss every constitutional and procedural claim made in the hundreds of pages of respondent's review briefs and attached exhibits. It is appropriate, however, to address respondent's main claims: (1) that the State Bar Court is an unconstitutional body lacking jurisdiction and independence; (2) that the provisions of various ethical statutes and rules which he was found by the hearing judge to have violated are unconstitutionally vague; (3) that the hearing judge was biased against him; (4) that the State Bar prosecuted him in bad faith; (5) that he is entitled to a new trial in *Acuna II* because of inadequate notices to show cause and ineffective assistance from his counsel; and (6) that several orders by the hearing judge and the application of the Civil Discovery Act in *Acuna III* denied him due process.

[1] In California, as in all the states, the regulation of the practice of law is a judicial function. (*Hustedt* v. *Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337, citing Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?* (1981) 69 Geo. L.J. 705, 707, fn. 4; see also *Middlesex Ethics Committee* v. *Garden State Bar Assn.* (1982) 457 U.S. 423, 432-434; *Santa Clara County Counsel Attys. Assn.* v. *Woodside* (1994) 7 Cal.4th 525, 542-543.) The California Supreme Court has original, inherent, and plenary jurisdiction to regulate attorneys in California. (*In re Hallinan* (1954) 43 Cal.2d 243, 253-254; *Preston* v. *State Bar* (1946) 28 Cal.2d 643, 650.) The State Bar provides assistance in the area of attorney regulation; it serves as "'an administrative assistant to or adjunct of [the Supreme Court], which nonetheless retains its inherent judicial authority . . . .'" (*Lebbos* v. *State Bar* (1991) 53 Cal.3d 37, 47, quoting *Saleeby* v. *State Bar* (1985) 39 Cal.3d 547, 557.) Although *Lebbos* v. *State Bar*, *supra*, and *Saleeby* v. *State Bar*, *supra*, involved the pre-1989 volunteer State Bar Court, the analysis provided by these cases applies even more strongly to the current State Bar Court. (See § 6086.5 [The State Bar Court acts in the Supreme Court's "place and stead in the determination of disciplinary" and other specified proceedings.].) Thus, contrary to respondent's suggestions, the State Bar Court possesses the jurisdiction to adjudicate attorney disciplinary proceedings as an arm of the Supreme Court.

[2] Respondent claims that the "State Bar Court is an entity created, owned, and run by the prosecuting party"; that the prosecuting party selects State Bar Court judges to be its employees, assigns their cases, and pays their salaries; and that judges who found respondents innocent "would lose their jobs, not be reappointed, and not [be] assigned cases." These claims are frivolous. The current State Bar Court is modeled after courts of record. State Bar Court judges are appointed for specified terms by the Supreme Court and are subject to discipline by the Supreme Court upon the same grounds as judges of courts of record.

(§ 6079.1 subd. (a).) The prosecution does not assign cases to State Bar Court judges, nor do their salaries depend upon finding attorneys culpable of misconduct. Although the Board of Governors of the State Bar is responsible for paying the salaries of State Bar Court judges, these salaries are set by law to equal those of judges of courts of record (*id*., subd.

(d)) and come from annual membership fees.[2] Thus, respondent has provided no evidence that the State Bar Court is improperly dependent on, or controlled by, the prosecution.

[3] Respondent criticizes as unconstitutionally vague the provisions of various statutes and rules which he is charged with violating. He focuses on section 6106, under which acts of moral turpitude, dishonesty, or corruption constitute a cause for disbarment or suspension. The Supreme Court, which exercises independent review, has routinely imposed discipline based on violations of the provisions criticized by respondent and has not invalidated these provisions. Further, "'one to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'" (*In re Kelley* (1990) 52 Cal.3d 487, 497, citing *Cranston* v. *City of Richmond* (1985) 40 Cal.3d 755, 764, quoting *Parker* v. *Levy* (1974) 417 U.S. 733, 756.) Regardless of how the criticized provisions may be read in some other context, they do not present ambiguity in the current proceeding. (Cf. *In re Morse*, *supra*, 11 Cal.4th at p. 200.) No reasonable person can fairly read section 6106 as inapplicable to respondent's deliberately misinforming a client about the receipt of a settlement check (cf. *Stephens* v. *State Bar* (1942) 19 Cal.2d 580, 583), his misappropriating funds from four clients (cf. *Morales* v. *State Bar* (1988) 44 Cal.3d 1037, 1045), and his practicing law and holding himself out as entitled to practice law when he knew he was suspended (cf. *Gold* v. *State Bar* (1989) 49 Cal.3d 908, 914 [moral turpitude involved in intentional deception]; *Simmons* v. *State Bar* (1970) 2 Cal.3d 719, 729 [moral turpitude involved in grossly negligent discharge of duties]).

Respondent contends that the hearing judge was biased against him and that the State Bar prosecuted him in bad faith. Because he identifies no evidence supporting these contentions, we reject them as speculative and conclusory. Further, as discussed *post*, the record reflects painstaking efforts by the hearing judge to provide respondent with a fair hearing.

[4] We disagree with respondent's argument that a new trial is necessary because the notices to show cause in *Acuna II* did not pair facts with each alleged ethical violation. The deputy trial counsel acknowledges that these notices followed the State Bar's historic pleading practice of reciting factual allegations separately from a catch-all charging paragraph without explaining the basis of each alleged violation. The Supreme Court has repeatedly criticized this practice. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816; *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968.) A defective notice, however, entitles an attorney to relief only if the attorney shows that specific prejudice resulted from the defect. (*Morales* v. *State Bar*, *supra*, 44 Cal.3d at p. 1047; *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 845.) Respondent made no such showing. Indeed, the State Bar's pretrial statement clarified the bases of the charges against respondent; and respondent identified no evidence establishing that he suffered prejudice from lack of notice about the charges against him. (Cf. *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 186.)

[5] We also disagree with respondent's suggestion that alleged ineffective assistance of his counsel necessitates a new trial. A disciplinary proceeding is "administrative in nature, not governed by the rules of criminal procedure." (*Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1115, citing *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 225-226.) Although an attorney in a disciplinary hearing must have a fair hearing (*Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, 634), the attorney has no constitutional right to counsel or effective assistance from counsel. (*Walker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 1115-1116; see also § 6085, subd. (c).) Any mistakes of respondent's counsel thus cannot warrant retrial. Nor does the record establish that respondent received an unfair hearing.

Respondent claims that he failed to receive due process because of various orders in *Acuna II*. The record not only fails to support this claim, but also

2. The mere fact that the State Bar can collect costs incurred in disciplinary proceedings (§ 6086.10) does not establish that State Bar Court judges have an impermissible financial interest in finding attorneys culpable of misconduct. Further, as one recent opinion of the United States Court of Appeals noted, costs collected by the State Bar make up less than 1 percent of the bar's total annual revenue. (*Hirsh* v. *Justices of Supreme Court of California* (9th Cir. 1995) 67 F.3d 708, 714.)

shows affirmatively the hearing judge's many efforts to afford respondent a fair hearing.

In *Acuna II*, respondent's counsel did not file a required pre-trial statement and did not appear timely at the properly noticed hearing. The hearing judge waited 20 minutes for respondent and his counsel before she ordered the entry of respondent's default. After the State Bar's opening statement, but before the introduction of any evidence, respondent's counsel arrived. Respondent had been subpoenaed to appear, but did not do so because of a family emergency. In order to afford respondent as fair a hearing as possible, the hearing judge allowed respondent's counsel to participate despite the entry of the default. Respondent's counsel was permitted to object to testimony by the State Bar's witnesses, to cross-examine the witnesses, to object to the introduction of exhibits, and to tape-record the hearing. Respondent's absence prevented the State Bar from obtaining his testimony.

Subsequently, the hearing judge ordered the setting aside of respondent's default in *Acuna II*. The order provided that at a new hearing respondent's testimony would be taken and the State Bar's witnesses could be further cross-examined.

Later, the hearing judge ordered respondent's counsel to inform the deputy trial counsel on which of seven alternative dates respondent's counsel and respondent would be available for the new hearing. Respondent's counsel did not comply with this order.

The hearing judge then set the new hearing for one of the alternative dates. The day before the scheduled hearing, respondent's counsel filed a motion for a continuance, based mainly on the need to appear in another State Bar Court matter on the same day. Observing that respondent's counsel had had almost a month's notice of the new hearing date, the hearing judge denied this motion. Yet she also delayed the time of the new hearing to accommodate respondent's counsel and made arrangements with the other State Bar Court judge before whom respondent's counsel was scheduled to appear in order to ensure the availability of respondent's counsel for the new hearing.

Neither respondent nor respondent's counsel appeared at the new hearing in *Acuna II*. Pursuant to subpoenas, all the State Bar's witnesses appeared. The hearing judge issued an order finding that respondent had waived his right to cross-examine the witnesses and to testify on his own behalf. The deputy trial counsel then completed the presentation of the State Bar's case, and *Acuna II* was submitted for decision.

In a review brief, respondent alleges for the first time that he was unavailable for the new hearing in *Acuna II* because he was appearing in a murder trial. Yet neither respondent nor his counsel advised the hearing judge of such alleged unavailability. Further, respondent made no motion to reopen the hearing, although he had more than 10 weeks to do so between the submission of the proceeding and the filing of the decision in *Acuna II*. Nor did respondent seek reconsideration of the decision. Thus, we conclude that the hearing judge's orders in *Acuna II* did not deny respondent due process.

[6a] In his review brief in *Acuna III*, respondent claims that the application of the Civil Discovery Act to "quasi-criminal attorney disciplinary proceedings" and the issuance of an order barring the testimony of a proposed witness denied him due process. We disagree.

[6b] In *Emslie* v. *State Bar*, *supra*, 11 Cal.3d 210, the Supreme Court explained: "State Bar disciplinary proceedings are administrative but of a nature of their own. [Citations.] It has been repeatedly held that they are not governed by the rules of procedure governing civil or criminal litigation [citations] although such rules have been invoked . . . when necessary to insure administrative due process. [Citation.]" (*Id.* at pp. 225-226.) Commenting on the "panoply of legal protection" around the right to practice law, the Supreme Court observed that the Rules of Procedure of the State Bar supply "a wide array of procedural safeguards" and that pursuant to these rules, the Civil Discovery Act, as adopted and limited by the Rules of Procedure of the State Bar, constitutes "the rules of discovery in State Bar disciplinary proceedings." (*Id.* at p. 226.)

[6c] Like the procedural rules at the time of *Emslie* v. *State Bar*, *supra*, 11 Cal.3d 210, the rules

at the time of the hearing in *Acuna III* and the current rules provide that the Civil Discovery Act applies with limitations to attorney disciplinary proceedings. (Former Trans. Rules Proc. of State Bar, rule 315; Rules Proc. of State Bar, title II, State Bar Court Proceedings (eff. Jan. 1, 1995), rule 180(a).) Under *Emslie* v. *State Bar*, *supra*, such application is constitutional. (See also *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 298-302.)

Respondent claims that an order barring a proposed witness from testifying in *Acuna III* denied him due process. The record does not support this claim.

Respondent did not reply to the State Bar's initial discovery requests in *Acuna III*. Nor did respondent comply with the hearing judge's subsequent order that he respond to the State Bar's interrogatories and demand for inspection of documents. The State Bar then filed a sanctions motion to prevent respondent from introducing evidence about the issues raised by the interrogatories and demand for inspection. Because respondent had discharged his counsel, the hearing judge extended the time for him to reply to the State Bar's motion. Nevertheless, respondent failed to reply until after the extended deadline. Also, although he filed a response to the State Bar's production request and request for admissions, as well as a list of four proposed witnesses, he did not answer the State Bar's interrogatories. Based upon information from respondent and upon interviews with three of respondent's four proposed witnesses, the deputy trial counsel withdrew the State Bar's objection to testimony by these three witnesses. Because the deputy trial counsel had not had an opportunity to interview the fourth witness, the wife of one of the three other witnesses, and because her proposed testimony appeared repetitive of her husband's proposed testimony, the State Bar sought only to preclude the testimony of the fourth witness. The hearing judge issued a sanctions order granting the State Bar's revised motion. This order excluded only the testimony of the fourth witness or of any other unidentified witness in the culpability phase of the proceeding. We hold that this sanctions order did not deny respondent due process.

As discussed *ante*, to prevail on a procedural objection in a disciplinary hearing, an attorney must prove that the procedural error specifically prejudiced him. Respondent offered no such proof. Although his review brief describes the fourth witness as "crucial," the transcript of the hearing suggests that he wanted her testimony only to establish a point which other evidence had made and which was irrelevant to his culpability or discipline.

B. Cases 92-O-12405 and 92-O-19266

Acuna II consists of case 92-O-12405, concerning respondent's representation of Rueveen Faye Watkins, and case 92-O-19266, concerning his representation of Larry Whitman. Although respondent asserts his innocence, we agree with the hearing judge that he is culpable of all the charges against him in *Acuna II*.

1. Watkins matter

In October 1989, Watkins retained respondent to represent her in a personal injury matter. She signed an agreement whereby respondent was to receive a fee of 33 1/3 percent of any settlement reached before the filing of a suit, 40 percent of any settlement made after the filing of a suit, and 40 percent of any recovery obtained by arbitration or trial.

In November 1991, Watkins signed settlement papers, and respondent informed her that she would receive her share of the settlement within 30 days. On November 21, 1991, respondent negotiated a $20,000 check made payable to Watkins and himself and deposited $15,000 of the settlement funds in his client trust account. Respondent allocated $8,000 of the settlement for his fee and $6,453.78 for Watkins's medical expenses and other costs. Thus, Watkins's net share of the settlement amounted to $5,546.22.

Between December 1991 and February 1992, the balance in respondent's client trust account often dropped below $5,546.22. On December 9, 1991, the balance fell to $337.32; and on February 13, 1992, the account showed a negative balance of $53.29.

Because Watkins did not receive her share of the settlement within 30 days after signing the settlement documents, she began telephoning respondent's

office to ask about the settlement funds. She repeatedly spoke with respondent's secretary and on one occasion spoke with respondent. They told her that the settlement check had not arrived.

In February and March 1992, respondent sent Watkins checks for $2,000, $600, and $500 drawn on his client trust account. He characterized these payments as advances on her settlement.

In April 1992, respondent sent Watkins a check for $2,500, the remainder of her share of the settlement, as well as a document showing costs and disbursements in her matter. When Watkins objected to the 40 percent contingency fee and asked about it, respondent's secretary told her that the fee was 40 percent rather than 33 1/3 percent because the matter had gone trial. Watkins, however, neither had been informed of nor had appeared at any trial. We find no clear and convincing evidence of a trial in the Watkins matter, although the record does establish that respondent settled her matter after filing a suit and was thus entitled to a 40 percent fee.

Respondent committed all the charged ethical violations in the Watkins matter. By telling Watkins that her settlement check had not arrived after cashing the check, respondent wilfully violated section 6106, which prohibits acts of moral turpitude and dishonesty, and section 6068, subdivision (m), which requires attorneys to keep clients reasonably informed of significant developments in their matters.[3] By repeatedly allowing the balance in his client trust account to drop below the amount owed to Watkins, respondent wilfully mishandled trust funds in violation of rule 4-100(A) of the Rules of Professional Conduct,[4] which requires that all funds received or held for the benefit of clients be deposited in a trust account. Such mishandling reflects at least gross negligence by respondent, who had stipulated in early November 1991 to a charge of moral turpitude for prior misuse of client funds. Thus, the trust account drops which occurred in late 1991 and early 1992 also constituted wilful misappropriation in violation of section 6106's prohibition against moral turpitude. (*Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474-475.) Because respondent did not start paying Watkins her share of the settlement until February 1992 and did not complete such payment until April 1992, despite her inquiries about receiving her share of the settlement, he also wilfully violated rule 4-100(B)(4), which requires that attorneys promptly pay such funds in their possession as their clients are entitled to receive upon request from the clients.

2. Whitman matter

In November 1991, respondent agreed to represent Whitman in a personal injury case on a contingency fee basis. In response to Whitman's request for an advance on his recovery, respondent issued Whitman a $500 check drawn on a client trust account in March 1992. Respondent did not advise Whitman to consult another attorney before accepting the check, did not discuss the terms of repayment with Whitman, and did not ask Whitman to sign any documents related to the advance.

Respondent is culpable of the ethical violations alleged in connection with his advance of $500 to Whitman. Contrary to respondent's suggestion, this advance constituted an unsecured loan. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 617.) Respondent wilfully violated rule 3-300, which prohibits an attorney's entering into a business transaction with a client or acquiring a pecuniary interest adverse to a client unless the attorney fully discloses the terms of the transaction or acquisition in writing to the client, advises the client in writing that the client may seek the advice of an independent lawyer, and gives the client a reasonable opportunity to seek such advice and unless the

3. Insofar as the facts establishing culpability under one section or rule include the facts establishing culpability under another section or rule, we attach no additional weight to such duplication in determining the appropriate discipline. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose served by duplicative allegations of misconduct]; *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221.)

4. Unless otherwise indicated, all further references to rules denote the Rules of Professional Conduct in effect from May 27, 1989, to September 13, 1992.

client consented in writing to the terms of the transaction or acquisition. (*Ibid.*) Also, respondent wilfully violated rule 4-210(A)(2), which prohibits an attorney's lending money to a client without a written promise of repayment. (*Ibid.*) When respondent loaned the $500 to Whitman from his client trust account, he did one of two things: either he had his own money in the account and therefore is culpable of commingling, or he loaned Whitman money which should have remained in trust for another client and therefore is culpable of misappropriation. In either case, respondent violated rule 4-100(A).

C. Case 92-O-19269

Acuna III addresses respondent's misconduct in the six matters covered by case 92-O-19269. Respondent denies that he committed acts of moral turpitude or dishonesty in violation of section 6106 and that he failed to comply with other ethical requirements.[5] We conclude that he repeatedly violated section 6106 and engaged in additional wrongdoing, as discussed *post.*

In the current proceeding, we see no need to discuss the *Acuna III* charges in which the hearing judge made determinations in respondent's favor. On review, the deputy trial counsel does not dispute these determinations. Pursuant to our obligation of independent review, we have examined the determinations and adopt them as our own.

Nor do we perceive a need to discuss each of respondent's many objections to the hearing judge's findings of fact in *Acuna III*, although we do address his main contentions. We have reviewed these findings and adopt them as our own unless we indicate otherwise.

1. Chigua matter

On April 15, 1992, the Supreme Court ordered that respondent be actually suspended for six months as a probation condition of *Acuna I*. The suspension period lasted from May 15 to November 14, 1992.

Respondent received the Supreme Court's order. On June 1, 1992, respondent acknowledged his suspension in a letter to another client, Lupe Silva. On July 10, 1992, respondent stated in his first quarterly probation report that his suspension began on May 15, 1992.

In early June 1992, Jose Chigua decided to hire respondent to represent him in a personal injury case. At respondent's office, Chigua met Marie Hernandez, who said that she was respondent's secretary and that respondent would take Chigua's case. Chigua signed retainer and medical lien agreements. On June 26, 1992, respondent signed the lien agreement.

Before respondent's suspension, Hernandez handled the interviewing and processing of new clients for him. She continued to do so while he was suspended. Although respondent was not physically in his office, Hernandez could reach him if she encountered problems. Neither Hernandez nor respondent informed Chigua about respondent's suspension.

[7a] The amended notice charged respondent in the Chigua matter with wilful violations of section 6106; section 6125, which prohibits the practice of law by anyone other than an active attorney; and section 6126, which prohibits holding oneself out as entitled to practice law by anyone other than an active attorney. The hearing judge found respondent culpable of all charges.

Relying on his own testimony, respondent claims that he did not know the effective date of his suspension. The hearing judge, however, determined that his testimony was not credible. This determination deserves great weight. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a).) Also, the hearing judge considered two important documents which respondent fails to address: (1) his June 1, 1992, letter, stating that he could not handle another client's matter because of his suspension,

5. During the hearing and on review, respondent has acknowledged his mishandling of trust funds and described his misconduct as aberrational. Nevertheless, in the conclusions of his review briefs, he asks for a remand with instructions that none of the charges apply to him.

and (2) his July 10, 1992, quarterly report, acknowledging the start of his suspension on May 15, 1992. We thus agree with the hearing judge's finding that respondent knew the effective date of his suspension.

According to respondent, no evidence indicates that he knew about Hernandez's signing up Chigua as a client for him. Yet, as Hernandez testified, respondent knew that she generally handled personal injury cases for him from intake to settlement. Further, the signed medical lien agreement shows that by late June 1992, respondent was aware that Hernandez had signed up Chigua as his client when he was suspended.

Respondent argues that he engaged in no "personal acts" of misconduct. The record, however, establishes an important "personal act": either deliberate permission for Hernandez to continue interviewing and processing clients during his suspension or grossly negligent failure to ensure that Hernandez stopped such interviewing and processing.

Respondent is culpable of wilfully violating section 6106. Through Hernandez, he permitted himself unlawfully to be held out as entitled to practice law. Because such permission either was intentional or resulted from gross negligence, he committed an act of moral turpitude. [Cf. *Sanchez* v. *State Bar* (1976) 18 Cal.3d 280, 283-285 [moral turpitude where attorney was grossly negligent in allowing legal documents to be signed by employees who were not authorized to practice law]; *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857-858 [moral turpitude where attorney was grossly negligent in failing to supervise his associate attorney and support staff].)

[7b] As we have held previously, sections 6125 and 6126 are not of themselves disciplinary offenses. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 237.) The appropriate method of charging disciplinary violations of those sections, is by way of adding a charge of a violation of section 6068, subdivision (a), to sections 6125 and 6126. (*Ibid.*; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.) Section 6068, subdivision (a), was not charged here, but the amended charges made it clear both by text and citation to sections 6125 and 6126 that respondent was being charged with accepting employment from and holding himself out to Chigua as entitled to practice law while respondent was suspended. In view of this charge and respondent's failure to object and show any evidence of specific prejudice arising from the failure to add section 6068, subdivision (a), to the underlying charges, we uphold the hearing judge's findings that respondent violated sections 6125 and 6126. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929; see also *In the Matter of Lilley*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 486.) However, since they essentially duplicate the moral turpitude findings in the previous paragraph, we will not add any additional weight to these findings on the issue of degree of discipline.

2. Leon-Reddersen matter

Jennifer Leon and Edward Reddersen were involved in a car accident in April 1992. Leon was a passenger; and Reddersen, the driver. Leon hired respondent to represent her in a personal injury claim against Reddersen, who retained respondent for defense in a criminal drunk driving case arising out of the accident. Respondent did not inform Leon or Reddersen about the conflict of interest, and neither client consented in writing to respondent's representation despite the conflict.

On May 21 and June 9, 1992, respondent appeared in court on Reddersen's behalf. He also filed a document with the court on June 9, 1992, in connection with Reddersen's plea of no contest to the criminal charges.

By appearing twice in court and filing the document for Reddersen when he knew that he had been suspended as of May 15, 1992, respondent committed acts of moral turpitude in wilful violation of section 6106.[6] (*In re Cadwell* (1975) 15 Cal.3d 762, 771-772.)

6. The hearing judge determined that respondent also violated sections 6125 and 6126. Again, the amended notice failed to charge a violation of subdivision (a) of section 6068. As discussed *ante*, respondent cannot be culpable of violating section 6125 or 6126 without such a charge.

Further, he wilfully violated the prohibition of rule 3-310(B) against representing clients with potentially conflicting interests, except with their informed written consent. (Cf. *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 614-616 [The representation of both the driver and the passenger in an automobile accident presented a potential conflict, subject to the prohibition to the predecessor of rule 3-310(B).].)

3. Silva matter

Lupe Silva hired respondent to represent her in a personal injury case. In early 1992, she met respondent to discuss a possible settlement. On April 23, 1992, an insurance company issued a $6,000 settlement check payable to respondent and Silva.

Respondent did not notify Silva about the receipt of this check.[7] Nor did Silva endorse the check or authorize respondent to endorse it on her behalf.

The check, endorsed with Silva's name, was deposited into respondent's client trust account on May 4, 1992. On June 1, 1992, respondent wrote Silva a letter informing her of his actual suspension in *Acuna I*. On the same day, the balance in his trust account dropped to $979.85.

Between early 1992 and September 1992, Silva often telephoned respondent's office to find out about her case. Respondent did not reply.

In August or September 1992, Silva met respondent to discuss the settlement. She signed a release of all claims, and respondent told her that she would receive about one-third of the settlement.

In early September 1992, Silva received a breakdown for the distribution of the settlement funds, although she did not know that respondent had completed the settlement. Near the end of the month, she received a check for $2,007 as her share of the settlement.

When Silva initially tried to negotiate the check, it was returned for insufficient funds.[8] Silva contacted respondent, who told her that he would reimburse her for the $15 bounced check fee and that he would send her file to her. He did neither.

Because respondent did not reply to Silva's repeated inquiries about her case between early 1992 and September 1992, he wilfully violated rule 3-500, which requires that an attorney keep a client reasonably informed about significant developments related to representation of the client and promptly comply with reasonable requests for information. By allowing the balance in his client trust account to drop below the amount owed to Silva on June 1, 1992, respondent willfully mishandled trust funds in violation of rule 4-100(A). This mishandling of trust funds reflects at least gross negligence, given the following facts: (1) his stipulation of November 1991 to misappropriation of client funds in *Acuna I*; (2) his awareness of his actual suspension for such misappropriation; and (3) the letter which he wrote to Silva about his actual suspension on the very day of the drop in his trust account. Accordingly, respondent's mishandling of trust funds was also in violation of section 6106's prohibition against acts of moral turpitude. By failing to return Silva's file, respondent wilfully violated rule 3-700(D)(1), which requires that an attorney promptly release all client papers and property upon termination of employment and request from the client.[9]

4. Smith matter

[8a] On May 26, 1992, the State Bar sent respondent a letter asserting that his payment of the disciplinary costs in *Acuna I* was a condition of reinstatement to the practice of law and that he would

7. Respondent claims that on June 1, 1992, he sent Silva a letter notifying her of the receipt of her funds. This letter, which was admitted as an exhibit, contains no such notification.

8. Apparently, Silva was able to negotiate the check later.

9. Respondent contends that no evidence indicates termination of employment. Yet the exhibits and Silva's testimony show that respondent's representation of Silva was at an end. She had hired him to handle a personal injury case, which he had settled. At her request, he agreed to send her file to her and pay her the $15 bank fee for the dishonored check.

remain on actual suspension until he paid the costs. On December 3, 1992, the State Bar sent him another letter again asserting that he would remain on actual suspension until he paid the costs. On January 11, 1993, he paid the costs in *Acuna I.*

[8b] On November 24, 1992, and January 5, 1993, respondent appeared in court as counsel for Cynthia Smith. The hearing judge determined that these appearances constituted wilful violations of sections 6106, 6125, and 6126.

[8c] We disagree. As respondent argues, his suspension lasted for only six months, the period stated by the Supreme Court's order in *Acuna I.* The "costs of a disciplinary proceeding need not be paid by a disciplinarily suspended [attorney] as a condition of reinstatement . . . unless the [attorney] has *also* been *administratively* suspended for failure to pay such costs as part of the [attorney's] next annual bill for membership fees." (*In the Matter of Langfus* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 161, 167.) No such automatic administrative suspension occurred in the current proceeding, and as we noted *ante*, respondent's actual suspension terminated on November 14, 1992.

5. Reyes matter

Respondent represented Amador Reyes in a personal injury case. Reyes agreed to settle the case for $7,650. In April 1992, the insurance company issued a $7,650 settlement check made payable to respondent and Reyes. Respondent did not notify Reyes of his receipt of the check. Reyes neither endorsed the check nor authorized anyone to endorse it on his behalf. On April 15, 1992, the check was deposited into one of respondent's ordinary checking accounts rather than his client trust account. From April 17, 1992, onwards, the balance in the ordinary checking account fluctuated above and below $2,550, Reyes's share of the settlement. On August 26, 1992, the balance dropped to a negative amount. After retaining another attorney in September 1992, Reyes found out about the completion of the settlement and demanded an explanation from respondent. Later in September 1992, Reyes received $2,550 from respondent.

Because respondent did not notify Reyes in April 1992 about the arrival of the settlement check, he wilfully violated rule 4-100(B)(1)'s requirement that an attorney promptly notify a client about the receipt of the client's funds. By failing to deposit and maintain Reyes's share of the settlement in a client trust account, respondent wilfully mishandled trust funds in violation of rule 4-100(A). Because respondent was at least grossly negligent in withdrawing these funds, he wilfully misappropriated $2,550 in violation of section 6106's prohibition against moral turpitude.

6. Rumbo matter

Respondent represented Anacleto Rumbo in a personal injury case. In July 1992, respondent received a $5,000 settlement check, which he deposited into an ordinary checking account. Rumbo's share of the settlement was $2,000. On August 25, 1992, the balance in the account fell to $1,541.67. In September 1992, respondent paid $2,000 to Rumbo.

By failing to deposit and maintain Rumbo's share of the settlement in a client trust account, respondent wilfully mishandled trust funds in violation of rule 4-100(A). Because he was at least grossly negligent in withdrawing these funds, respondent wilfully misappropriated $458.33 in violation of section 6106's prohibition against moral turpitude.

D. Mitigation

We agree with the hearing judge that respondent proved two mitigating circumstances. He provided free legal seminars to the Chinese community. (See *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 529; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 665-666.) Also, he voluntarily repaid misappropriated funds to his clients before the start of disciplinary proceedings. (See Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(vii); *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1366.)

As found by the hearing judge in *Acuna III*, respondent failed to provide an extraordinary demonstration under standard 1.2(e)(vi) of good character attested to by a wide range of references who are aware of the full extent of the attorney's misconduct. He offered the testimony of only two attorneys, neither of whom knew the scope of the charges

against him. (Cf. *In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [Testimony by seven witnesses plus twenty letters affirming the attorney's good character were not entitled to significant weight in mitigation because most of those who testified or wrote were unaware of the details of the attorney's misconduct.].)

In his review briefs, respondent contends for the first time that extreme personal and financial problems between 1987 and 1992 led to his wrongdoing. We give no mitigating weight to these belated and unsupported contentions.[10] Respondent failed to appear in *Acuna II* and neglected his duty to present evidence about the purported problems during the hearings in *Acuna III*. (See *Martin* v. *State Bar* (1991) 52 Cal.3d 1055, 1063.) Nevertheless, we note that respondent's two witnesses in the discipline phase of *Acuna III* briefly alluded to financial difficulties which respondent had experienced and which had culminated in respondent's filing for bankruptcy. Respondent introduced no evidence about the cause of the financial difficulties or his motives for misappropriating client trust funds. Although extreme financial difficulties resulting from circumstances beyond an attorney's control can constitute significant mitigation (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 31; *In re Naney* (1990) 51 Cal.3d 186, 196), respondent did not prove that such circumstances caused his difficulties. We thus decline to accord weight in mitigation to his difficulties.

Respondent also claims that his misconduct was aberrational. Yet his repeated acts of serious misconduct from late 1991 through 1992 undercut this claim. (See *In the Matter of Lane* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 735, 749; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.)

E. Aggravation

We agree with the hearing judge that the record demonstrates clearly the following aggravating circumstances: (1) a prior record of discipline for mishandling trust funds in *Acuna I* (std. 1.2(b)(i)); (2) multiple acts of wrongdoing (std. 1.2(b)(ii)); (3) harm to the administration of justice as a result of respondent's unauthorized practice of law (std. 1.2(b)(iv)); and (4) indifference toward rectifying the consequences of his misconduct, as shown by his continued failure to return Silva's file and reimburse her for the bounced check fee (std. 1.2(b)(vi)).

F. Discipline

In *Acuna II*, the hearing judge recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for eighteen months. In *Acuna III*, she recommended disbarment, independent of the *Acuna II* recommendation. Respondent wants *Acuna II* and *Acuna III* remanded with instructions that none of the charges apply to him. In review briefs, the State Bar requested sterner discipline in *Acuna II* and supported the disbarment recommendation in *Acuna III*.

We first seek guidance from the standards. (See *In re Morse*, *supra*, 11 Cal.4th at p. 206; *Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090.) Under standard 1.3, the primary purposes of discipline are to protect the public, courts, and legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession.[11] (See *In re Morse*, *supra*, 11 Cal.4th at p. 205.) If an attorney commits several acts of misconduct and if the standards prescribe different sanctions for the different acts, the most severe of these sanctions should be imposed. (Std. 1.6(a).) Of the standards which apply to respondent's misconduct, the ones with the most severe sanctions are standard 2.2(a),

10. An attorney who experiences a period of extreme personal pressures and financial difficulties should be "especially careful with the handling of . . . . clients' funds during this period, not less careful." (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 255; citing *Baranowski* v. *State Bar* (1979) 24 Cal.3d 153, 166.)

11. In his *Acuna III* review brief, respondent does not address these purposes. Instead, he states that "rehabilitation is the goal" of discipline. Under standard 1.3, rehabilitation is a permissible purpose of discipline only if it is consistent with the primary purposes.

which calls for the disbarment of an attorney who has wilfully misappropriated trust funds unless the amount involved is insignificantly small or the most compelling mitigating circumstances clearly predominate, and standard 2.3, which calls for the disbarment or suspension of an attorney who has engaged in acts of moral turpitude, fraud, or dishonesty, depending upon the circumstances. Given respondent's deliberately misinforming a client about the receipt of a settlement check, misappropriating significant sums, and engaging in the unauthorized practice of law, as well as the limited mitigation and substantial aggravation surrounding his wrongdoing, the standards call for his disbarment.

We should also consider the discipline imposed in similar proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In *Grim* v. *State Bar, supra*, 53 Cal.3d 21, Grim misappropriated $5,500 from a client and repaid the client only under the pressure of disciplinary proceedings. In mitigation, Grim cooperated with the State Bar and presented considerable evidence of good character. In aggravation, Grim had a prior private reproval for commingling personal funds with trust funds, took advantage of the client's move to another state, and made dishonest representations to the client's new attorneys about repaying the client. The Supreme Court ordered Grim's disbarment.

Respondent's misconduct surpasses Grim's. Respondent wilfully misinformed a client about the receipt of a settlement check, misappropriated a total of more than $9,000 from four clients, knowingly engaged in the unauthorized practice of law while he was on actual suspension, and violated other ethical requirements. Although respondent's mitigation may be comparable to Grim's, the aggravation surrounding respondent's misconduct is more serious than the aggravation surrounding Grim's wrongdoing. It is particularly disturbing that respondent's prior discipline was a six-month actual suspension for acts of moral turpitude or dishonesty in mishandling client trust funds.

Misappropriation "violates basic notions of honesty and endangers public confidence on the legal profession. (*Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128 . . .; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 656 . . . .) In all but the most exceptional of cases, it requires the imposition of the harshest discipline. (*Chang* v. *State Bar, supra*, at p. 128; *Gordon* v. *State Bar* (1982) 31 Cal.3d 748, 757 . . . .)" (*Grim* v. *State Bar, supra*, 53 Cal.3d at p. 29.)

[9] Respondent committed acts of moral turpitude and dishonesty without compelling mitigation and with substantial aggravation. He also engaged in a wide range of other misconduct. Only disbarment can adequately protect the public, courts, and legal profession; maintain high professional standards by attorneys; and preserve public confidence in the legal profession.

III. RECOMMENDATION

We recommend that respondent be disbarred from the practice of law in the State of California. We also recommend that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of rule 955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. We further recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

STOVITZ, J.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

REX ALLEN SPAITH

A Member of the State Bar

No. 92-O-11853

Filed August 1, 1996; Reconsideration denied September 25, 1996

SUMMARY

Respondent was found culpable in a single matter of intentionally misappropriating approximately $40,000 from a client and of intentionally misleading the client over a period of approximately a year as to the status of the money. Finding compelling mitigation, the hearing judge recommended that respondent be suspended from the practice of law for four years, that execution of such suspension be stayed, and that he be placed on probation for five years on conditions, including three years actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

Both respondent and the State Bar requested review. The review department concluded that the mitigating circumstances were not as compelling as found by the hearing judge, and, even though there were mitigating circumstances present, in view of the misconduct and the aggravating factors, the mitigating circumstances did not demonstrate that a sanction less than disbarment was warranted.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Dal Cerro

For Respondent: Jerome Sapiro, Jr.

HEADNOTES

[1 a, b] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
822.10 Standards—Misappropriation—Disbarment

Misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, and generally warrants disbarment unless the most compelling mitigating circumstances clearly predominate. Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. Where respondent did not meet that burden, disbarment was recommended.

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] **760.33 Mitigation—Personal/Financial Problems—Found but Discounted**
760.39 Mitigation—Personal/Financial Problems—Found but Discounted
Financial difficulties can be considered in mitigation. However, in misappropriation cases, financial problems are given significant weight in mitigation only if they are extreme and result from circumstances not reasonably foreseeable or that are beyond the attorney's control. The evidence presented indicated that respondent's financial pressures differed little from the financial pressures many attorneys experience at some point in their career. Respondent's practice simply was not generating enough income. No extraordinary or unforeseeable event caused this problem. The risk of financial difficulties should have been reasonably foreseeable to respondent, especially in view of the fact that he had practiced in his community for many years under similar financial conditions. Therefore, respondent's financial difficulties deserved little weight in mitigation.

[3] **760.32 Mitigation—Personal/Financial Problems—Found but Discounted**
760.33 Mitigation—Personal/Financial Problems—Found but Discounted
Marital problems can be a mitigating circumstance. However, such emotional problems are not mitigating unless they are extreme and are directly responsible for the misconduct. Where the asserted cause for the marital problems was the financial pressures respondent was experiencing, and where the record indicated, at most, that respondent and his wife constantly argued over their financial problems, the marital problems were not found to be extreme. In addition, respondent failed to prove by clear and convincing evidence that the marital difficulties were directly responsible for his misconduct.

[4] **745.31 Mitigation—Remorse/Restitution—Found but Discounted**
Restitution paid under the force or threat of disciplinary proceedings does not have any mitigating effect. No restitution was paid in this case until after respondent received a letter from his client threatening to file a complaint with the State Bar, and most of the restitution was not paid until after the client actually filed the complaint. Accordingly, this was not found to be significantly mitigating.

[5] **745.32 Mitigation—Remorse/Restitution—Found but Discounted**
745.39 Mitigation—Remorse/Restitution—Found but Discounted
Respondent's confession of his misdeeds to his client could be viewed as voluntary and therefore could be considered a mitigating circumstance as a recognition of wrongdoing. However, the weight attached to this factor was greatly reduced because a confession a year after the fact was not an objective step promptly taken spontaneously demonstrating remorse and recognition of the wrongdoing.

[6] **745.32 Mitigation—Remorse/Restitution—Found but Discounted**
745.39 Mitigation—Remorse/Restitution—Found but Discounted
The weight accorded respondent's remorse and recognition of wrongdoing was reduced where respondent's guilt and shame did not result in objective steps promptly taken by him to atone for his misconduct. Expressing remorse for one's misconduct is an elementary moral precept which, standing alone, deserves no special consideration in determining the appropriate discipline.

[7] **710.39 Mitigation—No Prior Record—Found but Discounted**
793 Mitigation—Other—Found but Discounted
Respondent's 15 years of blemish-free practice prior to committing the misconduct did not indicate that his misconduct was aberrational where respondent intentionally misappropriated a substantial

sum of money from his client for no apparent reason other than to keep his practice afloat. Then, for the next year, he repeatedly covered-up his misdeeds by means of misrepresentation and concealment. Thus, the totality of respondent's misconduct was serious and repeated.

[8 a, b] 740.10 Mitigation—Good Character—Found
740.32 Mitigation—Good Character—Found but Discounted

An extraordinary demonstration of good character attested to by a broad 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. Where some of the character evidence witnesses were not aware of respondent's misconduct, no mitigating weight was given to that evidence. However, where some of the witnesses were told of respondent's misconduct at trial and did not change their view of respondent, that evidence was entitled to weight in mitigation.

[9] 735.10 Mitigation—Candor—Bar—Found

Candor and cooperation with the State Bar during the disciplinary investigation and proceeding can be a mitigating circumstance. However, an attorney has a legal and ethical duty to cooperate with the State Bar's disciplinary investigation, and that cooperation, in and of itself, is not entitled to great weight as a mitigating factor. Nevertheless, where respondent admitted his wrongdoing when first contacted by an investigator for the State Bar, and stipulated to the facts and his culpability, such evidence was a mitigating circumstance.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m)
221.10 Section 6106
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Aggravation

Found

521 Multiple Acts
561 Uncharged Violations
582.10 Harm to Client

Mitigation

Found

765.10 Pro Bono Work

Declined to Find

730.50 Candor—Victim

Discipline

1010 Disbarment

Other

175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

NORIAN, J.:

Rex Allen Spaith, respondent, was found culpable in a single matter of intentionally misappropriating approximately $40,000 from a client and of intentionally misleading the client over a period of approximately a year as to the status of the money. As noted by the hearing judge, such misconduct warrants disbarment unless the most compelling mitigating circumstances clearly predominate. Finding compelling mitigation, the hearing judge recommended that respondent be suspended from the practice of law for four years, that execution of such suspension be stayed, and that he be placed on probation for five years on conditions, including three years actual suspension.

Both respondent and the State Bar requested review. Respondent concedes that his misconduct is serious, but argues that his actual suspension should be reduced to six months because the "facts in mitigation here are more compelling and more predominate than in other cases in which the recommended discipline was less severe than that being recommended in this case." The State Bar argues that respondent's misconduct was inexcusable and that the mitigating circumstances do not justify a disciplinary recommendation short of disbarment.

We have independently reviewed the record and conclude that the mitigating circumstances are not as compelling as found by the hearing judge, and do not warrant a sanction less than disbarment. Respondent's misconduct was extremely serious. The $40,000 he misappropriated was from a settlement of a personal injury claim that arose out of an automobile accident in which a woman and her two minor children were injured, and her husband was killed. Respondent was hired to represent the woman and children and the $40,000 was part of the settlement for their claims. Thus, respondent intentionally misappropriated a very large sum of money from very vulnerable clients. The primary reason offered by respondent for his misdeeds is that he was experiencing extreme financial difficulties in his law practice due to his poor management skills, and he needed the money to pay his office expenses. We do not find this to be compelling mitigation.

[1a] We recognize that there are mitigating circumstances present in this case. However, respondent's misconduct violates two of the most essential concepts underlying the attorney-client relationship, honesty and fidelity, and thereby seriously endangers public confidence in the legal profession. In addition, unlike the hearing judge, we also find aggravating circumstances present. In view of the misconduct and the aggravating factors, the mitigating circumstances do not demonstrate that a sanction less than disbarment will protect the public, courts, and legal profession, maintain high professional standards for attorneys, and preserve public confidence in the legal profession. Accordingly, we will recommend that respondent be disbarred from the practice of law.

FACTS AND FINDINGS[1]

Respondent was admitted to the practice of law in this State in June 1975, and has been a member of the State Bar of California since then. He has not been previously disciplined.

In January 1988, Sally Gaines (Gaines) and her two minor children were injured in an automobile accident in which Gaines' husband was killed. In August 1988, Gaines employed respondent, on a contingency fee basis, to represent her and her children in connection with the accident. By mid-November 1990, two insurance companies had issued settlement checks to respondent; the checks from Liberty Mutual Insurance Company totalled $35,000, and the checks from Farmers Insurance

1. Respondent stipulated to the basic facts surrounding his misconduct and the hearing judge made additional findings based on the evidence presented at trial. Except as indicated below, neither party contests the hearing judge's findings. We have independently reviewed the record and conclude that, with the modifications also indicated below, the hearing judge's findings are supported by the record and we adopt them. However, we set forth in this opinion only those facts necessary for the resolution of the issues before us.

Group totalled $47,869. A worker's compensation claim was settled in November 1991, for $95,000.

Respondent withdrew his fees from the Liberty Mutual and worker's compensation settlement monies and timely paid out to his clients the remaining funds from these settlements. He deposited the settlement checks from Farmers into his client trust account, but was not able to immediately disburse the money because he was waiting for a release of a lien against the money, which he obtained in mid-January 1991.

Prior to the Farmers settlement, the superior court ordered that any money paid by Farmers on behalf of the children be placed in blocked savings accounts, which were opened by Gaines for each of her children. However, Gaines wanted to instead invest the money in a mutual fund, and she made her desire known to respondent. Respondent informed Gaines that it would be necessary to get a new court order to do so. Gaines asked respondent to take the necessary steps to obtain such an order.

By January 1991, respondent was experiencing financial difficulties, and did not have the money to operate his law office. That month, respondent withdrew $39,977.09 from his client trust account, which was the amount due Gaines and her children from the Farmers settlement after attorney's fees and costs were deducted. He used the money to pay his office expenses. Gaines was not aware of respondent's misappropriation of this money.

After January 1991, whenever Gaines inquired about the funds, respondent falsely told her that he was working on obtaining a new court order for placing the money in a mutual fund. In the fall of 1991, Gaines asked respondent the whereabouts of the Farmers money and expressed her concern over lost interest. Respondent misrepresented to Gaines that the money was in his trust account.

Thereafter, Gaines periodically inquired about the delay in the disbursement of the money from Farmers, but was always put off by respondent. On January 3, 1992, resolving to end the delay in the disbursement of the funds, Gaines wrote to respondent, demanding the funds by the end of the month. She indicated in her letter that if the money, plus interest, was not placed in her children's savings account by the end of the month, she would contact the State Bar. That letter was not received by respondent until January 8, 1992.[2]

On January 6, 1992, respondent had his secretary call Gaines to arrange a meeting with respondent the next day. Respondent planned to tell her about his misappropriation of the money. On January 7, 1992, respondent attempted to drive to Gaines' home, but a snow storm prevented him from doing so. That day, respondent called Gaines and told her that he no longer had the money from Farmers because he had spent it for his own purposes. Respondent expressed remorse for his conduct, and promised Gaines that he would repay the money with interest. He explained that he did not have the money at that time, but that he would either borrow it or pay it out of his fees from other cases he believed would settle in the near future. Respondent attempted to borrow the money from a bank, but was not successful. Respondent advised Gaines that the loan was denied, but promised he would pay her from a settlement when it was received.

In February 1992, respondent sent Gaines a check for $3,194.18, representing her share of the Farmers settlement, plus a refund of respondent's fees in connection with the settlement, plus interest. At that time, respondent still owed Gaines the children's share of the settlement.

In March 1992, Gaines filed a complaint with the State Bar regarding this matter. In April 1992, the

2. The State Bar asserts that circumstantial evidence indicates that respondent received this letter on January 6, 1992. Although the letter is dated January 3, 1992, Gaines was not positive she mailed the letter on that date. The letter was stamped received on January 8, 1992, which Respondent testified was in compliance with the procedure in his office for incoming mail. Based on this testimony, the hearing judge found that respondent's testimony that the letter was received on January 8, was uncontroverted. We do not find the circumstantial evidence articulated by the State Bar sufficient to overturn the hearing judge's finding.

State Bar wrote to respondent informing him of allegations made by Gaines. On the day respondent received that letter, he called the State Bar investigator, admitted that the allegations of the complaint were true, and told the investigator that he did not have funds to pay the Gaines children their money but would send the money owed when he received it from a settlement.

In April 1992, respondent received a settlement in another case. From the money received as his fees, respondent sent checks to Gaines for the money owed to her children from the Farmers settlement, plus interest. In September 1992, respondent sent to Gaines $8,371.69, which represented a refund of respondent's fees and costs, plus interest, for his representation of the Gaines' children.

The notice to show cause in this matter charged respondent with violating sections 6068, subdivision (m), and 6106 of the Business and Professions Code,[3] and rules 3-110(A), 4-100(A), and 4-100(B)(4) of the Rules of Professional Conduct.[4] As indicated above, the parties stipulated to facts and culpability. Based on the stipulation and the evidence presented at trial, the hearing judge concluded that respondent was culpable of violating section 6106 because of his misappropriation of the Farmers settlement money, and because of two misrepresentations he made to Gaines regarding the whereabouts of the Farmers money (the January 1991 statement that he was working on obtaining a new court order to place the funds in a mutual fund, and the fall 1991 statement that the money was in his trust account). The hearing judge also concluded that respondent was culpable of wilfully violating rule 4-100(A) because he failed to maintain the Farmers settlement money in his trust account, and rule 4-100(B)(4) because he failed timely to pay, as requested by the client, the funds in his possession belonging to Gaines and her children. The stipulation did not address the remaining charges and the hearing judge dismissed them, finding insufficient evidence.[5]

The hearing judge did not find any aggravating circumstances. In mitigation, she found that respondent has not been disciplined for professional misconduct in his 19 years of practice (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(i)); that there was a lack of harm to the clients in this matter (std. 1.2(e)(iii)); that respondent has fully cooperated with the State Bar in connection with this matter, readily admitting the misconduct to the State Bar and to Gaines before learning that she had threatened to contact the State Bar regarding the matter (std. 1.2(e)(v)); that respondent has made an extraordinary showing of good character with the testimony and letters from a wide range of members of the legal and general community, including clients and former clients, community leaders, judges, and members of the legal profession (std. 1.2(e)(vi)); and that respondent performs valuable services for his community, including providing pro bono or reduced-fee legal services.

3. Unless otherwise noted, all future statutory references are to this Code. Section 6068, subdivision (m), directs 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. Section 6106 provides that an attorney's commission of any act involving moral turpitude, dishonesty or corruption whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

4. Unless otherwise indicated, all references to rules are to the Rules of Professional Conduct of the State Bar of California in effect from May 27, 1989, as they read before the amendments that took effect September 14, 1992. Rule 3-110(A) prohibits an attorney from intentionally, or with reckless disregard, or repeatedly, failing to perform legal services competently. Rule 4-100(A) requires an attorney to keep client funds in an identifiable bank trust account. Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds in the possession of the attorney which the client is entitled to receive.

5. The parties do not contest on review the dismissal of the remaining charges. Based on our independent review of the record, we agree with the dismissal of the rule 3-110(A) charge, and we do not address it further. As explained below, we disagree with the dismissal of the section 6068, subdivision (m), charge.

The hearing judge also made numerous findings regarding the financial pressures respondent was experiencing at the time of his misconduct. Although she did not indicate that respondent's financial position was a mitigating circumstance, she considered it in determining the discipline to recommend.

The findings regarding respondent's financial condition indicate that he practiced law in a small community and limited his practice to personal injury and workers' compensation. Prior to 1990, he was experiencing financial problems in his law office. In early 1990, he tried a number of things to increase his profit, including spending less, streamlining operations, increasing efficiency, working more hours, and providing additional training for staff, all without much success. Respondent sought the help of his father and father-in-law, both successful businessmen, regarding the cash flow problems in his law office. His father and father-in-law did an analysis of his business, and recommended that respondent hire an associate to help him with the cases.

Respondent eventually hired two associates, and his office expenses increased accordingly. These steps resulted in a small profit during the first half of 1990, but the second half of 1990 was not profitable. At some point during the second half of 1990, respondent's father-in-law suggested that respondent should borrow $100,000 from funds respondent and his wife had available for construction of a new home. Respondent's wife was reluctant to loan the money, but did so. Respondent used the loan funds strictly to pay expenses connected with the operation of his office.

Two days after making the loan, respondent's wife changed her mind and demanded that the money be returned immediately. Respondent and his wife had repeated arguments about the money. The financial problems put a strain on respondent's marriage. Respondent ended up using his office income to pay a total of $35,000 of the loan during November and December 1990. The use of his office funds only further exacerbated his financial difficulties. By January 1991, respondent was experiencing severe financial problems.

DISCUSSION

As the parties stipulated to facts and culpability in this matter, their arguments on review are primarily directed at the level of discipline. The State Bar argues that the mitigating circumstances are not compelling, that there are aggravating circumstances not found by the hearing judge, and that respondent should be disbarred. Respondent asserts that the hearing judge's findings are supported by the record and that the mitigating circumstances are compelling.

Before turning to the issue of discipline, we address several other matters. First, the notice to show cause charged respondent with violating section 6068, subdivision (m). As noted, that section requires an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in the client's case. The hearing judge dismissed this charge because of insufficient evidence. Gaines testified that she called respondent "at least" once a month during the summer of 1991 inquiring about the Farmers settlement money, and that respondent never returned her calls. The hearing judge found, and we agree, that Gaines periodically inquired about the money during 1991 and that she was "always put off" by respondent. We hold that by failing to inform Gaines about the status of the money despite her repeated inquiries, respondent failed to respond to his client's inquiries and failed to keep her informed of significant developments in the case, in wilful violation of section 6068, subdivision (m).

Second, the hearing judge concluded that respondent violated section 6106 in part based on two misrepresentations he made to Gaines regarding the whereabouts of the Farmers money. The State Bar asserts that the misrepresentations were "multiple and ongoing." Respondent stipulated that Gaines called him several times during the summer of 1991 and that whenever she raised the issue, he "continued" to mislead her "regarding the funds." Respondent also testified that there were "a couple of times when I was directly misleading to her, when I actually lied to her. And then there were a few times when I was evasive to her about the funds." Respondent was

evasive with Gaines in order to conceal the truth from her regarding the money. Concealment under these circumstances is dishonest and involves moral turpitude within the meaning of section 6106. (See *Crane* v. *State Bar* (1981) 30 Cal.3d 117, 122; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.) Although the record is not clear as to the exact number of times respondent "lied" or was "evasive" to Gaines, his testimony indicates that his actions were "multiple and ongoing" for the year period of time.

The hearing judge found no aggravating circumstances. The State Bar disagrees, arguing that respondent's misconduct involved multiple acts of wrongdoing (std. 1.2(b)(ii)); involved other uncharged ethical violations in that respondent violated a court order to deposit the children's share of the settlement money in a bank account and not withdraw it without further order of the court (std. 1.2(b)(iii)); and harmed his client (std. 1.2(b)(iv)). We agree with the State Bar.

First, respondent's misconduct involved misappropriation and repeated acts of deceit, and therefore involved multiple acts of wrongdoing. Second, section 6103 requires an attorney to comply with court orders. Respondent admitted that he violated the court order, and therefore, his misconduct included other uncharged ethical violations. Finally, Gaines was deprived of the use of approximately $3,000, which represented her share of the Farmer's settlement money, for over a year.[6] In light of the death of her husband and the serious injury to her two children, Gaines was in an especially vulnerable position. The loss of use of the money at such a time and the emotional distress it caused resulted in significant harm to Gaines.[7] (See, e.g., *Kelly* v. *State Bar* (1991) 53 Cal.3d 509, 519.)

[1b] Turning to the issue of discipline, the hearing judge and the parties recognized that misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, and generally warrants disbarment unless the most compelling mitigating circumstances clearly predominate. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 29; *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 656; std. 2.2(a).) Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e); *In the Matter of Twitty* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 664, 673.) Thus, the issue before us, in terms of the appropriate discipline, is whether respondent has proven compelling mitigating circumstances.

Respondent's showing in mitigation falls into five general areas. First, he presented evidence regarding the financial and related marital problems he was experiencing at the time of the misconduct. **[2a]** Financial difficulties can be considered in mitigation. (*Grim* v. *State Bar*, *supra*, 53 Cal.3d at p. 31.) However, in misappropriation cases, financial problems are given significant weight in mitigation only if they are extreme and result from circumstances not reasonably foreseeable or that are beyond the attorney's control. (*Ibid.*) We agree with the State Bar that respondent's financial difficulties were reasonably foreseeable.

[2b] The evidence presented indicates that the financial pressures here differ little from the financial pressures many attorneys experience at some point in their career. Respondent's practice simply was not generating enough income. No extraordinary or unforeseeable event caused this problem. The risk of financial difficulties should have been reasonably foreseeable to respondent, especially in view of the fact that he had practiced in his community for many years under similar financial conditions. Respondent's asserted lack of management skills does not change our view. The lack of management skills necessary to succeed in private practice and the difficulties inherent in a solo practice are not ordinarily considered mitigating circumstances. (*Rose* v.

6. As the children's share of the settlement money was to remain in a blocked account until further order of the court, Gaines was not deprived of the use of that money.

7. As we have found harm to the client as a factor in aggravation, we delete the hearing judge's finding in mitigation that no harm occurred.

State Bar (1989) 49 Cal.3d 646, 667; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 405-406.)

[3] Marital problems can also be a mitigating circumstance. (*In re Naney* (1990) 51 Cal.3d 186, 197.) However, such emotional problems are not mitigating unless they are extreme and are directly responsible for the misconduct. (Std. 1.2(e)(iv); *In re Naney, supra,* 51 Cal.3d at p. 197.) We agree with the State Bar that respondent failed to meet his burden. The asserted cause for those problems was the financial pressures respondent was experiencing. At most, the record indicates only that respondent and his wife constantly argued over their financial problems. We find nothing extreme about a husband and wife arguing over money issues. We also do not find that respondent proved by clear and convincing evidence that the marital difficulties were directly responsible for his misconduct. In fact, respondent's psychiatrist testified that marital problems were *not* the cause of the misappropriation.

The next area of mitigation involves respondent's confession to Gaines regarding his misconduct and his restitution of the misappropriated money. We do not find these factors to be significantly mitigating. [4] Restitution paid under the force or threat of disciplinary proceedings does not have any mitigating effect. (*Hitchcock* v. *State Bar* (1989) 48 Cal.3d 690, 709; *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 778.) No restitution was paid in this case until after respondent received a letter from Gaines threatening to file a complaint with the State Bar, and most of the restitution was not paid until after Gaines actually filed the complaint. We also note that respondent had the ability to pay at least some of the money to Gaines prior to February 1992, yet he failed to do so.

[5] Respondent also argues that his confession to Gaines should be considered a mitigating factor. The hearing judge found that respondent confessed his misdeeds prior to receiving Gaines' letter threatening to file a complaint with the State Bar. That letter was dated January 3, 1991, but was not received by respondent until January 8. Respondent confessed his misdeeds to Gaines on January 7, 1991. Although Gaines left a threatening telephone message with respondent's office on January 3, there is no direct evidence that respondent received that message prior to his confession. Accordingly, respondent's confession could be viewed as voluntary and therefore could be considered a mitigating circumstance as a recognition of wrongdoing. (See std. 1.2(e)(vii).) However, the weight we attach to this factor is greatly reduced as we do not view a confession a year after the fact as an objective step "promptly taken" spontaneously demonstrating remorse and recognition of the wrongdoing. (*Id.*)

[6] Respondent also asserts that his "sincere remorse" is a mitigating circumstance. Several witnesses testified to the changes that occurred in respondent's personality after January 1991. Respondent's psychiatrist testified that "within three to six months" after taking the money respondent began to feel guilty and ashamed and began to get clinically depressed. The record indicates that respondent also developed a heart condition. This evidence indicates remorse and recognition of wrongdoing. However, standard 1.2(e)(vii) provides that mitigating effect is given to "objective steps promptly taken by the member spontaneously demonstrating remorse [and] recognition of wrongdoing . . . which steps are designed to timely atone for any consequences of the member's misconduct." Respondent's "guilt" and "shame" did not result in objective steps promptly taken by him to atone for his misconduct. As noted by the Supreme Court, "expressing remorse for one's misconduct is an elementary moral precept which, standing alone, deserves no special consideration in determining the appropriate discipline." (*Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, 627, fn. 2.) Therefore, the weight we accord this evidence is reduced.

In addition, respondent argues on review that he did not use the money "to line his own pockets but to pay the salaries to his employees, withholding taxes, and rent." Respondent also testified that he did not believe he "stole the money" because at the time he took it he intended to repay it. These expressions raise a concern as to whether respondent has recognized the extent of his wrongdoing, and cast a shadow on his other evidence of remorse. Whether the money went directly into his pockets, or indirectly into his pockets through payment of office expenses he was obligated to pay, matters little. Respondent inten-

tionally took his client's money for his personal benefit. In addition, the impact of this misconduct on the client is the same. Furthermore, in view of respondent's financial condition and his unsuccessful attempts to borrow money prior to the misappropriation, his "intent" to repay was hollow at best.

[7] The next area of mitigation is respondent's 15 years of blemish-free practice prior to committing the misconduct.[8] Respondent argues that this factor indicates that his misconduct was aberrational. He asserts that he handled all other trust account money properly, including the other Gaines money, and "[o]nly on one occasion" when his wife made unreasonable demands upon him, did he "misappropriate client funds." Respondent mischaracterizes his conduct as a single instance. He intentionally misappropriated a substantial sum of money from his client for no apparent reason other than to keep his practice afloat. Then, for the next year, he repeatedly covered-up his misdeeds by means of misrepresentation and concealment. Thus, the totality of respondent's misconduct was serious and repeated.

In *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, 1071-1072, the Supreme Court rejected an argument that an attorney's misconduct was aberrational and disbarred him even though the attorney had practiced some 12 years without prior discipline. Kaplan had misappropriated approximately $29,000 from his law firm. The Court found that "Kaplan's conduct was distinguishable from those cases in which we found conduct sufficiently aberrational to reject the Review Department's disciplinary recommendations: it was part of a purposeful design to defraud his partners. Thus, it was unlike the cases Kaplan cites in which a few isolated incidents, generally involving client neglect, formed the basis of the State Bar's charges."[9] (*Ibid.*) Respondent's misconduct was part of a deliberate plan to misappropriate his clients' money and shield his misdeeds, which was misconduct similar to Kaplan's.

Furthermore, the record indicates that the emotional problems which respondent argues are responsible for his conduct are unresolved. We recognize that respondent's psychiatrist believed that respondent would not misappropriate money again, and that he no longer suffered from "extreme depression." However, the psychiatrist also testified that respondent still suffers from stress and that he continues to treat respondent for marital problems. Respondent's deceit was indicative of a level of dishonesty that raises concerns beyond those associated with misappropriation of client funds. Without assurance that respondent's emotional problems are solved, we are concerned that future marital or financial problems could trigger similarly dishonest behavior. (See *Kaplan* v. *State Bar*, *supra*, 52 Cal.3d at p. 1073.)

We do not totally discount respondent's years of blemish-free practice as a mitigating circumstance. Rather, we do not find it sufficiently outweighs the above concerns to warrant a lesser sanction than disbarment. (See *In the Matter of Brazil* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 679, 688 [attorney's 14 years of practice was mitigating but did not prove that disbarment was excessive for convictions for grand theft and forgery]; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [attorney's 14 years of practice was mitigating but did not outweigh seriousness of attorney's misconduct, involving misappropriation of $66,000 in client funds and repeatedly lying to the client to conceal the theft, and the other aggravating circumstances].)

The next area of mitigating circumstances involves respondent's character evidence. The hearing judge found this evidence to be an extraordinary showing of good character from a wide range of members of the legal and general community. Approximately five judges, four attorneys, and seven lay witnesses testified in person, by telephone, or by

8. The hearing judge found that respondent had practiced 19 years without prior discipline. As the misconduct occurred in January 1991 and respondent was admitted in June 1975, we conclude respondent practiced 15 and 1/2 years, and so modify the finding.

9. Among others, Kaplan cited *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, the same case relied on by respondent. (*Kaplan* v. *State Bar*, *supra*, 52 Cal.3d at p. 1071, fn. 5.)

declaration. In addition, respondent submitted approximately 10 letters from various people. As the hearing judge found, these witnesses uniformly attested to respondent's honesty and trustworthiness. In addition, respondent presented evidence of his volunteer work in his community which the hearing judge characterized as "valuable" to the community.

[8a] An extraordinary demonstration of good character attested to by a broad 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. (Std. 1.2(e)(vi).) Nine of the letter writers did not indicate that they had any knowledge of respondent's misconduct, and the tenth indicated that respondent had "borrowed" the client money. We therefore do not find the 10 letters to be mitigating.

[8b] The remaining witnesses all indicated they were aware that respondent had misappropriated money from a client. However, most were not aware until told at the hearing that respondent had also engaged in repeated acts of deceit to cover-up his misdeeds. An attorney's failure to make full disclosure to these witnesses prior to the disciplinary hearing diminishes the weight to be accorded to their testimony. (*Grim* v. *State Bar, supra*, 53 Cal.3d at p. 33.) Nevertheless, even after learning of the additional misconduct, none of the witnesses changed their view of respondent. Accordingly, their testimony is still entitled to considerable weight in mitigation. (*Ibid.*)

Community service and other pro bono activities are also mitigating circumstances. *Rose* v. *State Bar, supra*, 49 Cal.3d at p. 667; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 729.) Respondent's efforts in this regard are a factor in mitigation.

[9] The final area of mitigation involves respondent's candor and cooperation with the State Bar during the disciplinary investigation and proceeding. An attorney has a legal and ethical duty to cooperate with the State Bar's disciplinary investigation (see § 6068, subd. (i)), and that cooperation, in and of itself, is not entitled to great weight as a mitigating factor. (*Hipolito* v. *State Bar, supra*, 48 Cal.3d at p. 627, fn. 2.). However, in this case, respondent admitted his wrongdoing when first contacted by an investigator for the State Bar, and stipulated to the facts and his culpability. Such evidence is a mitigating circumstance. (Std. 1.2(e)(v); *In the Matter of Respondent E, supra*, 1 Cal. State Bar Ct. Rptr. at p. 730.)

In summary, we have given little weight in mitigation to respondent's financial and emotional problems, and his confession and repayment of the money. We have given some weight in mitigation to his 15 years of practice, but have concerns about future similar misconduct. We have given considerable weight in mitigation to respondent's character evidence, and also find mitigating his candor and cooperation with the State Bar.

In *Grim* v. *State Bar, supra*, 53 Cal.3d 21, the attorney intentionally misappropriated approximately $5,500 from a client. In aggravation, Grim had been previously disciplined (a private reproval), and he had exhibited gross neglect in the management of his trust account. In mitigation, Grim had cooperated with the State Bar, and had presented favorable character evidence. The Supreme Court rejected Grim's claim of financial problems because they were neither unforeseeable nor beyond his control, and his claim of restitution because it was not made until after he was contacted by the victims' attorneys and after the commencement of the State Bar disciplinary proceeding. The Court disbarred Grim, finding that his cooperation with the State Bar and good character did not constitute compelling mitigation in view of the aggravating circumstances. (*Id.* at pp. 35-36.)

In *Kaplan* v. *State Bar, supra*, 52 Cal.3d 1067, the Supreme Court disbarred the attorney. Kaplan intentionally misappropriated a total of $29,000 in a number of instances over a seven-month period, which was followed by several instances of deceit to the victims and the State Bar. In mitigation, Kaplan had practiced some 12 years without prior discipline; and suffered from emotional problems, principally related to marital stress and his mother-in-law's terminal illness. The Court did not find these factors sufficiently compelling to warrant less than disbarment; noting that Kaplan had taken the money for no

apparent reason, and had not proven that he no longer suffered from the emotional problems.

In *In re Abbott* (1977) 19 Cal.3d 249, the attorney intentionally misappropriated approximately $30,000 from a single client, and as a result, he was convicted of grand theft. In mitigation, Abbott had practiced law blemish-free for 13 years prior to his misconduct; had presented evidence that he suffered from manic-depressive psychosis; had presented character evidence from several attorneys and judges; and had displayed remorse. The Supreme Court again did not find these factors sufficiently compelling to warrant less than disbarment.

In *In the Matter of Kueker, supra*, 1 Cal. State Bar Ct. Rptr. 583, we recommended and the Supreme Court ordered that the attorney be disbarred. Kueker had intentionally misappropriated approximately $66,000 in client funds and repeatedly lied to his client to conceal the theft. In mitigation, Kueker had practiced law 14 years without prior discipline. However, several aggravating circumstances were also present, including a lack of restitution and multiple acts of misconduct. We concluded that the seriousness of the misconduct and accompanying deceit, surrounded by no extraordinary mitigation which would explain the offense, followed by a lack of evidence that the offense would not recur, called for disbarment.

We recognize that there are differences between the above cases and respondent's. For example, Grim had been previously disciplined, Kaplan's misconduct was more extensive, Abbott had been convicted of grand theft, and Kueker had misappropriated a larger amount. However, respondent misappropriated significantly more than Grim, Kaplan, and Abbott. In addition, although Kueker misappropriated more than respondent, both cases involved misappropriation of large sums of money, repeated lies to clients, and no extraordinary showing in mitigation. On balance, we find that respondent's case is similar to the above cases.[10]

In each of the above cases, mitigating circumstances comparable to respondent's were not found to be sufficiently compelling to justify a lesser sanction than disbarment when weighed against the misconduct and the aggravating circumstances. We reach the same conclusion in the present case.

Many attorneys may experience financial and resulting emotional difficulties comparable to those experienced by respondent in the present matter. These attorneys may face the same temptation to resort to client funds at such times. While these stresses are never easy, we must expect attorneys to cope with them without engaging in dishonest activities, as did respondent. As noted by the Supreme Court, "It is precisely when the attorney's need or desire for funds is greatest that the need for public protection afforded by the rule prohibiting misappropriation is greatest." (*Grim* v. *State Bar, supra*, 53 Cal.3d at p. 31.)

RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Rex Allen Spaith, be disbarred from the practice of law in this State; and that he be ordered to comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court within 30 to 40 days, respectively, after the effective date of the Supreme Court's order. We further recommend that the State Bar be awarded costs pursuant to section 6086.10.

We concur:

OBRIEN, P.J.
STOVITZ, J.

10. In support of his position that the discipline recommendation is excessive, respondent cites to a number of cases which he argues have "comparable" mitigation to that found by the hearing judge here. As noted, we have not found the mitigating circumstances as compelling as the hearing judge did, and we have found aggravating circumstances not considered by the hearing judge. Thus, even if the cited cases have "comparable" mitigation, they are distinguishable from the present case.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GERALD J. TIERNAN

A Member of the State Bar.

No. 95-PM-11292

Filed November 21, 1996; as modified November 22, 1996

SUMMARY

In this probation revocation proceeding, the hearing judge found that respondent violated two conditions of his disciplinary probation, and recommended that respondent's probation be revoked and that he be actually suspended from the practice of law for six months. She also ordered respondent involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (d), but directed that the inactive enrollment automatically terminate if either party requested review. (Hon. Jeniffer Gee, Hearing Judge.)

Respondent requested review contending that the evidence was insufficient to support one of the hearing judge's findings and that the discipline recommendation was excessive. The review department rejected respondent's contentions and affirmed most of the hearing judge's findings and culpability determinations, but increased the recommended actual suspension from six months to eleven months. The review department also ordered respondent enrolled inactive under Business and Professions Code section 6007, subdivision (d).

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Gerald J. Tiernan, in pro. per.

HEADNOTES

[1] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
Whenever an appellee wishes to address issues different from those raised by the appellant, that party should file its own request for review. (Rule 301, Rules of Proc. of State Bar.)

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] **213.90 State Bar Act—Section 6068(i)**
735.50 Mitigation—Candor—Bar—Declined to Find
1719 Probation Cases—Miscellaneous
Respondent's participation in probation revocation proceeding was not a mitigating circumstance because his participation was mandated by Business and Professions Code section 6068, subdivision (i).

[3] **745.59 Mitigation—Remorse/Restitution—Declined to Find**
1719 Probation Cases—Miscellaneous
Respondent's belated filing of probation reports was not a mitigating circumstance as an objective step promptly taken spontaneously demonstrating remorse or recognition of wrongdoing where he filed the reports after he had knowledge of the probation revocation proceeding.

[4] **1714 Probation Cases—Degree of Discipline**
1719 Probation Cases—Miscellaneous
Respondent's continued unwillingness or inability to comply with probation conditions demonstrated a lapse of character and a disrespect for the legal system that directly related to his fitness to practice.

[5] **1714 Probation Cases—Degree of Discipline**
1719 Probation Cases—Miscellaneous
When an attorney commits multiple violations of the same probation condition, the gravity of each successive violation increases so that respondent's seventh successive failure to timely file his probation report warranted the greatest level of discipline.

[6] **1714 Probation Cases—Degree of Discipline**
1719 Probation Cases—Miscellaneous
Because respondent had already been disciplined for not timely filing his probation reports in a previous probation revocation proceeding, respondent's failure to timely file his probation reports in the present probation revocation proceeding warranted the greatest level of discipline.

[7 a-e] **191 Effect/Relationship of Other Proceedings**
1715 Probation Cases—Inactive Enrollment
1719 Probation Cases—Miscellaneous
Before the State Bar Court orders that an attorney be involuntarily enrolled inactive under Business and Professions Code, section 6007, subdivision (d), it must weigh the need for public protection in light of the Supreme Court's inherent and plenary jurisdiction over attorney admissions and discipline. To order the involuntary inactive enrollment of an attorney under subdivision (d) any time its requirements are met without regard to whether there is an issue of public protection and to the length of the actual suspension recommended could conceivably defeat or materially impair the Supreme Court's inherent prerogatives. When measured against these criteria, the review department enrolled respondent inactive, concluding that respondent's four prior records of discipline and lack of any mitigating circumstances established a public protection issue, and that as the review department recommended an actual suspension of almost a year, there could be no reasonable expectation that the time elapsing between when respondent was enrolled inactive and the finality of the matter would equal or exceed the final actual suspension imposed by Supreme Court.

[8] **135.81 Procedure—Revised Rules of Procedure—Involuntary Inactive Enrollment**
135.82 Procedure—Revised Rules of Procedure—Probation
1715 Probation Cases—Inactive Enrollment
1719 Probation Cases—Miscellaneous

In determining whether an attorney should be enrolled inactive under Business and Professions Code section 6007, subdivision (d), the record as a whole must be considered. However, when the State Bar Court seeks to estimate the time between its ruling and recommendation and when the Supreme Court can consider them, it may ordinarily rely on the expedited nature of probation revocation proceedings.

Additional Analysis

Discipline

1813.01 Stayed Suspension—1 Month
1815.05 Actual Suspension—9 Months
1817.10 Additional Probation—4 Years
1820 Probation Conditions

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing
1029 Other Probation Conditions
1751 Probation Cases—Probation Revoked

Other

175 Discipline—Rule 955
178.10 Costs—Imposed
1093 Substantive Issues re Discipline—Inadequacy

OPINION

OBRIEN, P.J.:

Respondent Gerald J. Tiernan seeks review of a hearing judge's order granting the State Bar's motion to revoke his probation and ordering him enrolled inactive involuntarily under Business and Professions Code section 6007, subdivision (d).[1] In accordance with rule 565 of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings,[2] we review the hearing judge's order revoking respondent's probation under rule 301 of those same rules.

Respondent was on disciplinary probation pursuant to a Supreme Court order in case number SO32298 because of prior misconduct. The State Bar moved to revoke his probation on the grounds that he had failed to cooperate with his probation monitor and to submit the quarterly probation reports due by January 10 and April 10, 1995.

In her order granting the State Bar's motion, the hearing judge held that respondent willfully violated the conditions of the probation in case number S032298 by (1) failing to cooperate with his probation monitor and (2) by not timely filing his quarterly probation reports. Accordingly, the hearing judge recommended that the respondent's probation in Supreme Court case number S032298 be revoked, that respondent be actually suspended from the practice of law for six months, and that respondent be placed on a new period of probation for four years.

In that same order, the hearing judge ordered that respondent be involuntarily enrolled as an inactive member of the State Bar under section 6007, subdivision (d). That subdivision authorizes the State Bar Court to order an attorney who is on probation under a stayed suspension order enrolled inactive when it files a recommendation that the attorney be placed on actual suspension because of a probation violation. In addition, the hearing judge ordered that respondent's inactive enrollment be terminated without further court order if either he or the State Bar filed a request for review of the order.

In accordance with the hearing judge's order, respondent was enrolled inactive on October 3, 1995, and thereafter returned to active status on October 12, 1995, when he filed his request for review. Thus, we note that respondent was on inactive status for 10 days under section 6007, subdivision (d).

Respondent argues that the evidence is insufficient to support the factual finding underlying the hearing judge's determination that he did not cooperate with his probation monitor and that the hearing judge's discipline recommendation is excessive. The State Bar contends in its appellee's brief that the hearing judge's discipline recommendation is insufficient.[3] **[1 - see fn. 3]** In addition, the State Bar requests that we (1) disapprove of the hearing judge's order that respondent's inactive enrollment would terminate "automatically" if either he or the State Bar sought review of the order and (2) order him enrolled inactive forthwith.

In late October 1995, respondent's then counsel moved to augment the record or to remand the proceeding to the hearing department to reopen the record. This motion alleged the discovery of new evidence about the dates of the probation monitor's calls. In February 1996 we denied respondent's motion to augment the record or remand the proceeding because the alleged new evidence could, and should, have been presented at trial.

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

2. Unless otherwise noted all future references to rules are to the rules of these Rules of Procedure for State Bar Court Proceedings.

3. [1] In the State Bar's "Brief on Review; . . ." it argues, *inter alia*, for a one-year actual suspension and disapproval of the hearing judge's inactive enrollment order, conditioned on the absence of either party seeking review. These were not issues raised by respondent. If an appellee wishes to address issues different from those raised by an appellant, that party should file its own request for review. Rule 301(c)(1) would then require the cost of the transcript be divided equally between the parties. Moreover, under rule 301(b) the appellee can delay seeking review until after it ascertains whether the opposing party will seek review.

Having examined the record under our duty of independent review (rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207, we adopt almost all the hearing judge's findings of fact and conclusions of law.

We do not find merit in respondent's arguments on review. In fact, all arguments asserted by the parties not expressly addressed by this opinion have been considered and rejected as irrelevant or meritless. In our view, the aggravating circumstances and the lack of any mitigating circumstances in this matter necessitate a substantially greater level of discipline. We therefore modify the hearing judge's discipline recommendation by increasing the recommended period of actual suspension and adding three additional probation conditions to it. Finally, we conclude that, under the facts of this case, it is appropriate to order that respondent be involuntary re-enrolled inactive, and we so order.

RESPONDENT'S ASSIGNMENTS OF ERROR

Challenge to the Sufficiency of the Evidence

On October 7, 1994, respondent met with his probation monitor, Michael Mahoney. They discussed respondent's probation conditions, including the requirement to cooperate with Mahoney. Communication problems with a prior monitor had already alerted respondent to this requirement.

In a declaration signed on May 12, 1995, and properly admitted into evidence at trial, Mahoney stated that Mahoney had telephoned respondent three times between October 7, 1994, and May 10, 1995, and had left messages on respondent's answering machine for him to reply. Mahoney also stated that respondent had not replied as of May 12, 1995.

No evidence in the record casts doubt on Mahoney's statements, which were made under penalty of perjury. Nor did respondent dispute or seek to clarify Mahoney's statements. Like the hearing judge, we find them to be true. Respondent left the country without notifying Mahoney. At trial, respondent testified that he had been on a foreign vacation from early February until early May 1995.

Even though we agree with respondent that the probation monitor's declaration is not a "model" of clarity or specificity, respondent did not object to it as being vague when it was proffered into evidence at the hearing. (See Rule 563(d)(2).) Nor did he even choose to exercise his right to cross-examine the probation monitor at the hearing. If respondent wanted to exercise that right, he was required to state in his opposition to the State Bar's motion, that he desired to cross-examine the probation monitor. (See rules 563(b)(2) & 563(d)(2).)

Moreover, we rejected respondent's belated attempts to attack the probation monitor's declaration because of vagueness and to "impeach" the probation monitor's testimony in the declaration on review when we denied respondent's motion to augment the record. Before we filed our February 14, 1996, order denying respondent's motion to augment, respondent filed his appellant's brief on January 18, 1996.

Respondent's then attorney again sought to augment the record in the opening review brief, this time with another declaration by herself, a letter from her to Mahoney, and a letter from Mahoney to her. We exclude the three documents on the same grounds as we denied the earlier motion.

After reviewing the probation monitor's declaration, we hold that it establishes, by a preponderance of the evidence (see rule 561), that respondent did not return the three telephone calls from his probation monitor as the hearing judge found. Our holding is further supported by the fact that respondent did not contradict any of the statements in the probation monitor's declaration when respondent testified at the hearing. (See Evid. Code, § 413; rules 214 & 566(d); *Breland* v. *Traylor Eng. etc., Co.* (1942) 52 Cal.App.2d 415, 426 ["A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse."].)

Respondent would be culpable even if he proved that Mahoney had first called him on March 13, 1995; that Mahoney had been told he was out of the country; and that Mahoney had not made any other

calls to him after March 13, 1995. Because of his problems with a prior monitor and his October 1994 discussion with Mahoney, respondent was well aware of his obligation to maintain communication with Mahoney. Instead of excusing his failure to reply to Mahoney's calls, respondent's three-month foreign vacation reflects the need for him to have made arrangements to prevent a breakdown in communication. Under these circumstances, his failure to reply to Mahoney's calls constituted a wilful violation of his duty to cooperate with the probation monitor.

In summary, we reject respondent's first point of error and affirm the hearing judge's determination that respondent willfully violated the probation condition that requires him to cooperate with his probation monitor.

Challenge to the Discipline Recommendation

Respondent contends, in his second point of error, that the six-month period of actual suspension recommended by the hearing judge is excessive in light of the record as a whole. Before addressing the merits of respondent's contention, we review the hearing judge's other culpability determination that respondent willfully violated the probation condition that requires him to file quarterly probation reports by failing to timely file his probation reports that were due in January 1995 and April 1995. In that regard, we note that respondent does not complain of that culpability determination on review. After independent review, we affirm it.

We now turn to the merits of respondent's second point of error. We reject respondent's claim of excessive discipline and further conclude that the additional discipline is required.

AGGRAVATING CIRCUMSTANCES

Prior Records of Discipline

Respondent has four prior records of discipline. Each of these prior records is an aggravating circumstance, and they demonstrate that, in the present proceeding, a degree of discipline substantially greater is needed than would otherwise be necessary. (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(i).)

Respondent's first prior record was in November 1990 when the State Bar Court, in case number 88-O-14675, sent respondent a letter publicly reproving him for abandoning two clients in the late 1980s.

Respondent's second prior record was in June 1993 when the Supreme Court filed an order, in case number S032298 (State Bar Court case number 91-O-04020), imposing a one-year stayed suspension and a three-year period of probation with conditions (but no actual suspension). This second prior record of discipline resulted from misconduct between October 1990 and February 1991, when respondent improperly used his client trust account for personal banking and issued three insufficiently funded checks drawn on his client trust account.

Respondent's third prior record of discipline was in August 1994 when the Supreme Court filed an order, in case number S032298 (State Bar Court case number 94-PM-10678), extending his probation for an additional year (from three to four years). The Supreme Court ordered that discipline because respondent did not timely file his first three probation reports required under the Supreme Court's order filed in June 1993 in case number S032298 (State Bar Court case number 91-O-04020). (See Std. 1.2(f) [Discipline for a probation violation is a "prior record of discipline."].) Those three probation reports were due in October 1993, January 1994, and April 1994, respectively.

In that matter, the State Bar filed a probation revocation motion, which was handled by the same hearing judge who dealt with the current proceeding. She concluded that, even though "respondent admittedly knew of the requirement to file the reports,"[4] his failure to file them timely did not require the revoca-

4. The State Bar sent respondent a letter in August 1993 reminding him to comply with the probation conditions of his second prior discipline, including the requirement to submit reports.

tion of his probation, but did warrant the extension of his probation. She based that conclusion largely on her finding that the probation violation proceeding had impressed upon respondent the importance of probation conditions. Thus, she recommended only that his probation be extended by one year "to provide him with the opportunity to demonstrate that he can and will make all the timely probation reports required by the Supreme Court."

Respondent's fourth prior record of discipline was in March 1995 when the Supreme Court filed an order, in case number S044121 (State Bar Court case number 92-O-18194), imposing on him a two-year stayed suspension and a two-year period of probation with conditions, including a 60-day period of actual suspension.

The Supreme Court ordered that discipline because, from 1986 through 1991, respondent failed to communicate with two clients and failed to perform legal services competently for one of them.

Multiple Acts of Misconduct

Respondent's current misconduct consists of three acts of misconduct which are as follows: one for failing to cooperate with his probation monitor and two for failing to timely file the two probation reports that were due in January and April 1995. These acts are multiple acts of misconduct that are aggravating under standard 1.2(b)(ii).

As noted *ante*, the Supreme Court disciplined respondent in August 1994 for not timely filing his first three quarterly probation reports (which were due in October 1993, January 1994, and April 1994, respectively). Yet at that same time, respondent had not filed his fourth report, which was due in July 1994. Therefore, on September 19, 1994, the State Bar sent respondent a letter requesting that he file the report and reminding him that his next and fifth report was due in October 1994.

Shortly after the State Bar's letter, respondent finally late filed his fourth report, which was due in July 1994. But, despite the express reminder in the State Bar's September 19, 1994, letter, respondent did not file, on time, his next and fifth report, which was due in October 1994. Respondent eventually filed it 42 days late.

On November 23, 1994, the State Bar sent respondent a letter indicating that it was not going to move to revoke his probation because he filed late his fourth and fifth reports, which were due in July and October 1994. Instead, it warned him that, if he filed any more late reports, it may then move to revoke his probation. In accordance with that letter, the State Bar has not charged respondent with violating his probation by filing those two reports late. They are, nonetheless, aggravating circumstances as two additional acts of misconduct under standard 1.2(b)(ii).

Moreover, respondent "proffered" a copy of his January 1995 report at trial[5] to support his contention that he is entitled to mitigating credit for late filing his January 1995 and April 1995 probation reports in June 1995. Not only do we reject his contention that he is entitled to mitigating credit for filing those two reports late because he did not file them until after the State Bar filed the instant motion to revoke his probation and served a copy of it on him (see discussion *post*), but we find that the January 1995 report contains an accountant's certification that does not remotely comply with the probation condition requiring that he have a certified public accountant certify that he was properly handling and maintaining the required records of his receipt and holding of trust funds. Respondent received and held trust funds during the time period covered by his January 1995 report.

The State Bar, however, did not charge respondent with violating the accountant's certification probation condition in his January 1995 report in the present proceeding. It would, therefore, be improper

5. Even though a copy of respondent's January 1995 report was not formally marked and admitted into evidence at the hearing, the transcript of the hearing shows that the hearing judge and both of the parties treated the copy of it attached to respondent's reply (opposition) as though it was in evidence. Accordingly, it is deemed admitted. (Cf. *Reed* v. *Reed* (1954) 128 Cal.App.2d 786, 790-792.)

to discipline him for this uncharged probation violation. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35-36.) Nevertheless, we may and do consider it as evidence establishing an additional act of wrongdoing, which is an aggravating circumstance under standard 1.2(b)(ii). (*Ibid.*)

Moreover, we consider it to be a substantial aggravating circumstance for two reasons. First, the language in the accountant's certification probation condition is plain and unambiguous. Second, the respondent was on notice that he was not complying with the accountant's certification probation condition in the State Bar's November 1994 letter to him. In that letter the State Bar advised respondent that his July 1994 submission did not comply with the accountant's certification probation condition and specifically asked him to communicate to his accountant the specific terms of his accountant's certification probation condition. Respondent was still either unwilling or unable to comply with the certification condition.

In summary, respondent committed six multiple acts of misconduct as follows: (1) four by not timely filing his probation reports that were due in July 1994, October 1994, January 1995, and April 1995 (his fourth through sixth reports, respectively); (2) one by not cooperating with his probation monitor; and (3) one by filing his report due in January 1995 with a defective accountant's certification.

MITIGATING CIRCUMSTANCES

The hearing department order states in part ". . . because respondent is participating in the State Bar Court proceedings and did file the reports, albeit late, imposition of the entire one-year stayed suspension would be unduly harsh." Whether the hearing judge treated these acts as mitigation, or contemplated that the failure to perform these acts would have amounted to aggravation is unclear.

[2] Respondent's participation in State Bar Court proceedings is mandated by section 6068, subdivision (i). Respondent did not display any spontaneous candor or cooperation in his participation in this matter. Absent such a display, respondent is not entitled to mitigating credit under standard 1.2(e)(V). (Cf. *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 203.)

[3] Respondent claims mitigation credit for the belated filing of his probation reports in June of 1995. Mitigation includes objective steps promptly taken spontaneously demonstrating remorse or recognition of wrongdoing. (Standard 1.2(e)(vii).) The State Bar correctly points out that no such credit is appropriate because the late filing of the reports occurred after he had knowledge of the probation revocation motion and thus was not spontaneous. (*In the Matter of Rose*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 204.)

APPROPRIATE LEVEL OF DISCIPLINE

In the order covering the present proceeding, the hearing judge described respondent's current probation violations as especially significant because of the third prior disciplinary proceeding. She asserted that he "should have recognized the importance of the quarterly reports after the last encounter with [the State Bar] Court for not filing them." Also, she observed that in October 1994 Mahoney and he had discussed probation requirements, including the filing of timely reports, and that in November 1994, the State Bar had sent him a letter cautioning him about the need for timely filing of reports and warning him that his next report was due by January 10, 1995. Despite all warnings, he waited until June 1995, after receiving the State Bar's probation revocation motion in the current proceeding, to file the reports due by January 10 and April 10, 1995.

The hearing judge concluded that the significant actual suspension was appropriate "to ensure that [r]espondent understands the consequences of not treating the probation conditions seriously." We agree. **[4]** Moreover, we conclude that respondent's continued unwillingness or inability to comply with the conditions of probation imposed on him by a Supreme Court order "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. [Citation.]." (*In re Kelley* (1990) 52 Cal.3d 487, 495.)

[5] Moreover, respondent has not timely filed a *single* quarterly probation report during the first year

and nine months of his probation. Stated differently, respondent filed each of his first seven probation reports late. When an attorney commits multiple violations of the same probation condition, the gravity of each successive violation increases. Respondent's seventh successive failure to timely file one of his probation reports unquestionably warrants the greatest level of discipline.

[6] In addition, respondent's late filing of his January 1995 and April 1995 probation reports is identical to the prior misconduct for which the Supreme Court disciplined respondent in its August 1994 order in case number S032298 (State Bar Court case number 94-PM-10678). This fact also supports our conclusion that respondent's current probation violations warrant the greatest level of discipline. (Cf. *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.)

Rule 562 provides that any period of actual suspension recommended in probation revocation proceedings "shall not exceed the entire period of stayed suspension" previously imposed on the respondent. Accordingly, the maximum period of actual suspension that we would ordinarily recommend, in light of the entire record in this proceeding, is one year. As we noted *ante*, respondent was involuntarily enrolled inactive for 10 days under section 6007, subdivision (d). He should be given credit for those 10 days. (Section 6007, subd. (d)(3).) In addition, our order will enroll respondent inactive on the effective date of this order. He should be given credit for that period of prospective inactive enrollment. (Section 6007, subd. (d)(3).) Accordingly, we modify the hearing judge's discipline recommendation by increasing the recommended period of actual suspension from six months to 11 months with credit as indicated.

We further recommend that respondent be suspended for the remaining 30 days of the previously ordered one year stayed suspension, and that execution of this 30 day suspension be stayed, and that respondent be placed on probation for four years on the conditions of probation recommended by the hearing judge. We recommend the extended period of probation to better insure that the respondent is both willing and able to comply with conditions of probation.

In addition, we modify the hearing judge's discipline recommendation by adding three probation conditions. The first two additional conditions require that respondent include an accountant's certification in his quarterly probation reports and take the State Bar's Client Trust Accounting and Record Keeping Course. We add those two conditions because respondent's arguments and testimony in this matter raise serious doubt as to whether respondent knows the nature, purpose, or method of keeping proper trust account records. The third additional condition requires that respondent attend the State Bar's Ethics School. Even though respondent attended Ethics School in November 1993 in accordance with one of the Supreme Court's prior disciplinary orders against him, we recommend that he take it again in accordance with rule 290.

INACTIVE ENROLLMENT

Absent a petition for review under rule 301 (*supra*, footnote 3) the State Bar urges, in its appellee's brief, not only that we exercise our independent authority to order respondent involuntarily enrolled inactive under subdivision (d) of section 6007, but that we expressly disapprove of the hearing judge's order enrolling respondent inactive under that subdivision because it directed that respondent's inactive enrollment be automatically terminated if and when either party filed a petition for review.

[7a] Before the State Bar Court orders that an attorney be involuntarily enrolled inactive under section 6007, subdivision (d), it must weigh the need for public protection in light of the Supreme Court's inherent and plenary jurisdiction over attorney admissions and discipline. To order the involuntary inactive enrollment of an attorney under subdivision (d) any time its requirements are met without regard to whether there is an issue of public protection and to the length of the actual suspension recommended could conceivably "defeat or materially impair" the Supreme Court's inherent prerogatives. (Cf. *Conway v. State Bar* (1989) 47 Cal.3d 1107, 1120, fn. 7 [The State Bar Court's authority to order involuntary inactive enrollment under section 6007, subdivision (c) in *exigent* circumstances does not defeat or materially impair the Supreme Court's inherent prerogatives.].)

[7b] This is because rule 952(e) of the California Rules of Court requires that a petition for Supreme Court review show that the petitioner has exhausted his or her review within the State Bar Court. Thus, an inactively enrolled attorney must first seek review of the hearing judge's order in the review department before seeking review by the Supreme Court. Where the period of time of the recommended actual suspension is short, it could expire before the Supreme Court can review the recommendation. In such a situation, the Supreme Court would be effectively deprived of any meaningful review of that recommendation, because section 6007, subdivision (d)(3) provides that an attorney be given full credit for any time she or he is enrolled inactive against any period of actual suspension it ultimately orders.

[7c] We measure the facts of this case against these enunciated criteria, noting that some of the issues before us are materially different than those before the hearing judge. Even though the State Bar did not proffer any evidence directly indicating that there was even an issue of public protection sufficient to justify the hearing judge's exercising her discretionary authority, under section 6007, subdivision (d), to order respondent involuntarily enrolled inactive, we conclude that such an issue is established by the respondent's four prior records of discipline and lack of any mitigating circumstance. (See, generally, standard 1.7(b) [if an attorney has two prior records of discipline, the degree of discipline in the current proceeding shall be disbarment in the absence of predomination of the most compelling mitigating circumstances].)

[7d] We are recommending an actual suspension of almost a year, compared to the hearing judge's recommendation of a six-month period of actual suspension. We are also aware that respondent may directly seek Supreme Court review of our final opinion. Thus, there can be no reasonable expectation that the time elapsing between when respondent is enrolled inactive under section 6007, subdivision (d) in accordance with our order and the finality of this matter will equal or exceed the final actual suspension imposed by Supreme Court. We conclude that, in light of the public protection issue noted *ante*, there is no reasonable possibility that our order directing respondent's involuntarily inactive enrollment will defeat or materially impair the Supreme Court's inherent prerogatives.

Moreover, in light of our order directing respondent's inactive enrollment, we conclude that the propriety of the hearing judge's conditional order of inactive enrollment is a moot issue. Nonetheless, we acknowledge our concern as to whether State Bar Court orders may tend to defeat or materially impair the Supreme Court's inherent prerogatives. (Cf. *Conway* v. *State Bar*, (*supra*), 47 Cal.3d. at p. 1120, fn. 7.)

We also observe that a conditional order of the sort here utilized by the hearing judge may invite petitions for review for reasons other than the merits of appellant's position, thereby increasing the immediate devotion of judicial resources. A proper balancing by the State Bar Court of the Supreme Court's inherent perogatives of review and the public protection requirement of immediate involuntary inactive status, even though it may be an invitation to inappropriate petitions for review, is the appropriate standard.

[8] However, by acknowledging these concerns we do not suggest that any given period of recommended actual suspension is controlling. We further do not suggest that the period of the recommended actual suspension is the only factor to be considered in determining whether an attorney should be enrolled inactive under section 6007, subdivision (d). Rather the record as a whole must be considered. In fact, when the State Bar Court seeks to estimate the time between its ruling and recommendation and when the Supreme Court can consider them, it may ordinarily rely on section 6093, subdivision (c) and rule 565, which both provide for the expedited handling of probation revocation proceedings. Likewise, when estimating that time limit when an attorney is charged with violating probation in an original disciplinary proceeding (see, generally, rule 560), in which the State Bar Court has ordered the attorney enrolled inactive involuntarily under section 6007, subdivision (c), the State Bar Court may ordinarily rely on section 6007, subdivision (c)(3) and rule 482, which both provide for the expedited handling of any original disciplinary proceedings in which the attorney has been involuntarily enrolled inactive.

DISCIPLINE RECOMMENDATION

We recommend:

1.That respondent Gerald J. Tiernan's probation as originally ordered and thereafter extended in Supreme Court case number S032298 be revoked, that the previously ordered stay of execution of the one year suspension be lifted, that respondent be actually suspended from the practice of law for eleven months of the previously ordered one year stayed suspension, with credit given for any period of involuntary inactive enrollment imposed under Business and Professions Code section 6007, subdivision (d), that respondent be suspended for the remaining 30 days of the previously ordered one year stayed suspension, that execution of this 30 day suspension be stayed, and that respondent be placed on probation for four years on the conditions of probation recommended by the hearing judge in her decision together with the following conditions:

(A)That respondent shall attend and satisfactorily complete the State Bar's Client Trust Accounting and Record-Keeping Course within one year of the effective date of the Supreme Court order in this matter and furnish satisfactory proof of such to the Probation Unit of the Office of the Chief Trial Counsel within that same year. This condition of probation is separate and apart from respondent's Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing the State Bar's Client Trust Accounting and Record-Keeping Course.

(B)That respondent shall attend and satisfactorily complete the State Bar's Ethics School within one year of the effective date of the Supreme Court order in this matter and furnish satisfactory proof of such to the Probation Unit of the Office of the Chief Trial Counsel within that same year. This condition of probation is separate and apart from respondent's MCLE requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing the State Bar's Ethics School.

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

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

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

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

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

(2)Whether 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";

(3)Whether respondent has maintained a permanent record showing:

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

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

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

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

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

2.That respondent be ordered to comply with rule 955 of the California Rules of Court, as recommended by the hearing judge.

3.That the State Bar be awarded its costs in accordance with Business and Professions Code section 6086.10, as recommended by the hearing judge.

INACTIVE ENROLLMENT ORDER

[7e] It is hereby ordered that respondent Gerald J. Tiernan be enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (d), effective 10 days after the date of service of this opinion and order on him.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STATE BAR INVESTIGATION OF MEMBER W

A Member of the State Bar.

No. 93-O-17837

Filed December 19, 1996; as modified, December 26, 1996

SUMMARY

Member filed a motion to quash the investigative subpoena the State Bar issued and served on member's bank seeking the production of financial records relating to member's trust account. The State Bar issued the subpoena in accordance with the State Bar Act and the State Bar's Rules of Procedure. Member sought to have the subpoena quashed on constitutional grounds. A hearing judge determined that the procedures for issuing investigative subpoenas for trust account records under the State Bar Act and the State Bar Rules of Procedure conflicted with the procedures for issuing subpoenas in civil matters under the Code of Civil Procedure and the Government Code. The hearing judge concluded that the Code of Civil Procedure and the Government Code pertained and then granted the motion because the subpoena was not issued in accordance with them. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar sought interlocutory review. The review department held that the Code of Civil Procedure and the Government Code do not pertain to investigative subpoenas of the State Bar and that the statutory scheme meets the standards set forth by the Supreme Court in a prior case, and that the subpoena was issued in accordance with that statutory scheme. Accordingly, the review department reversed the hearing judge's order granting the motion and remanded the matter to the hearing department.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Member: Theodore A. Cohen

HEADNOTES

[1 a-c] **193 Constitutional Issues**

A client has a reasonable expectation of privacy regarding her deposits in an attorney's trust account. However, that expectation of privacy is limited by the Business and Professions Code

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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.

section that provides that all attorneys are deemed to have irrevocably authorized the disclosure of the contents of their trust account records to the State Bar. Thus, the right of privacy is not absolute, and must be balanced against the need for disclosure. The legislature has clearly determined that there is a public interest in disclosure of trust account information sought in attorney misconduct investigations.

[2 a, b] **114 Procedure—Subpoenas**
135.40 Procedure—Rules of Procedure
135.89 Procedure—Rules of Procedure

The Rules of Procedure of the State Bar presently in effect concerning the issuance and service of investigative subpoenas are not materially different than were the rules before the Supreme Court in a prior case. Where the subpoena duces tecum was issued based on a competent declaration that was presented to the designee of the Chief Trial Counsel which demonstrated that the records sought were, in fact, trust account records, that they were reasonably required for the matter under investigation, and that the matter under investigation concerned an attorney, the subpoena was issued in accordance with those rules.

[3] **114 Procedure—Subpoenas**
135.10 Procedure—Rules of Procedure
135.40 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
214.30 State Bar Act—Section 6068(m)
275.00 Rule 3-500 (no former rule)

In a prior case, the Supreme Court expressed concern for the privacy of the targeted attorney's clients, and further noted that the proceedings of the State Bar were conducted in strict confidence. While such formal proceedings are now public, the investigative process is conducted in the same strict confidence that the Supreme Court noted in the prior case. In addition, in the event the records are sought to be used in a subsequent public proceeding following a confidential investigation, the attorney's duty of informing the client or clients whose trust account information may become public of that fact would come into play. The client or clients would then have the opportunity to seek relief from the State Bar Court under the rules of procedure that create a method for sealing portions of the record.

[4] **114 Procedure—Subpoenas**
135.40 Procedure—Rules of Procedure
192 Due Process/Procedural Rights
193 Constitutional Issues
194 Statutes Outside State Bar Act

Based on the determination that the provisions of the State Bar Act and the Rules of Procedure of the State Bar concerning investigative subpoenas for trust account records meet the standard as enunciated by the Supreme Court in a prior case, the review department concluded that there was no need to import either the provisions of Code of Civil Procedure section 1985 et seq., or the provisions of Government Code section 7470 et seq., for either due process or other reasons into the procedures for the issuance of State Bar investigative subpoenas.

Additional Analysis

[None]

OPINION

OBRIEN, P.J.:

A motion to quash the service of an investigative subpoena seeking the production of certain trust account records of member W[1] has been granted by the hearing department, and the Office of Chief Trial Counsel of the State Bar (OCTC) seeks interlocutory review under the provisions of the Rules of Procedure of the State Bar, rule 300.[2]

I. *PROCEDURAL HISTORY*

On or about January 20, 1995, an attorney designee of the Chief Trial Counsel of the State Bar issued a subpoena duces tecum to the custodian of records of a bank for certain client trust account records of member. That subpoena was served on the bank on or about the 20th of that same month. No copy was served on member, nor were any supporting declarations served on either the bank or member. Member learned of the subpoena as the result of the bank mailing him or her a copy.

On February 27, 1995, member brought this motion to quash the subpoena. On March 10, 1995, the hearing department denied the motion on the grounds that the subpoena complied with the requirements of rule 150, and that the court had no authority to invalidate the subpoena based on constitutional grounds. Member petitioned for review in this court of the March 10, 1995, order. So far as can be determined from the record before us, OCTC, in response to that petition, for the first time revealed the confidential declaration of its investigator relied on in issuing the subpoena, and it contains information on which the subpoena could be properly based. We remanded stating "Mere compliance with a rule, however, cannot justify an improper invasion of constitutional rights." We went on to set forth four questions that the hearing judge should address, which we restate: 1. Did the subpoena procedure used comply with all of the rules, including rule 150? 2. Did the subpoena procedure comply with privacy protection as afforded by the California Constitution, considering *Doyle.* v *State Bar* (1982) 32 Cal.3d 12, 18-21? 3. Did the subpoena procedure comply with all other constitutional requirements, including due process? This question included a recommendation to determine if member initially received adequate notice despite not being served with a copy of the confidential declaration of the investigator. 4. Has the State Bar subsequently cured any inadequate notice by providing a copy of the investigator's confidential declaration?

On remand, a newly assigned hearing judge considered the recommendations of the review department, and further recognized the conflict between the procedures and safeguards established in Code of Civil Procedure section 1985 et seq., concerning subpoenas issued in civil matters, as well as the conflict with Government Code section 7470 et seq., on the one hand, and the mandates governing the State Bar and this court as set forth in the State Bar Act (Bus. & Prof. Code, § 6000 et seq.),[3] on the other hand. In granting the motion to quash, the hearing judge determined the provisions of Code of Civil Procedure section 1985 and Government Code section 7470, subdivision (a) and section 7476 pertained. This interlocutory petition for review follows. As required, the matter is reviewed for an error of law or abuse of discretion. (Rule 300(b).)

Following an analysis of the statutory scheme governing State Bar investigative subpoenas, we shall determine that the provisions of Code of Civil Procedure section 1985 and Government Code section 7470, subdivision (a) and section 7476 do not pertain to investigative subpoenas of the State Bar and that the statutory scheme meets the standards of *Doyle* v. *State Bar, supra* 32 Cal.3d 12, and we shall reverse the order quashing the subpoena in this matter.

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1. No charges have been filed in this matter; therefore the investigation is confidential. (Bus. & Prof. Code, § 6086.1, subd. (b).) The name of the member being investigated and other identifying material are deleted.

2. All references to rules shall be to the Rules of Procedure of the State Bar unless otherwise noted.

3. All refereuces to sections shall refer to the Business and Professions Code, unless otherwise indicated.

II. DISCUSSION

We set out the statutory scheme for pre-filing investigative subpoenas seeking trust account records of attorneys in California as revealed by the State Bar Act.

Section 6044, subdivision (c) provides the State Bar may conduct investigations of all matters relating to the discipline of its members. Section 6086.1, subdivision (b) mandates that all such investigations are confidential until such time as formal charges are filed. Section 6049, subdivision (a)(3) authorizes the State Bar to compel, by subpoena, the production of documents pertaining to that investigation. Section 6049, subdivision (b) authorizes Chief Trial Counsel, or designee, to issue the subpoena relating to an investigation.

Section 6069, subdivision (a) provides that all lawyers admitted to practice in California shall be deemed to have irrevocably authorized disclosure to the State Bar and the Supreme Court of all trust account records, provided no such records shall be disclosed to the State Bar absent a subpoena pursuant to section 6049. Section 6069, subdivision (a) requires the Board of Governors of the State Bar to create by rule a provision for notice to a lawyer subject to an investigative subpoena for trust account records similar to that required by Government Code section 7473, subdivision (d). That Government Code section requires that an agency or department examining financial records provide notice to the "customer" within 30 days of the receipt of the records, and contains provisions for up to two additional extensions of 30 days each, in which to give the notice. Section 6051.1 requires that a motion to quash an investigative subpoena be brought in the State Bar Court. (See *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18, 22.)

In implementing this scheme the State Bar has adopted rules of procedure of the State Bar of California. Rule 2301 et seq. further effectuate the confidential nature of State Bar investigations, as mandated by section 6086.1, subdivision (b). Rule 150(b) provides the sole ground for quashing an investigative subpoena of trust account records "shall be that the records sought by the subpoena are not trust account records... ." Rule 150(a)(1) requires the motion to quash to be filed within five court days of service of written notice of the subpoena, or within five days of actual knowledge of the subpoena, whichever is earlier. Rule 2503(b) requires that the trust account subpoena describe the records sought with particularity and be supported by a declaration showing reasonable cause to believe the records sought pertain to trust funds and they are required for the matter under investigation. The Chief Trial Counsel is empowered to make the determination that the records sought are within the authorized parameters. (§ 6049, subd. (b); rule 2503(b)(2).) Rule 2503(b)(2) further provides that the declaration supporting the subpoena shall be confidential and need not be disclosed to the targeted lawyer, the financial institution, or the State Bar Court.

We evaluate this statutory and rule scheme in light of the privacy clause of the California Constitution (art. I, § 1) and as considered by the California Supreme Court.

[1a] As discussed in *Doyle* v. *State Bar, supra,* 32 Cal.3d 12, 20, and properly considered by the hearing judge, member's clients had a reasonable expectation of privacy regarding their deposits in member's trust account. However, that expectation of privacy is limited by the provisions of section 6069, subdivision (a), requiring the State Bar to mail to each lawyer an annual notice that the member of the bar is deemed to have irrevocably authorized disclosure of the contents of the lawyer's trust account records. Thus, the right of privacy is not absolute, and must be balanced against the need for disclosure. The legislature has clearly determined that there is a public interest in disclosure of trust account information sought in attorney misconduct investigations. (§ 6091.1, subd. (a).)

[1b] The protectable privacy interest may be required to give way to the public interest in a given situation. (*Board of Medical Quality Assurance* v. *Gherardini* (1979) 93 Cal.App.3d 669, 679. [Privacy interest in medical records gives way to public interest in competent medical treatment.] Citing *Gherardini*, the court in *Doyle, supra*, 32 Cal.3d 12, addressed the contention that State Bar procedures

violated the California Constitution (art. I, § 1.) and stated ". . . administrative review of a patient's confidential files could be based either upon his consent or waiver, or upon a showing of 'good cause,' including a demonstration that the materials were relevant and material to the board's inquiry, and that the patient's privacy would not be unduly invaded by disclosure." (*Id.*, at p. 20.)

[1c] In the matter before us we must assume that members of the bar are acquainted with the provisions of section 6069, subdivision (a), especially in view of the requirement that the State Bar give notice of this requirement annually to each member. We must further assume that members of the bar alert their clients to these provisions as a part of their duties to the client in holding funds in their trust account for the client's benefit. (See § 6068, subd. (m) [duty to respond promptly to reasonable status inquiries and to keep clients reasonably informed of significant developments in their matters]; rule 3-500 [similar duty].) As a consequence, a client's expectation of privacy regarding trust account matters must be lower than as to the balance of her or his affairs.

[2a] Our review shows the Rules of Procedure of the State Bar presently in effect concerning the issuance and service of investigative subpoenas are not materially different than were the rules before the Supreme Court in *Doyle* v. *State Bar*, *supra*, 32 Cal.3d 12, with exceptions noted, *post*. We have also concluded from attachments to OCTC's petition for review that the investigator's declaration supporting the issuance of the subpoena in this matter is clearly sufficient to support the issuance of the subpoena duces tecum in the case before us. We thus find, that the procedures established by the State Bar Act and the Rules of Procedure of the State Bar have been complied with.

[2b] A competent declaration was presented to the designee of the Chief Trial Counsel, demonstrating that the records sought were, in fact, trust account records, and that they were reasonably required for the matter under investigation, and the matter under investigation concerned an attorney. While the record is not clear on the time respondent was notified, it is clear that he was notified by the bank. No challenge to the timeliness of the motion is advanced by OCTC, and thus the right to make such a challenge is deemed waived.

[3] In *Doyle*, the Court expressed concern for the privacy of the targeted attorney's clients, and further noted that the proceedings of the State Bar were conducted in strict confidence. While such formal proceedings are now public, it is clear that the investigative process is conducted in the same strict confidence that the Supreme Court noted in *Doyle*. (§ 6086.1, subd. (b).) We also note that in the event the records are sought to be used in a subsequent public proceeding following the confidential investigation, the attorney's duty of informing the client or clients whose trust account information may become public of that fact would again come into play. (See § 6068, subd. (m); rule 3-500.) The client or clients would then have the opportunity to seek relief from the State Bar Court under rule 23. That rule defines and creates a procedure for sealing portions of the record. While this issue is not before us it would appear that rule 23 would again require a balance between the constitutional right of privacy and the public interest in being able to investigate attorney misconduct.

We need not decide any issues relating to the purported limitation set forth in rule 150(b) in this case, because OCTC has made a full record, including the declaration for the issuance of the subpoena. The member has been given a forum in the State Bar Court in which to challenge the subpoena as required by section 6051.1. As a result, we are able to determine that both the procedures required by the State Bar Act (§ § 6049, subd.(a)(3); 6049, subd. (b); and 6051.1), and the Rules of Procedure of the State Bar (rule 2503(b)) have been complied with, as well as the fact that the records sought were trust account records.

[4] Based on the determination that the provisions of the State Bar Act and the Rules of Procedure of the State Bar concerning investigative subpoenas for trust account records meet the standard as enunciated in *Doyle*, we find no need to import either the provisions of Code of Civil Procedure section 1985 et seq., or the provisions of Government Code section 7470 et seq., for either due process or other reasons into the procedures for the issuance of State

Bar investigative subpoenas. However, nothing in this decision is intended to, in any way, affect the applicability of those Code of Civil Procedure sections or Government Code sections to either discovery or trial proceedings in matters before the State Bar Court.

III. ORDER

We order that the order granting the motion to quash the investigative subpoena for the trust account records of member W be reversed and that the matter be remanded to the hearing department for further proceedings.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

TIMOTHY W. ELLIOTT

A Member of the State Bar

No. 94-O-18609

Filed December 23, 1996

SUMMARY

In a single client matter, respondent failed to hold his client's money in trust until paid to the client, failed to promptly pay the client her share of a settlement, and misappropriated approximately $4,000 of the client's money. Respondent failed to answer the notice of disciplinary charges and his default was entered. The hearing judge recommended that respondent be suspended from the practice of law for a period of three years, that execution of the suspension be stayed, and that he be placed on probation for a period of three years, on conditions, including one year actual suspension. However, the hearing judge did not recommend that respondent make restitution because the State Bar did not prove that the respondent had not paid the money back. (Hon. David S. Wesley, Hearing Judge.)

The State Bar sought review, contending that respondent should be required to make restitution, and that the discipline recommendation should be increased to include a two-year actual suspension. The review department concluded that restitution was appropriate, and that the discipline recommendation should be increased to five years stayed suspension and five years probation on conditions, including two years actual suspension and until respondent makes restitution and establishes his rehabilitation and fitness to practice.

COUNSEL FOR PARTIES

For State Bar: Cecilia M. Horton-Billard

For Respondent: No Appearance

HEADNOTES

[1]	**171**	**Discipline—Restitution**
	221.00	**State Bar Act—Section 6106**
	280.00	**Rule 4-100(A) [former 8-101(A)]**

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

Even if an attorney returns money that he or she misappropriates, the attorney is still be culpable of the original misappropriation. Thus, restitution is not a defense to a misappropriation charge. Rather, it is a mitigating circumstance that could possibly support a reduction in the discipline. Respondent had the burden of proving mitigating circumstances, including restitution. Where there was no evidence that respondent paid the money back, he did not meet his burden of proving that restitution had been paid. Under these circumstances, restitution was an appropriate component of the discipline.

Additional Analysis

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Mitigation

Found but Discounted

710.33 No Prior Record

Discipline

1013.11 Stayed Suspension—5 Years
1015.08 Actual Suspension—2 Years
1017.11 Probation—5 Years

Probation Conditions

1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

OPINION

OBRIEN, P.J.:

We review the recommendation of the hearing judge in this matter that Timothy W. Elliott, respondent, be suspended from the practice of law for a period of three years, that execution of the suspension be stayed, and that he be placed on probation for a period of three years, on conditions, including one year actual suspension. The recommendation is based on the hearing judge's findings that, in a single client matter, respondent failed to hold his client's money in trust until paid to the client, failed to promptly pay the client her share of a settlement, and misappropriated approximately $4,000 of the client's money.

Respondent did not answer the notice of disciplinary charges, and his default was properly entered.[1] At the default trial, the State Bar relied exclusively on the allegations in the notice of disciplinary charges, which were deemed admitted by respondent as a result of his default. (Rule 200(d), Rules Proc. of State Bar, title II, State Bar Court Proceedings.) The State Bar did not introduce any independent evidence.

The State Bar seeks review, contending that respondent should be required to make restitution to the client of the money he misappropriated, and that the discipline recommendation should be increased to include a two-year actual suspension. We have independently reviewed the record in this matter and conclude that restitution is appropriate. We also deem it appropriate to recommend an increase in the discipline to five years stayed suspension and five years probation on conditions, including two years actual suspension and until respondent makes restitution and complies with standard 1.4(c)(ii). (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards).)

FACTS AND CONCLUSIONS

The State Bar does not contest the hearing judge's findings of fact or conclusions of law. As indicated above, the findings are based exclusively on the allegations in the notice of disciplinary charges. Based on our independent review of the notice of disciplinary charges, which constitutes the evidence, we agree that the hearing judge's findings and conclusions are supported by the record, and we adopt them. Briefly, those findings are as follows.

Respondent was admitted to practice law in this state in 1987 and has not been previously disciplined. In July 1993, he was employed to represent Coleen Latta in a wrongful death matter pursuant to a written fee agreement. In December 1993, before an action had been filed, respondent settled the case for $25,000. In the later part of December 1993, respondent deposited the settlement money in his client trust account. As of September 1994, respondent owed Latta $4,000 from the settlement funds, but his trust account had a negative balance of approximately $5,300. The trust account balance fell below the $4,000 that was owed to Latta between September 1994 and February 1995. Respondent failed to pay Latta the $4,000 that he owed her despite her repeated attempts to collect the money; he failed to maintain that money in his client trust account; and he wilfully misappropriated it to his own use and purpose.

The notice of disciplinary charges alleges that respondent violated rule 4-100(A) and 4-100(B)(4) of the Rules of Professional Conduct,[2] and section 6106 of the Business and Professions Code.[3] The hearing judge concluded that respondent violated rule 4-100(A) because he did not maintain his client's funds in the trust account, rule 4-100(B)(4) because he failed to pay that money promptly to his client

1. In light of respondent's failure to file an answer, the hearing judge ordered him involuntary enrolled inactive under Business and Professions Code section 6007, subdivision (e). Respondent's inactive enrollment under that order will terminate only on the earlier of (1) the effective date of the Supreme Court's order in this matter or (2) the date he files a motion for relief from default and a proposed answer in this matter. (See Bus. & Prof. Code, § 6007, subd. (e)(2).)

2. Unless otherwise indicated, all further references to rules are to the current Rules of Professional Conduct of the State Bar of California.

3. Unless otherwise indicated, all further references to sections are to the Business and Professions Code.

upon demand, and section 6106 because he wilfully misappropriated the $4,000.[4]

In mitigation, the hearing judge found that the absence of discipline in respondent's six and one-half years of practice prior to the misconduct was entitled to only minimal weight as a mitigating factor because it is a relatively short period of time. No aggravating circumstances were found by the hearing judge.

DISCUSSION

The State Bar raises two key issues on review. The first issue which has two aspects raises the propriety of the hearing judge failing to order restitution. The first aspect of that issue is did the hearing judge err in holding that additional proof is required other than the deemed admissions that result from the default. The second aspect is, did the hearing judge err in not including in the discipline recommendation the requirement that respondent pay restitution to the client for the $4,000 that he misappropriated. The second key issue raised is whether the discipline recommendation is insufficient.

The hearing judge did not include restitution in his recommendation because he concluded that there was no clear and convincing evidence that respondent did not ultimately pay Latta the money. The hearing judge reasoned that the fact that respondent misappropriated the money did not establish that he failed to ultimately pay the money back. Since the notice of disciplinary charges did not allege that respondent did not subsequently pay the money back and since the State Bar did not present any evidence establishing that Latta was not paid, the State Bar did not prove by clear and convincing evidence that respondent failed to re-pay the $4,000. We disagree that it was the State Bar's burden to prove that restitution had not been made.

[1] Even if respondent had paid Latta, he would still be culpable of the original misappropriation. Thus, restitution would not be a defense to the misappropriation charge. Rather, it would be a mitigating circumstance that would possibly support a reduction in the discipline. (*Sevin* v. *State Bar* (1973) 8 Cal.3d 641, 646; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 15, fn. 7.) Respondent has the burden of proving mitigating circumstances. (Std. 1.2(e); *In the Matter of Twitty* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 664, 673.) This burden applies as well to restitution. The notice of disciplinary charges alleged that respondent misappropriated the money. This allegation was deemed admitted by respondent as a result of his default. Thus, the record establishes clearly and convincingly that respondent misappropriated the $4,000. There is simply no evidence in the record that indicates that respondent paid Latta her settlement money. Accordingly, respondent did not meet his burden of proving that restitution has been paid. Under these circumstances, we conclude that restitution is an appropriate component of the discipline in this case. (See *Bate* v. *State Bar* (1983) 34 Cal.3d 920, 924-925.)

Turning to the degree of discipline, we note that the Supreme Court has repeatedly stated that the usual discipline for wilful misappropriation of client funds is disbarment. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37, and cases there cited.) The standards are consistent. Standard 2.2(a) provides that culpability for wilful misappropriation of entrusted funds shall result in disbarment unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances predominate. However, the standards are not mandatory sentences imposed in a blind or mechanical manner. (*Gary* v. *State Bar* (1988) 44 Cal.3d 820, 828.) We must also consider whether the recommended discipline is consistent with prior cases that have similar facts. *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

The hearing judge concluded that a one year period of actual suspension was appropriate based on

4. The hearing judge did not find respondent culpable of an additional charge of failing to cooperate in the disciplinary proceeding (Bus. & Prof. Code, § 6068, subd. (i)). The State Bar does not contest that conclusion, and after independently reviewing the record, we adopt it.

Edwards v. *State Bar*, *supra*, 52 Cal.3d 28. Edwards commingled personal and client funds in a trust account and misappropriated $3,000 of client funds. The State Bar recommended two years actual suspension. The Supreme Court agreed with the State Bar that disbarment was not necessary, but concluded that one year actual suspension was sufficient, noting that Edwards had not been disciplined before, that he engaged in no acts of deceit, that he made full restitution before he was aware of the State Bar complaint, that he was candid and cooperative throughout the disciplinary proceeding, and that he voluntarily took steps to improve his management of entrusted funds. (*Id.* at pp. 38-39.)

As in *Edwards*, respondent has not been previously disciplined. (See *Edwards* v. *State Bar, supra,* 52 Cal.3d at p. 39.) In addition, respondent did not engage in acts of deceit. However, there is no evidence that respondent made restitution and he did not participate in the disciplinary proceeding. An attorney's attitude toward the disciplinary process is a consideration in determining discipline. (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 451.) These factors indicate that although disbarment is not necessary here, more severe discipline than imposed in *Edwards* is warranted.

In *Bate* v. *State Bar, supra*, 34 Cal.3d 920, the attorney was suspended for five years, execution of which was stayed, and was placed on five years probation on conditions, including actual suspension for three years and until he made restitution. Bate settled a client's case without the client's consent, misrepresented to the client that the matter was not concluded, wilfully misappropriated approximately $2,200 of the client's funds, and did not make any attempt to repay the misappropriated money. In addition, Bate did not participate in the disciplinary proceeding at the State Bar level. Bate did not have a prior record of discipline and practiced law approximately eight years prior to his misconduct. The Supreme Court held that the discipline was not excessive "in light of the amount of funds misappropriated, petitioner's initial casual response to the proceeding, and his failure to make an offer to make restitution to his client." (*Id.* at p. 924; see also *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357.)

Unlike Bate, respondent did not settle Latta's case without her consent; nor did he misrepresent the status of the case to her. These facts indicate that less discipline than imposed in *Bate* is appropriate here.

In light of the foregoing, we conclude that five years stayed suspension, five years probation on conditions, including two years actual suspension, will be sufficient to protect the public, courts and the profession. We also deem it appropriate to require respondent to make restitution to his client of the money he misappropriated before he is relieved of his actual suspension. (See *Bate* v. *State Bar, supra,* 34 Cal.3d at p. 925.) As we are recommending an actual suspension of two years, we also include the requirement that respondent demonstrate his rehabilitation and fitness to practice prior to being relieved of his actual suspension pursuant to standard 1.4(c)(ii).

RECOMMENDATION

We recommend that Timothy W. Elliott be suspended from the practice of law for a period of five years, that execution of the order of suspension be stayed, and that he be placed on probation for a period of five years, on the conditions of probation recommended by the hearing judge, except as follows.

(1)We modify condition number 1 to read "That respondent shall be actually suspended from the practice of law in this state for the first two years of his probation and until he makes restitution to Coleen Latta (or the Client Security Fund, if appropriate) in the amount of $4,000 plus 10% interest per annum from September 16, 1994, until paid and furnishes satisfactory proof thereof to the State Bar Probation Unit 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)We modify condition number 8 to reflect our recommended five year stayed suspension.

We further recommend that respondent be ordered to comply with the requirements of rule 955 of

the California Rules of Court and that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code, as recommended by the hearing judge. Finally, we modify the hearing judge's recommendation that respondent be required to take and pass the Multistate Professional Responsibility Examination to provide that respondent must do so within the period of his actual suspension and, as modified, adopt the recommendation.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT STEVEN KAPLAN

A Member of the State Bar

Nos. 89-O-16723, 91-O-08041, 91-O-08534, 92-O-14506, 92-O-15331, 92-O-16536, 93-O-16047

Filed December 26, 1996

SUMMARY

Respondent committed extensive misconduct between 1986 and 1993. Asserting that the misconduct included no act of moral turpitude and that respondent's subsequent office reforms strongly mitigated his wrongdoing, the hearing judge recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until respondent proves his rehabilitation. (Hon. Michael E. Wine, Hearing Judge Pro Tempore.)

Respondent requested review. Although he admitted many ethical violations, he described them as minor. He argued that they resulted mainly from negligent office management and involved no moral turpitude. In addition, he sought the dismissal of almost all the charges against him in six matters on the grounds that parts of some notices to show cause were not adequate and that the record did not support the factual findings and culpability conclusions. According to respondent, the appropriate discipline would be actual suspension for ninety days if his challenges were entirely successful or for six months to one year if they were not.

The review department found most of the challenged portions of the notices to be sufficient for the hearing judge's culpability conclusions, and it agreed with many of the hearing judge's factual and legal determinations. Also, the review department found that respondent's habitual and reckless disregard of his clients' interests amounted to a pattern of misconduct involving moral turpitude, that other substantial aggravating factors surrounded his misconduct, and that the record established no substantial mitigating factors. The review department thus recommended disbarment.

COUNSEL FOR PARTIES

For State Bar: Russell G. Weiner

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] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Respondent recklessly provided incompetent legal services where he filed a complaint for a client and then took no substantive action on the client's behalf for three and one-half years despite inquiries from the client about the status of the case.

[2] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Respondent recklessly provided incompetent legal services where a matter presented serious evidentiary problems requiring timely and substantive action, but where he did not clearly advise the client of the problems and obtain her consent to a strategy for handling the matter, where he did not seek to terminate his employment, and where he did not aggressively pursue the matter.

[3] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Respondent violated the rule requiring prompt payment of client funds on request where a client asked respondent to distribute certain trust funds to the client, where another person to whom respondent owed a fiduciary duty claimed a lien on these funds, and where respondent did not promptly take appropriate steps to resolve the dispute in order to disburse the funds.

[4] **214.30 State Bar Act—Section 6068(m)**
275.00 Rule 3-500 (no former rule)
An attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients.

[5] **191 Effect/Relationship of Other Proceedings**
511 Aggravation—Prior Record—Found
A prior record of discipline is an aggravating factor regardless of when the discipline was imposed. Where misconduct addressed by a current disciplinary proceeding resembles misconduct addressed by a prior disciplinary proceeding and occurred after the filing of a notice to show cause in the prior proceeding, the filing alerted the attorney to the ethically questionable nature of the misconduct. Thus, the prior disciplinary proceeding warranted significant weight in aggravation to the extent that the misconduct addressed by the current proceeding happened after the filing of a notice to show cause in the prior proceeding.

[6 a-d] **531 Aggravation—Pattern—Found**
Respondent engaged in a pattern of misconduct where he recklessly provided incompetent legal services to clients in eight matters during a period of more than seven years, where one of these clients lost a $25,000 settlement, where a dispute over $70,000 in payments which he had received for another of the clients remained unresolved for at least six years, and where three more of the clients lost their causes of action. The period of time over which the misconduct accrued, combined with the frequency of the occurrences lead the review department to conclude that respondent's failure to competently perform had become habitual and thus involved moral turpitude. An attorney's habitual disregard of clients' interests constitutes moral turpitude, even if such disregard results only from gross negligence rather than dishonesty.

[7] **795 Mitigation—Other—Declined to Find**
The pressure of a prior disciplinary proceeding does not justify lenient discipline for the current misconduct. By filing the initial notice to show cause in the prior disciplinary proceeding, the State Bar alerted respondent to his questionable behavior. Instead of providing mitigation, the prior disciplinary proceeding demonstrated the need for respondent to examine his conduct carefully and to avoid further ethical violations.

[8] **735.30 Mitigation—Candor—Bar—Found but Discounted**
Belated stipulations to facts which mainly concern easily provable facts merit limited weight in mitigation.

[9] **795 Mitigation—Other—Declined to Find**
Lack of experience in managing a law office does not mitigate misconduct.

[10 a, b] **861.30 Standards—Standard 2.6—Disbarment**
861.40 Standards—Standard 2.6—Disbarment
Disbarment was appropriate where respondent engaged in a pattern of misconduct which no tragic event or set of circumstances explained and where respondent was likely to continue or repeat the misconduct.

Additional Analysis

Culpability

Found

213.91 Section 6068(i)
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
273.31 Rule 3-310 [former 4-101 & 5-102]
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)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]

Aggravation

Found

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

Mitigation

Found but Discounted

760.31 Personal/Financial Problems
760.32 Personal/Financial Problems
793 Other

Declined to Find

740.51 Good Character

745.52 Remorse/Restitution

Discipline

1010 Disbarment

Other

175 Discipline—Rule 955

178.10 Costs—Imposed

OPINION

OBRIEN, P.J.:

This consolidated proceeding deals with extensive misconduct by respondent Robert Steven Kaplan from 1986 to 1993. According to the hearing judge, the misconduct included no act of moral turpitude, and respondent's subsequent office reforms strongly mitigated his wrongdoing. The hearing judge recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until respondent proves his rehabilitation.

Respondent requested review. In ten matters, he admits that he committed ethical violations other than failure to cooperate with disciplinary investigations, and he does not dispute that he failed to cooperate in seven of these matters and in seven other matters. Describing his violations as minor, he argues that they resulted mainly from negligent office management and involved no act of moral turpitude. In six matters, he seeks the dismissal of almost all the charges against him on the grounds that parts of some notices to show cause were not adequate and that the record does not support the factual findings and culpability conclusions. Respondent claims that the appropriate discipline is actual suspension for ninety days if his challenges are entirely successful or for six months to one year if they are not.

The State Bar's Office of the Chief Trial Counsel (State Bar) defends almost all the disputed factual findings, culpability conclusions, and notices to show cause. According to the State Bar, respondent committed two additional ethical violations of which the hearing judge did not find him culpable. The State Bar asserts that by recklessly and habitually disregarding his clients' interests, respondent engaged in a pattern of misconduct involving moral turpitude. Stressing an abundance of aggravation and a lack of mitigation, the State Bar recommends disbarment.

We find most of the challenged portions of the notices to be sufficient for the hearing judge's culpability conclusions, and we agree with many of the hearing judge's factual and legal determinations. We conclude that respondent recklessly failed to provide competent legal services in eight matters and that he failed to cooperate with disciplinary investigations in fourteen matters, to communicate properly with clients in nine matters, to forward files promptly to clients in three matters, to take reasonable steps to avoid foreseeable prejudice to his clients' rights upon withdrawal from employment in two matters, to deliver trust funds promptly upon request in two matters,[1] to render an appropriate accounting in one matter, to notify a client promptly about the receipt of funds in one matter, and to obtain the written consent of all relevant parties when he represented conflicting interests in one matter. Also, we find that respondent's habitual and reckless disregard of his clients' interests amounted to a pattern of misconduct involving moral turpitude. Surrounding his misconduct were other substantial aggravating factors, including a 1994 suspension for less serious but similar misconduct. The record reveals no substantial mitigating factors. In particular, his office reforms did not mitigate his wrongdoing. To protect the public, maintain high professional standards by attorneys, and preserve confidence in the legal profession, we recommend disbarment.

I. PROCEDURAL HISTORY

Respondent was admitted in 1979 to practice law in California. From 1987 to 1989, he committed substantial misconduct addressed by prior disciplinary action, in what we shall identify as *Kaplan I*. In that prior matter the State Bar filed notices to show cause covering that misconduct in March and June 1990. The two proceedings were consolidated, and the State Bar filed an amended notice for the consolidated proceeding in January 1991. After a disciplinary hearing and decision against him, respondent sought review.

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1. In one of the two matters, respondent's culpability of failing to deliver trust funds promptly upon request rests on facts already addressed by the conclusion that he recklessly failed to provide competent legal services. We do not give additional weight to this duplicative ethical violation in determining the proper discipline.

The review of *Kaplan I* resulted in *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, where the review department found respondent culpable of misconduct in nine matters. He failed to sign substitution of attorney forms promptly or to forward clients' files promptly in seven matters, failed to communicate properly in five matters, recklessly or repeatedly provided incompetent legal services in three matters, failed to endorse and return a settlement draft in one matter, and failed to pay court-ordered sanctions in one matter. The record, however, did not contain clear and convincing evidence to support the hearing judge's finding that respondent lacked candor in testifying during the disciplinary proceeding. Stressing that respondent had committed no act of moral turpitude or serious misconduct, had significantly harmed only one client, and had corrected the poor law office practices underlying much of his wrongdoing, the review department recommended a two-year stayed suspension and two-year probation, conditioned on a three-month actual suspension. The Supreme Court adopted this recommendation.

Between March 1992 and February 1994, the State Bar filed notices to show cause addressing the acts of misconduct covered by the current consolidated proceeding (*Kaplan II*). The hearing judge held 14 days of trial in 1994. On motions by the State Bar, the hearing judge properly dismissed five of the twenty-nine counts of alleged wrongdoing.

In 1995, the hearing judge filed an 82-page decision concluding that respondent committed ethical violations in the remaining 24 counts, encompassing 19 client matters.

Respondent requested review. After receiving extensions of time, he filed a 57-page opening brief. The State Bar promptly filed a 51-page response brief.

Pursuant to rule 305(b) of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings, we notified the parties in April 1996 that we might consider two issues which had not previously been raised: (1) whether respondent's misconduct as a whole involved moral turpitude and (2) if so, what weight such moral turpitude deserved in determining the appropriate discipline. We also allowed the parties to submit supplemental briefs on these issues if they wished. The State Bar filed such a brief; respondent did not.

Oral argument took place in May 1996.

II. DISCUSSION

Under our obligation of independent review (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we have examined the record, including several hundred exhibits, to ensure that clear and convincing evidence supports the hearing judge's findings (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 213; *In re Morse*, *supra*, 11 Cal.4th at p. 206). Except as indicated *post*, we agree with these determinations.[2]

A. Undisputed Determinations

Respondent disputes none of the hearing judge's determinations in the following 10 matters. He admits that he wilfully failed to cooperate with disciplinary investigations in seven of these matters and in seven other matters. We agree with the determinations except for one culpability conclusion in the Prickett matter.

1. Sciambia matter

In July 1987, respondent undertook the representation of Jennifer Sciambia, a minor. In December 1989 another attorney became successor counsel for Sciambia. Between March and August 1990 the successor counsel telephoned respondent's office repeatedly to obtain Sciambia's file. Respondent did not return these calls. Nor did he deliver the file until

2. The hearing judge dismissed some allegations on motions by the State Bar. We agree with these dismissals, which we find no need to discuss in this opinion. The hearing judge determined that the record did not support other allegations. Except as indicated *post*, we agree with these determinations and do not discuss them.

August 1990. Thus, he wilfully violated the requirement of rule 3-700(D)(1) of the current Rules of Professional Conduct[3] that an attorney whose employment has been terminated must promptly release all client papers at the client's request.

2. Weiss matter

In July 1987 Deborah Weiss employed respondent to represent her in two matters. For a year or so from March 1989 onward, Weiss telephoned respondent's office every week or two and was told that respondent was not available. Because the general, nonspecific comments of his assistants did not satisfy her, she always left messages for respondent to call her. He never did. In May 1990 she sent him a written request for a status report. He did not reply. Thus, he wilfully violated Business and Professions Code section 6068, subdivision (m),[4] which requires an attorney to respond promptly to reasonable status inquiries from clients and to keep clients reasonably informed of significant developments in their matters.

In June 1990 Weiss sent respondent a letter asking him to forward her file to her successor counsel. By failing to deliver the file for four months, he wilfully violated current rule 3-700(D)(1).

3. Deliman matter

In 1987 respondent executed a medical lien in favor of Alison Deliman, who provided medical services to one of his clients. Deliman notified respondent's office in October 1989 of a change of address. After learning that respondent had settled the client's case, Deliman telephoned respondent's office in January 1990 to request payment of her lien. A month later, respondent's office mailed a check for $2,190, the full amount of Deliman's lien, to Deliman's old address. Deliman did not receive the check. Between March 1990 and August 1991 Deliman contacted respondent's office many times to request payment of her lien and reminded his staff of her address change. Because of respondent's inadequate supervision of his staff, Deliman did not receive payment of her lien until September 1991. Thus, respondent wilfully violated his duty under current rule 4-100(B)(4) to pay funds promptly upon request.[5]

4. Gutierrez matter

Respondent undertook the representation of Gloria Gutierrez in 1987. Between September 1988 and March 1990 Gutierrez called his office three or four times a month to inquire about her case. Upon being told that he was not available, she left messages for him. Because he did not return her calls during this 18-month period, he wilfully violated section 6068, subdivision (m).

5. Inman matter

Michael Inman employed respondent in 1988. In December 1989 Inman's successor counsel asked respondent to forward Inman's file. Respondent did not do so until August 1990, after he had received a court order requiring him to forward the file. Thus, respondent wilfully violated current rule 3-700(D)(1).

6. Catlin matter

In 1988 respondent undertook the representation of Janice Catlin. From January 1989 through February 1990, Catlin telephoned respondent's office many times. Neither respondent nor his staff returned her calls. He thus wilfully violated section 6068, subdivision (m).

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3. Unless otherwise indicated, all references to current rules denote the provisions of the Rules of Professional Conduct in effect since May 27, 1989; and all references to former rules denote the provisions of the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

4. Unless otherwise indicated, all references to sections denote provisions of the Business and Professions Code.

5. Current rule 4-100(B)(4) provides that upon request by a client, an attorney must promptly pay any funds which the client is entitled to receive. This rule also applies to the obligation of an attorney to pay third parties out of fuuds held in trust, including the obligation to pay holders of medical liens. (Cf. *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979 [obligation to pay a third party under former rule 8-101(B)(4), whose provisions were nearly identical to those of current rule 4-100(B)(4)].)

7. Boyer matter

In January 1986 James Boyer employed respondent. Although respondent filed a complaint on Boyer's behalf in the same month, he took no other substantive steps to protect Boyer's interest. During the next few years, respondent seldom communicated with Boyer, who left many messages to which respondent did not reply. Respondent told Boyer in the late summer of 1989 that Boyer's case seemed likely to settle. Thereafter, respondent abandoned the case and communicated no further with Boyer. In September 1991 the superior court ordered respondent to appear and show cause why Boyer's case should not be dismissed. Because respondent neither appeared nor filed an at-issue memorandum, the court dismissed Boyer's case in November 1991.

By failing to reply to reasonable requests for information from Boyer, respondent wilfully violated his duty to communicate with a client under section 6068, subdivision (m) and current rule 3-500, whose provisions are nearly identical to those of section 6068, subdivision (m). The rule violation, however, merits no additional weight in determining the proper discipline because it rests upon the same misconduct as the statutory violation.[6]

The State Bar alleged that respondent violated former rule 6-101(A)(2) and current rule 3-110(A). Both rules prohibited the intentional, reckless, or repeated failure to provide competent legal services.[7] The former rule applied through May 26, 1989; and the current rule, thereafter.

The hearing judge concluded (1) that respondent did not violate former rule 6-101(A)(2) because he did not abandon Boyer by July 1989 and, (2) that he violated current rule 3-110(A) because he thereafter abandoned Boyer. We disagree with the first conclusion and with the reasoning underlying both conclusions.

[1] An attorney who continues to represent a client has the obligation to take timely, substantive action on the client's behalf. (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 626; cf. *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 378 [duty to perform services diligently].) Reckless inattention to the client's needs violates this obligation. (*In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179, and cases there cited.) Respondent continued to represent Boyer after filing the complaint in January 1986 and yet took no substantive action on Boyer's behalf for three and one-half years despite Boyer's inquiries about the status of the case. Under these circumstances, respondent recklessly disregarded his obligation to provide competent legal services and thus violated former rule 6-101(A)(2) and current rule 3-110(A).

Current rule 3-700(A)(2) provides that an attorney who withdraws from employment must take reasonable steps to avoid reasonably foreseeable prejudice to the client's rights. By abandoning Boyer's case after the late summer of 1989, respondent wilfully violated current rule 3-700(A)(2).

8. Pyeatt matter

In 1985 Carla Pyeatt employed respondent to represent her in a personal injury matter. In March 1986 he filed a complaint on her behalf, received a $3,955 check from her former attorney under her medical payment coverage, deposited the check in his client trust account, and submitted a claim to the defendant's insurer. He did not inform Pyeatt about his receipt of the check.

6. Insofar as the facts establishing culpability under any section or rule include the facts establishing culpability under another section or rule, we attach no additional weight to such duplication in determining the appropriate discipline. (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose served by duplicative allegations of misconduct].)

7. Although the hearing judge concluded that respondent violated former rule 6-101(A)(2) and current rule 3-110(A) in nine matters, he did not explicitly state whether he considered the failures to provide competent legal services were intentional, reckless, or repeated. Yet in each matter where the facts establish such a violation, they also show that the failure was at least reckless. We construe the hearing judge's conclusions accordingly.

The defendant's insurer offered to settle Pyeatt's matter for $11,500 in April 1986. Respondent promptly sent Pyeatt a letter informing her of the offer and expressing his disapproval of it. He did not, however, reply to the insurer.

As early as April 1986, respondent was encountering difficulty in finding the defendant. In June and July 1986 he took some unsuccessful steps to locate the defendant, but he did not inform Pyeatt of the problem.

In July 1986 the defendant's insurer sent respondent a letter asking him to reply to the $11,500 settlement offer. He did not do so.

In late September 1986, the insurer sent respondent a letter requesting a courtesy copy of the complaint. The letter also asked whether respondent still represented Pyeatt.

In early November 1986, respondent provided a copy of the complaint to the insurer and asked for the defendant's current address.

Within a week, the insurer offered to settle the matter for $15,000. Respondent did not reply to this offer.

In April 1987 the insurer sent respondent a letter asking him to reply to the $15,000 settlement offer. He did not do so.

In August 1987 the insurer again asked for a reply to the $15,000 settlement offer. Within a week, respondent sent the insurer a letter rejecting the $15,000 offer and requesting the current address of the defendant.

Between 1987 and March 1989, respondent made several fruitless efforts to find the defendant. These efforts, however, were neither persistent nor diligent. Further, he did not effect service by publication. Nor did he inform Pyeatt of his failure to serve the defendant.

Respondent's failure to act gave rise to the conditions permitting dismissal and the matter was dismissed in 1991 for lack of prosecution. Respondent did not inform Pyeatt of these significant developments.

Between 1985 and 1991, Pyeatt called respondent's office many times and was repeatedly told that he was not available. Although she left messages for him, he did not return her calls.

In March 1992 respondent sent Pyeatt a check for $3,955.

Respondent committed various ethical violations. By failing to inform Pyeatt about the $3,955 check in March 1986, he wilfully violated former rule 8-101(B)(1), which required attorneys to notify clients promptly of the receipt of client funds. Also, respondent wilfully violated section 6068, subdivision (m) from 1987 onwards[8] by failing to reply to Pyeatt's reasonable status inquiries, to tell her about the problems in finding the defendant, and to inform her about the running of the statute of limitations and the dismissal of her case for lack of prosecution. Although respondent performed some services for Pyeatt, his representation of her reflected reckless and repeated incompetence, including his failures to reply to the insurer's letters of November 1986 and April 1987, his desultory attempts to locate the defendant, and his lack of prosecution before the statute of limitations ran in March 1989. Thus, he wilfully violated former rule 6-101(A)(2).

9. Hitchcock matter

Respondent undertook the representation of Sandra Hitchcock in a personal injury matter in 1987. Between then and the settlement of the matter in 1992, Hitchcock made numerous reasonable status inquiries to which respondent failed to reply. Such failure wilfully violated his duty to communicate with his client under section 6068, subdivision (m) and current rule 3-500.[9]

8. January 1, 1987, was the effective date of section 6068, subdivision (m).

9. As discussed *ante*, the rule violation warrants no additional weight in determining the appropriate discipline because it rests upon the same misconduct as the statutory violation.

Although Hitchcock's medical treatment ended in December 1988, respondent did not settle the relatively simple case until October 1992. Despite Hitchcock's persistent inquiries, many unexplained delays marred respondent's handling of the case. By recklessly disregarding his obligation to handle the case diligently, respondent wilfully violated current rule 3-110(A).

10. Prickett matter

In 1985, Raymond Prickett hired respondent to represent his minor son, Joshua Prickett, in a personal injury matter. From 1986 to 1991, Raymond Prickett and his wife made many reasonable status inquiries to which respondent did not reply. Respondent thereby wilfully violated section 6068, subdivision (m), as well as current rule 3-500.[10]

Although respondent performed some minimal services, long delays and inactivity marked his handling of the matter. Despite the inquiries from Joshua Prickett's parents, he allowed the matter to languish. The applicable statutes of limitations ran against the possible defendants, and Joshua Prickett received no compensation. By recklessly disregarding his obligation to provide competent legal services, he wilfully violated former rule 6-101(A)(2) and current rule 3-110(A).

We disagree with the hearing judge's determination that respondent wilfully violated current rule 3-700(A)(2) by failing to file a timely action on behalf of Joshua Prickett.[11] As discussed *ante*, current rule 3-700(A)(2) requires a withdrawing attorney to take reasonable steps to protect a client's rights. The record here lacks clear and convincing evidence of withdrawal from employment. In August 1991 respondent sent a letter asking for information about Joshua Prickett's medical condition. Also, respondent arranged two meetings with Joshua Prickett's parents in March 1992 although he cancelled both meetings.

11. Failure to cooperate with disciplinary investigations

Respondent admitted that he failed to cooperate with the State Bar's investigation of 14 matters: the Weiss, Deliman, Gutierrez, Inman, Boyer, Pyeatt, and Prickett matters, discussed *ante*; the McGraw, Barela/Quillinan, Stewart-Uniack, and Bodner matters, discussed *post*; and three other matters. These failures were each wilful violations of his duty to cooperate with disciplinary investigations under section 6068, subdivision (i).

B. Disputed Determinations

Respondent disputes most of the hearing judge's factual findings and culpability conclusions in the following six matters. He also attacks parts of the notices as inadequate to sustain culpability conclusions in some of these matters. The State Bar defends most of the disputed findings, conclusions, and notices and argues that the hearing judge should have found respondent culpable of additional violations. We agree with the hearing judge except as indicated *post*. In the Furia/Marino, McGraw, Barela/Quillinan, and Stewart-Uniack matters, we reject some culpability conclusions. We add two culpability conclusions: one in the Furia/Marino matter and the other in the Barela/Quillinan mater.

1. Piha matter

Shirley Piha was hit at a restaurant in November 1987. Three weeks later, she employed respondent, and he filed a complaint on her behalf in November 1988. He went to the site of the injury, got a title report on the property, did a business check on the restaurant, and obtained medical records. Also, he made minimal attempts to locate the man who struck Piha, to contact a witness, and to serve the property and business owners. Between December 1987 and March 1990, respondent spoke two or three times with Piha. At the end of March 1990, respondent sent

10. Because the rule violation rests upon the same misconduct as the statutory violation, the rule violation warrants no additional weight in determining the appropriate discipline, as discussed *ante*.

11. Because we addressed respondent's failure to file a timely action in examining his reckless disregard of the obligation to provide competent legal services, this failure weighs in our determination of the proper discipline, despite our rejection of respondent's culpability under current rule 3-700(A)(2).

Piha a letter requesting the address of her assailant. In April 1990 she sent respondent a letter expressing surprise at the request and inquiring about the status of her matter. Respondent did not reply to her inquiry until August 1990. Later in the same month, she met with respondent and terminated his employment.

We reject respondent's challenges to the hearing judge's culpability determinations. By failing to answer Piha's April 1990 letter for four months, respondent wilfully violated his duty to reply promptly to reasonable status inquiries under section 6068, subdivision (m).

[2] Also, he recklessly failed to provide competent legal services. As respondent stresses, Piha's matter involved unusual facts and presented serious problems of finding the assailant and the witness. The matter thus required timely and substantive action, which it did not receive from respondent. Although he took some steps, he did little to advance her interests. Upon becoming aware of the difficulties in Piha's matter, he did not clearly advise her of them and obtain her consent to a strategy for handling the case. He neither sought to terminate his employment nor aggressively pursued the matter. Instead, he made only meager efforts to investigate the matter and failed to obtain personal service on any defendant or to conduct any discovery. By recklessly disregarding the need for prompt action, he wilfully violated former rule 6-101(A)(2) and current rule 3-110(A). (Cf. *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 643.)

2. *Furia/Marino matter*

In May 1984 Joan Furia and Juanita Marino were involved in an accident in Furia's car. Marino was the driver; and Furia was the passenger.

In April 1985 Furia and Marino employed respondent to represent them.

In February 1987 Richard Peterson, counsel for the defendant, sent respondent an offer to settle for $35,000 and releases for Furia and Marino to sign. Five months later, Peterson sent respondent a letter requesting the signed releases. In September 1987 Peterson telephoned respondent's office three times and left messages for him. In February 1988, Peterson sent respondent another letter requesting the signed releases. Respondent replied to none of Peterson's letters or telephone messages.

In March 1988 respondent obtained signatures from Furia and Marino for settlement disbursement sheets. He did not get their signatures for the releases.

In late January 1989, respondent sent Peterson's office a letter accepting the $35,000 settlement offer.

In March 1989 Furia and Marino sought other counsel. Furia's new attorney was Roger Calton; and Marino's new attorney was Karen Schmidt. On March 7, 1989, Furia sent respondent a letter asking him to forward her file to Calton. On March 9, 1989, Calton sent respondent a substitution of attorney form for him to sign and a letter from Furia authorizing the transfer of her file. On March 24 and 27, 1989, Calton left telephone messages which respondent did not return. Calton spoke with respondent's office manager on March 28, 1989, and collected Furia's file a week later.

In March 1989 Schmidt sent respondent a request to sign a substitution of attorney form.

In May 1989 Calton sent respondent another letter asking him to sign a substitution of attorney form.

In June 1989 Calton and Schmidt filed motions to become substitute counsel for Furia and Marino, respectively.

In July 1989 Peterson advised respondent that he was withdrawing the $35,000 settlement offer because of respondent's failure to return the signed releases.

In late July 1989, the court held a hearing on the motions filed by Calton and Schmidt to become substitute counsel. Respondent did not appear. The court granted the motions in August 1989. The $35,000 offer was reinstated, and the matter was settled.

Respondent argues that the hearing judge's determination of culpability under former rule

6-101(A)(2) rested upon inadmissible hearsay evidence. Having independently reviewed the record, we conclude that stipulated facts, testimony by Peterson, and properly admitted and considered State Bar exhibits establish respondent's reckless failure to provide competent legal services in 1987 and 1988. Respondent let the $35,000 settlement offer languish for almost two years. Despite letters and messages from Peterson, respondent did not take diligent action to obtain or return the necessary signed releases.

According to respondent, the hearing judge's determination of culpability under former rule 6-101(A)(2) ignored plausible, uncontradicted testimony by respondent that in March 1988, he gave the releases to Furia and Marino, who did not respond to his efforts to get them to sign and return the releases. The hearing judge found that respondent's testimony lacked credibility. Given all the evidence in the record, we accept this finding (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a) [great weight to be given to credibility findings by a hearing judge]) and reject as implausible respondent's explanation of his failure to return the signed releases.

Respondent disputes the hearing judge's conclusion that he failed to forward Furia's file promptly to Calton, her new attorney, and thus violated current rule 3-700(D)(1). As respondent argues, the record does not establish a lack of prompt action. Relatively little time (i.e., a period of about two weeks) elapsed between the apparent receipt by respondent of Furia's and Calton's letters of March 7 and 9, 1989, and the undisputed agreement between respondent's office manager and Calton on March 28, 1989, for the collection of Furia's file. Also, we agree with respondent that it was impossible for him to have violated current rule 3-700(D)(1), which did not become effective until May 27, 1989.

The State Bar challenges the hearing judge's determination that respondent did not violate current rule 3-700(A)(2), which prohibits withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to a client's rights. The hearing judge offered no explanation for this determination. Regardless of who terminates the attorney-client relationship, "the attorney's ethical duties upon such termination remain the same. [Citations.] An attorney of record in pending litigation remains counsel of record, and thus continues to have a duty to take such actions as are essential to avoid foreseeable prejudice to the client's interests, unless and until a substitution of counsel is filed or the court grants leave to withdraw. [Citations.]" (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115.) Respondent failed to reply to the March 1989 requests of Calton and Schmidt to sign substitution of attorney forms, forced them to file motions to become the new attorneys of record for Furia and Marino, and failed to appear at the July 1989 hearing on these motions. We agree with the State Bar that respondent wilfully violated current rule 3-700(A)(2) by such conduct.

On review, respondent does not dispute the culpability determination under former rule 5-102(B), which prohibited the representation of conflicting interests except with the written consent of all concerned parties. We agree with the hearing judge that respondent wilfully violated former rule 5-102(B) by undertaking to represent Furia and Marino without obtaining their written consent to the potential conflict raised by such dual representation. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 614-616.)

3. McGraw matter

In March 1986 James McGraw employed respondent to handle a difficult personal injury matter, which posed serious problems about establishing liability. During the following years, respondent sought information about McGraw's accident, medical treatment, and wage losses; contacted the defendant's lawyers; filed a complaint; kept abreast of developments in McGraw's worker's compensation case; responded to interrogatories served on McGraw; and prevented the dismissal of the personal injury matter.

Robert Long, a contract attorney working for respondent, became involved in the matter in July 1991. Long discussed the matter with McGraw, handled a mandatory settlement conference, attended McGraw's deposition, and made attempts to contact

a potentially favorable witness. Despite McGraw's lack of cooperation, Long obtained a settlement acceptable to McGraw for $5,000.

Relying on McGraw's testimony and telephone logs, the hearing judge concluded that respondent did not reply to reasonable status inquiries from McGraw between July and November 1991. Generally, the hearing judge found McGraw's testimony to be unreliable. McGraw's logs merely show that he called respondent's office, not whether he asked for Long or respondent or whether the calls were returned. According to McGraw's own testimony, McGraw telephoned for either attorney or both; and McGraw's letter of complaint to the State Bar mentioned only calls to Long. The hearing judge's decision did not address undisputed exhibits and testimony on this issue by Long, whom the hearing judge generally found credible. Such exhibits and testimony show that Long often communicated with McGraw and that McGraw knew of the significant developments in his matter during the period from July to November 1991. We thus agree with respondent that the record does not clearly and convincingly establish a wilful violation of section 6068, subdivision (m).

Focusing on respondent's failure to attend the deposition of a hostile witness and failure to contact a potentially favorable witness, the hearing judge concluded that respondent was culpable of intentionally, recklessly, or repeatedly failing to provide competent legal services. Respondent argues that the notice to show cause did not properly charge these failures as a basis for respondent's alleged violation of rule 3-110(A). We need not decide this issue because even if properly charged, the record lacks clear and convincing evidence of such a violation. With regard to the facts stressed by the hearing judge, we observe that the worker's compensation attorney for McGraw attended the deposition of the hostile witness; that respondent obtained a transcript of this deposition; and that Long made efforts to contact the potentially favorable witness, who did not respond.

4. Barela/Quillinan matter

In March 1984 Michelle Barela hired respondent to represent her son, Wayne Quillinan, in a personal injury matter. In 1985 Barela and respondent signed a reimbursement agreement with Valley Clerks Trust Fund (VCTF); California State Automobile Association (CSAA) sent respondent checks for $20,000 and $50,000 in settlement of the Quillinan matter; and respondent deposited these checks in a client trust account.

VCTF later claimed a lien on the $70,000 from CSAA and refused to waive its right of reimbursement. Respondent did not inform Barela of this development. Nor did he answer any of the messages which Barela left with his office between 1987 and 1989.

In 1989 Barela hired Daniel McCampbell to represent her in a bankruptcy proceeding. Between May and September 1989, McCampbell sent four letters asking for respondent's help in obtaining the release of Quillinan's funds. McCampbell stated that he represented Barela, that the $70,000 was protected from VCTF by an automatic stay, and that the $70,000 could be reimbursed after the issuance of a discharge. Such discharge occurred in August 1989.

After receiving the last letter, respondent talked to McCampbell. Respondent said that McCampbell did not know all the facts and that the discharge did not resolve the dispute over the $70,000.

Quillinan mailed respondent a request to finalize the personal injury matter in November 1990 and a request to complete the matter and provide an accounting in May 1991. In August 1991 Barela sent respondent a request to complete Quillinan's matter and to render an accounting. Respondent replied to none of these requests.

At the time of the disciplinary hearing in 1994, the $70,000 from CSAA remained undisbursed.

The hearing judge concluded that respondent wilfully violated section 6068, subdivision (m) by (1) failing to inform Barela of the VCTF lien, (2) failing to respond to her status inquiries from 1987 to 1989, and (3) failing to reply to the requests from Barela and Quillinan. We note that the notice to show cause alleges that the VCTF lien was discharged by virtue of Barela's discharge in bankruptcy. The accu-

racy of that allegation is far from clear. Regardless of that allegation, however, petitioner had a duty under 6068, subdivision (m) to keep Barela informed of significant events. The notice to show cause alleges respondent "failed to reasonably communicate with Barela regarding the funds held in trust." Even if respondent is relieved of culpability regarding communicating notice of the lien claim (an issue we need not decide), he did fail to respond to status inquiries from 1987 to 1989. In addition, he was required to notify both Barela and Quillinan of the status of Quillinan's matter even though they asked for completion of the matter and an accounting. That request of the client was sufficient to put respondent on notice that he was required to advise the client of "significant events."

The hearing judge concluded that respondent violated former rule 6-101(A)(2)[12] and current rule 3-110(A) by failing to take diligent steps to resolve the dispute over the $70,000 and complete the matter between 1986 and 1995. The State Bar supports this conclusion, whereas respondent contends that the facts alleged in the notice to show cause do not support the conclusion.

We conclude that the facts alleged in the notice and the evidence in the record do not show a violation of former rule 6-101(A)(2), which was in effect through May 26, 1989, but do establish a violation of current rule 3-110(A), which was in effect from May 27, 1989, onward. The letters written by McCampbell in 1989 reflect Barela's desire for respondent to complete Quillinan's matter and disburse the funds held in trust. Also, Quillinan's 1990 and 1991 requests and Barela's 1991 request sought the completion of Quillinan's matter. Despite these letters and requests, respondent made minimal efforts. He did not take timely, substantive steps to finalize Quillinan's matter and make appropriate disbursements by November 1992, when the State Bar filed the notice. Respondent was thus culpable of repeatedly and at least recklessly failing to render competent legal services from May 1989 to November 1992. Further, respondent's ongoing reckless failure to finalize Quillinan's matter from November 1992 to the trial in this matter constituted a violation of current rule 3-110(A).

However, because the State Bar did not amend the notice to allege that respondent continued to fail to perform in Quillinan's matter after November 1992, respondent cannot be disciplined for his failure to perform after that date. Nevertheless, we may and do consider his failure to perform between November 1992 and the trial in this matter to be an uncharged violation of current rule 3-110(A) and thus an aggravating circumstance. (*Edwards* v. State *Bar* (1990) 52 Cal.3d 28, 35-36.)

We agree with the hearing judge's conclusion that by not responding to Quillinan's and Barela's requests for an accounting, respondent wilfully violated current rule 4-100(B)(3), which requires an attorney to render appropriate accounts to a client. Respondent denies culpability on the ground that he believed McCampbell represented Barela and Quillinan. Yet McCampbell's letter of May 1989 made it clear that McCampbell merely represented Barela in the bankruptcy proceeding. Respondent remained Quillinan's attorney in the personal injury matter. If respondent doubted the propriety of replying to Barela and Quillinan, he should have contacted McCampbell.

[3] Citing "an unresolved, bona fide dispute as to who is entitled to the funds and in what proportion," the hearing judge concluded that respondent did not violate current rule 4-100(B)(4), which provides that, upon request, an attorney must promptly pay funds which the client is entitled to receive. Respondent supports, and the State Bar disputes, this conclusion. We hold that where a client asks an attorney to distribute trust funds claimed by the client and where another person to whom the attorney owes a fiduciary duty claims a lien on these trust funds, the

12. The hearing judge referred to "former rule 6-101(A)(1)." We construe this reference as a typographical error. The notice charged a violation of former rule 6-101(A), which consisted of two parts. Part (1) defined attorney competence; and part (2) provided that an attorney "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently."

attorney violates current rule 4-100(B)(4) if the attorney does not promptly take appropriate, substantive steps to resolve the competing claims in order to disburse the funds. (Cf. *In the Matter of Riley*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 114.) By failing to take such steps in response to the requests from Quillinan and Barela, respondent wilfully violated current rule 4-100(B)(4). Yet we give no additional weight to this violation in determining the proper discipline insofar as it rests upon facts already addressed by the conclusion of culpability under current rule 3-110(A).

5. Stewart-Uniack matter

In August 1986 Shannon Stewart-Uniack hired respondent to represent her in a personal injury matter. He filed a complaint on her behalf in June 1987.

In September 1990 respondent attended an arbitration of the case. Finding that Stewart-Uniack had received excessive treatment for her injuries and that her work record did not support a claim for lost earnings, the arbitrator awarded her $18,500, although her medical bills totalled around $20,000.

Stewart-Uniack decided to request a trial de novo. Robert Long, respondent's contract attorney, started handling various tasks in her case. Although she received no information about the disbursement of the settlement, she agreed to an overall $25,000 settlement reached by Long and the defendant's attorney, Pamela Swindells.

In July 1991 Swindells sent a $25,000 settlement draft and a release to be executed by respondent and Stewart-Uniack. Respondent forwarded the draft and release to Stewart-Uniack with no disbursement information.

Stewart-Uniack consulted another attorney, Ric Ottaiano. Although respondent remained counsel of record for Stewart-Uniack in the personal injury case, Ottaiano mailed respondent several letters asking for disbursement information.

Eventually, respondent sent Ottaiano two disbursement proposals. One assumed the full payment of the medical bills and would have left Stewart-Uniack with nearly $6,000 in unpaid medical expenses. The other assumed the reduction of the medical bills by half and would have left her with a net recovery of slightly more than $4,000.

In December 1991 Ottaiano mailed respondent a letter requesting the restructuring of the settlement to ensure Stewart-Uniack's receipt of a $10,000 net recovery. Ottaiano discussed this request by telephone with a person whom he believed was Dawn Lahl, a secretary in respondent's office.

In January 1992 Ottaiano sent respondent a letter asserting that Lahl had agreed to the request. Ottaiano also returned the unsigned, expired settlement draft to respondent and asked him to issue a $10,000 check to Stewart-Uniack.

Long telephoned Ottaiano and denied any agreement whereby Stewart-Uniack was to receive a net $10,000 recovery. Respondent neither contacted Ottaiano nor attempted to resolve the problem.

At the disciplinary hearing, Lahl testified that she had reached no agreement with Ottaiano. Believing this testimony, the hearing judge found no agreement between Ottaiano and Lahl.

Yet relying on Ottaiano's testimony and on letters written by Ottaiano during 1992, the hearing judge found that Ottaiano was merely mistaken about the identity of the person with whom Ottaiano believed an agreement had been reached. We agree with respondent that the record lacks clear and convincing evidence of an actual agreement between Ottaiano and anyone in respondent's office to ensure Stewart-Uniack a $10,000 net recovery.

Upon learning of the alleged agreement, Swindells sent respondent's office a letter asking for information. Respondent did not answer this letter, nor did he return the unsigned, expired settlement draft for Swindells to have a new draft issued.

In February, March, and April 1992, Ottaiano sent respondent letters asking him to complete the settlement. Respondent replied to none of these letters.

In May 1992 Ottaiano mailed respondent a letter stating that Ottaiano planned to complain to the State Bar about Stewart-Uniack's case. Again, respondent did not reply.

Swindells informed Ottaiano that the five-year statutory period for bringing Stewart-Uniack's case to trial was about to run and that Swindells intended to file a motion to dismiss. In June 1992 Ottaiano sent respondent a letter warning him about this situation.

Swindells filed the dismissal motion in July 1992. With the service copy of the motion, Swindells sent respondent a letter stating that the $25,000 settlement offer would remain open until the hearing on the motion in August 1992.

Swindells also sent Ottaiano a courtesy copy of the motion. Ottaiano mailed respondent a letter urging him to take appropriate action in order to protect Stewart-Uniack's interests.

Respondent filed an opposition, but did not appear at the hearing. Stewart-Uniack's case was dismissed.

The hearing judge focused on respondent's failure from July 1991 through August 1992 to make any significant effort at reducing Stewart-Uniack's medical bills and his failure to respond to Swindells's and Ottaiano's requests for a resolution of Stewart-Uniack's case. Finding that these failures resulted in the disintegration of the settlement and the dismissal of Stewart-Uniack's case, the hearing judge concluded that respondent violated current rule 3-110(A), regardless of whether anyone in his office agreed with Ottaiano to provide a $10,000 net recovery to Stewart-Uniack.

According to respondent, Stewart-Uniack and Ottaiano "held the key to the settlement but preferred to try to extort [him]." Respondent argues that they adopted "an untenable and arbitrary position," which prevented him from negotiating with the medical lienholders and finalizing the settlement with Swindells.

This argument lacks merit. As Stewart-Uniack's attorney, respondent had "a fiduciary relationship of the very highest character" with her. (*Lee* v. *State Bar* (1970) 2 Cal.3d 927, 939.) We agree with the State Bar that he did not faithfully discharge his duty. If he believed that a $10,000 net recovery was "untenable," he should have explained this belief to Stewart-Uniack and have responded accordingly to Ottaiano's letters of early 1992. Further, he should have made timely, substantive efforts to negotiate with the medical lienholders and to preserve the $25,000 settlement offer, which remained open until the day of the hearing on the dismissal motion. He neither took such actions nor appeared at the hearing. Based on these facts, we conclude that he at least recklessly failed to provide competent legal services in violation of current rule 3-110(A).

Citing the same facts, the hearing judge concluded that respondent violated current rule 3-700(A)(2), which prohibits an attorney's withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to a client's rights. The State Bar supports this conclusion, and respondent objects to it for the same reasons as he disputes the culpability determination under current rule 3-110(A).

As the hearing judge found, Long telephoned Ottaiano in early 1992 to deny any agreement for a $10,000 net recovery; and respondent filed an opposition to Swindells's dismissal motion of July 1992. Relying of these facts, we resolve reasonable doubts in respondent's favor (cf. *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240, and cases cited therein), find that the record lacks clear and convincing evidence of withdrawal from employment, and therefore conclude that he is not culpable of violating current rule 3-700(A)(2).

6. Bodner matter

In January 1992 Mary Bodner met with respondent about an accident which she had suffered in Hawaii. They discussed her accident and attorney's fees. Respondent said that he was not familiar with Hawaii law and would have to investigate the statute of limitations. Bodner signed an authorization for respondent to obtain medical information, but not a retainer agreement. Although respondent told her that he would not represent her in the Hawaii accident matter, he gave her five self-addressed, stamped envelopes for her to send him copies of her medical bills and other information relevant to her accident in Hawaii.

Thereafter, respondent had various conversations with Bodner and helped her with trying to get her medical bills paid. Yet, as respondent testified at the disciplinary hearing, he repeatedly told her that he was not representing her in the accident matter.

In March 1992 respondent and Bodner discussed a possible wrongful termination matter unrelated to the Hawaii accident. After he told her that he would not represent her in the wrongful termination matter, she became upset.

In April 1992 respondent sent Bodner a letter stating that he could not represent her regarding the accident because it occurred in Hawaii and that the Hawaii statute of limitations was two years. In the letter he also gave her the names, addresses, and telephone numbers of two Hawaii law firms. Although the letter was properly addressed, Bodner did not receive it.

Bodner telephoned respondent's office 10 to 15 times during the next 12 months or so and left messages for him to call her. He did not do so. In March 1993 respondent's staff told her that the office had no file in her name.

In June 1993 Bodner sent respondent a letter asking about the status "of the law suit [he was] handling for [her] against the Hilton in Hawaii." He received this letter, but did not reply to it.

The hearing judge concluded that respondent wilfully violated section 6068, subdivision (m) and current rule 3-500 by failing to reply to Bodner's June 1993 letter in order to clarify that he did not represent her and in order to provide her with information about protecting her rights in the Hawaii matter. Also, the hearing judge concluded that respondent was not culpable of violating section 6068, subdivision (m) or current rule 3-500 before he received Bodner's June 1993 letter because he believed in good faith that he was not her attorney and had so informed her in his April 1992 letter.

Respondent argues that he is not culpable of failing to communicate with Bodner because she had no reasonable basis for believing that he represented her. The State Bar contends that respondent wilfully violated his duty to communicate by failing to reply both to her telephone messages after April 1992 and to her letter of June 1993.

[4] "The attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients." (*Butler* v. *State Bar* (1986) 42 Cal.3d 323, 329.) Bodner could reasonably have believed that respondent represented her in the personal injury matter based on the following facts: (1) she signed an authorization for the release of medical information, (2) she received stamped envelopes to send him copies of her medical bills and other relevant information, (3) she spoke with him multiple times about the accident in Hawaii, (4) he tried to help have her medical bills paid, and (5) she did not get his April 1992 letter. Despite respondent's oral statements to Bodner of early 1992 and his letter of April 1992, her telephone messages after April 1992 and her letter of June 1993 gave him ample notice of her misunderstanding. Considering the facts in retrospect at the disciplinary hearing, respondent acknowledged that he should have replied to her letter. We conclude that respondent wilfully violated section 6068, subdivision (m) and current rule 3-500 by failing to reply to Bodner's telephone messages after April 1992 and letter of June 1993.[13]

C. Aggravation

The hearing judge found the following aggravating factors: a prior record of discipline, multiple acts of wrongdoing, significant harm to clients, and indifference toward rectification. Although respondent includes no separate section in his review brief about aggravation, he stresses that his misconduct did not involve moral turpitude and was not serious. In its responsive brief, the State Bar supports the hearing judge's find-

13. Because the rule violation rests on the same facts as the statutory violation, the rule violation merits no extra weight in determining discipline, as discussed *ante*.

ings and contends that lack of cooperation during the disciplinary proceeding was another aggravating factor. In its supplemental brief, addressing our notice about additional issues, the State Bar explicitly argues that respondent engaged in a pattern of misconduct involving moral turpitude. We agree with most of the State Bar's arguments and find that the uncharged ethical violations in the Barela/ Quillinan matter constitute aggravating factors.

1. Prior record of discipline

The hearing judge found *Kaplan I* an aggravating factor. According to the hearing judge, the filing of charges in *Kaplan I* alerted respondent to serious problems, and the September 1992 hearing decision in *Kaplan I* made respondent aware of such problems or should have done so. The hearing judge gave *Kaplan I* less weight insofar as respondent's misconduct in *Kaplan I* overlapped his misconduct in *Kaplan II*, but significant weight insofar as respondent's acts of misconduct in *Kaplan II* occurred after September 1992.[14]

The State Bar considers *Kaplan I* an aggravating factor and does not dispute the hearing judge's allocation of weight. Yet the State Bar observes that the notices to show cause in *Kaplan I* were filed in March and June 1990 and that respondent's misconduct in *Kaplan II* continued beyond these dates.

[5] A prior record of discipline is an aggravating factor (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct [standards], std. 1.2(b)(i)), regardless of when the discipline was imposed (*Lewis* v. *State Bar* (1973) 9 Cal.3d 704, 715; *In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 618). Where misconduct addressed by a current disciplinary proceeding resembles misconduct addressed by a prior disciplinary proceeding and occurred after the filing of a notice to show cause in the prior proceeding, the filing alerted the attorney to the ethically questionable nature of the misconduct. (*In the Matter of Harney* (Review Dept. 1995), 3 Cal. State Bar Ct. Rptr. 266, 283.) The prior disciplinary proceeding warrants significant weight in aggravation to the extent that the misconduct addressed by the current proceeding happened after the filing of a notice to show cause in the prior proceeding. (See *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 406.) Thus, *Kaplan I* strongly aggravates his wrongdoing because the ethical violations in *Kaplan II* resemble the violations in *Kaplan I* and because respondent committed most of the violations addressed by *Kaplan II* after the March 1990 filing of the initial notice to show cause in *Kaplan I*.

2. Multiple acts of wrongdoing and a pattern of misconduct involving moral turpitude

It is an aggravating factor to commit ethical violations which evidence multiple acts of wrongdoing or demonstrate a pattern of misconduct. (Std. 1.2(b)(ii).) As the hearing judge's decision correctly concludes and the State Bar's responsive brief correctly asserts, respondent's numerous acts of wrongdoing constitute an aggravating factor.

We focus, however, on the contention in the State Bar's supplemental brief that some of these acts reflect a pattern of misconduct. "[O]nly the most serious instances of repeated misconduct over a prolonged period of time" demonstrate a pattern of misconduct. (*Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14, citing *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1367.)

[6a] We find that between 1986 and 1993, respondent engaged in a pattern of misconduct by recklessly failing to provide competent legal services in the Boyer, Pyeatt, Hitchcock, Prickett, Piha, Furia/Marino, Barela/ Quillinan, and Stewart-Uniack matters.[15] His misconduct was serious insofar as Boyer, Pyeatt, and Prickett

14. Respondent's only acts of misconduct after September 1992 were his failure to communicate in the Bodner matter and his failure to cooperate with the disciplinary investigations of 14 matters.

15. In determining whether respondent engaged in a pattern of misconduct, we could also consider his ethical violations in *Kaplan I*. (See *Twohy* v. *State Bar* (1989) 48 Cal.3d 502, 512-513; *Slaten* v. *State Bar* (1988) 46 Cal.3d 48, 63.) As discussed *ante*, these violations occurred from 1987 to 1989 and included the reckless or repeated provision of incompetent legal services in three matters. Because respondent's wrongdoing in *Kaplan II* sufficiently reflects a pattern of misconduct, we need not, and do not, address his violations in *Kaplan I* to establish such a pattern.

lost their causes of action; as the dispute over $70,000 in payments which he received for Quillinan was unresolved from 1989 to 1995 and may still be unresolved; and as Stewart-Uniack lost a $25,000 settlement.[16]

[6b] The individual acts or failures to act that form the various items of misconduct that in turn form the pattern to which we refer are of a nature that individually they could be explained as mere negligence. However, when those same acts or failure to act recur with the frequency demonstrated by the record in this matter, combined with a continuing disregard for the legitimate wishes of clients for knowledge of the status of their matters, this court can no longer be comfortable with the description of negligence.

[6c] The serious nature of respondent's repeated failure to communicate with his clients exacerbates the seriousness of his failure to provide competent legal services. We add to this consideration the fact that at least three of these clients lost their causes of action and one lost a settlement offer because of respondent's failure, even refusal to act. In other cases delay of many years in the resolution of the matter has occurred because of respondent's failure to act in either a timely or competent manner.

[6d] The period of time over which the misconduct has accrued, combined with the frequency of those occurrences lead us to the conclusion that respondent's failure to competently perform has become habitual and thus involves moral turpitude. An attorney's habitual disregard of clients' interests constitutes moral turpitude, even if such disregard results only from gross negligence rather than dishonesty. (See *Farnham* v. *State Bar* (1988) 47 Cal.3d 429, 446, and cases there cited.)

3. Significant harm to clients

Significant harm to clients is an aggravating factor. (Std. 1.2(b)(iv).) The hearing judge found such harm to Boyer, Pyeatt, and Stewart-Uniack.

Although respondent acknowledges that he harmed Boyer, Pyeatt, and Prickett, he argues that none of them suffered serious harm. Respondent claims in his review brief that Boyer's and Prickett's cases lacked merit and that his malpractice insurer compensated Pyeatt.

Rule 302(a) of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings, requires an appellant's brief to refer to the record in order to establish all factual issues supporting the points raised by the appellant. Respondent's review brief includes no such references to support the claims that Boyer's and Prickett's cases lacked merit and that his malpractice insurer compensated Pyeatt. Having reviewed the extensive record in *Kaplan II*, we do not find clear and convincing evidence for these claims.

As discussed *ante*, Boyer, Pyeatt, Prickett, Stewart-Uniack, and Quillinan suffered serious harm. We thus agree with the State Bar that respondent significantly harmed clients, but we do not give this harm additional weight as a separate aggravating factor because we have already considered it in determining that he engaged in a pattern of misconduct.

4. Indifference toward rectification

Indifference to rectifying the consequences of misconduct is an aggravating factor. (Std. 1.2(b)(v).) The hearing judge found that respondent demonstrated such indifference by failing to distribute the $70,000 which he received for Quillinan in 1985. The State Bar claims that respondent has not taken steps to atone for his misconduct, although it neither refers to the record nor mentions any specific facts.

As discussed *ante*, we took respondent's reckless failure to finalize the Quillinan matter into account in determining that respondent had engaged in a pattern of misconduct. Although this failure also reflects indifference to rectification, we give it no additional weight as a separate aggravating factor.

16. In connection with his inattention to his clients' needs, respondent repeatedly failed to communicate properly. He did not supply reasonable case status information to Boyer, Pyeatt, Hitchcock, Prickett, and Piha; did not render an accounting to Quillinan upon request; and did not respond to letters from attorney Ottaiano about Stewart-Uniack's matter.

5. Lack of cooperation

The failure to cooperate with the State Bar during a disciplinary proceeding is an aggravating factor. (Std. 1.2(b)(vi).) As discussed *post*, the hearing judge discounted the mitigating effect of respondent's stipulation because he did not participate in conferences before trial. Yet such lack of cooperation should be considered aggravation.

Respondent contends, and the State Bar concedes, that he appeared at one of the conferences which the hearing judge asserted he did not attend. Thus, we find that he failed to cooperate during the disciplinary proceeding by failing to appear at all but one of the six conferences before trial. We agree with the State Bar that this failure significantly aggravates his misconduct because it reflects an ongoing lack of commitment to comply with ethical requirements.

D. Mitigation

The hearing judge found as limited mitigating factors that respondent experienced personal problems, that four attorneys testified about respondent's competence as an attorney, that respondent cooperated with the State Bar, and that he declined fees in the Hitchcock matter. Also, the hearing judge found it strongly mitigating that respondent made many reforms in managing his office. Respondent has no separate discussion devoted to mitigation in his review brief. In addressing the hearing judge's culpability conclusions and disciplinary recommendation, he is not always clear about the extent to which he supports or opposes the hearing judge's mitigation findings. On review, he seems to renew the claim that his inexperience in managing a law office mitigated his misconduct. The State Bar claims that respondent established no mitigation. We find that he proved four mitigating factors, each of which merits limited weight: personal problems, testimony about his competence as an attorney, some cooperation with the State Bar, and declining of fees in the Hitchcock matter. However, we find that neither his office reforms nor his lack of experience in managing a law office constitutes a mitigating factor.

1. Personal problems

"Marital and other stressful emotional difficulties may be considered in mitigation. [Citations.]" (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667.) Such difficulties mitigate an attorney's misconduct when they occur at the same time as the misconduct, although they deserve less weight if the attorney does not show their role in the misconduct and if expert testimony does not establish a nexus between them and the misconduct. (*In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 59-60; cf. std. 1.2(e)(iv) [mitigation established if expert testimony shows the attorney suffered from extreme emotional difficulties at the time of the misconduct, if such difficulties did not result from illegal conduct by the attorney, and if the attorney proves that such difficulties no longer affect the attorney].) At trial, respondent claimed that the combined pressures of *Kaplan I*, the dissolution of his prior marriage, the pregnancy of his second wife, and the illness and death of his father contributed to the misconduct of which he was culpable and to his failure to appear at conferences before the disciplinary hearings began. The hearing judge considered respondent's personal problems in mitigation, but assigned little weight to them because the record failed to clarify their effect on any of respondent's ethical violations and because no expert testimony established a nexus between them and the violations.

Respondent's marital and family problems merit limited weight in mitigation for the reasons specified by the hearing judge. **[7]** Yet the pressure of *Kaplan I* does not justify more lenient discipline for the current misconduct. By filing the initial notice to show cause in *Kaplan I* in March 1990, the State Bar alerted respondent to his questionable behavior. (*In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 283; cf. *In the Matter of Boyne*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 406 [significance of an attorney's engaging in additional misconduct when the attorney was aware of a pending disciplinary proceeding].) Instead of providing mitigation, *Kaplan I* demonstrated the need for respondent to examine his conduct carefully and to avoid further ethical violations.

2. Testimony about respondent's competence as an attorney

Testimony about an attorney's legal ability and dedication to clients can establish a mitigating factor. (*Rose* v. *State Bar*, *supra*, 49 Cal.3d at p. 667; *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 602.) Respondent's current law partner and three lawyers who had referred clients to him attested to his competence insofar as they had dealt with him. Like the hearing judge, we give limited mitigating weight to their testimony.

Citing *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 331, and *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 750, respondent claims that the testimony by the four attorneys deserves greater weight. Yet their comments, although fully believable, do not approach the remarkable expressions of esteem from many witnesses in the cited cases.

As the State Bar correctly asserts, respondent did not provide evidence of good character attested to by a broad number of references in the legal and general communities. Such evidence would have been necessary under standard 1.2(e)(vi) to show an extraordinary demonstration of good character attested to by a wide range of references who are aware of the full extent of an attorney's misconduct.

3. Cooperation with the State Bar

Cooperation during a disciplinary investigation and proceeding is a mitigating factor. (Std. 1.2(e)(v).) Respondent stipulated to many material facts as well as to his culpability of wilful failure to participate in disciplinary investigations. The hearing judge did not accord significant weight to the stipulations because of respondent's failure to participate in conferences before trial. As discussed *ante*, we consider this failure a separate aggravating factor.

[8] We give limited mitigating weight to respondent's stipulations because they were belated and, for the most part, concern easily provable facts. He made them less than one week before the start of the trial. The stipulated facts mainly acknowledge that specified clients employed him and that he wrote, signed, sent, or filed many of the documents admitted in evidence as exhibits.

Although respondent agrees that his stipulations were belated, he claims that they strongly mitigated his misconduct by greatly shortening the trial time. The State Bar's responsive brief does not address this claim. Only limited mitigation is possible because respondent fails to show how he significantly shortened trial time by stipulating to facts which were, in general, easily provable. (See Std. 1.2(e) [attorney's burden to establish mitigation clearly and convincingly]; *In re Morse*, *supra*, 11 Cal.4th at p. 206.)

4. Declining of fees in the Hitchcock matter

Respondent did not assert his lien for fees in the Hitchcock matter, which he settled for $10,200. The hearing judge found that the declining of fees warrants limited weight because the matter was relatively simple and because respondent let the matter languish for five years. Respondent's review brief acknowledges, but does not dispute, the finding. The State Bar's responsive brief fails to deal with the finding. We agree with the hearing judge.

5. Reforms in office management

The hearing judge found that respondent had implemented many office reforms, mainly from the middle of 1993 onward. These reforms included procedures to improve the tracking of cases, to make his staff accountable, to notify clients in writing about the values of their cases, to return telephone calls within one day, and to answer letters and execute forms for attorney substitution within three days. Asserting that the reforms demonstrated respondent's remorse and determination to rehabilitate himself and citing *Schultz* v. *State Bar* (1975) 15 Cal.3d 799, 804, the hearing judge deemed them a strong mitigating factor.

Respondent stresses his office reforms. According to respondent's review brief, his current acts of misconduct, which occurred between 1986 and 1993, resulted primarily from negligent office mismanagement. The brief, however, connects only one instance of misconduct with office mismanagement: his failure to forward the Inman file between December

1989 and August 1990. Instead of specifying how his staff were responsible for this failure, the brief merely states that the failure "occurred during the tenure of" Karen Hooks, an office manager who "figured prominently" in *Kaplan I*.

The acts of misconduct addressed by *Kaplan I* occurred between 1987 and 1989. Hooks was partly responsible for these acts insofar as she hid messages from respondent and destroyed documents. When respondent became aware that Hooks had withheld a letter from him in 1988, he reprimanded her, but took no other steps to prevent misconduct. (See *In the Matter of Kaplan*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 520.) The March 1990 notice to show cause in *Kaplan I* alerted respondent to ethical violations. In June or July 1990, he relieved Hooks of her duties as office manager. (*Ibid.*)

During the trial in the current proceeding, *Kaplan II*, respondent testified that Hooks mismanaged his office and was sometimes responsible for his failure to deal with problems and to reply to telephone calls and return documents. When asked whether he could specify any way in which Hooks had been responsible for his current misconduct, respondent suggested only that he had signed a form for substitution of attorney in the Furia/Marino matter and that Hooks was responsible for failing to return this form. Respondent does not explain why Hooks should be regarded as responsible to any significant extent for the acts of misconduct addressed by *Kaplan II*, since almost all of these acts occurred partly or entirely after March 1990.

Respondent asserts that *Kaplan I* brought problems to his attention and prompted many reforms. He states that he implemented reforms over years by "trial and error" in an "evolving process." Filed in July 1995, his review brief describes some reforms as instituted in 1992 and most reforms as having been in place for 12 to 18 months or longer. Further, respondent hedges about whether the reforms have finally solved his problems.[17] Also, consistent with the State Bar position, we agree that respondent's misconduct is not generally the result of office management problems.

We first examine the sole authority cited by the hearing judge's discussion of office reforms. In *Schultz* v. *State Bar*, *supra*, 15 Cal.3d at p. 804, the Supreme Court found it mitigating that the attorney had "demonstrated his remorse, his willingness to accept punishment, and his determination to rehabilitate himself [citation]." We do not find the cited case to be controlling for the record does not demonstrate that the conduct of respondent in *Kaplan II* falls within the ambit of the conduct described in *Schultz*. (*Ibid.*)

For clearer guidance about the proof of remorse, we focus on standard 1.2(e)(vii). To establish mitigation under this standard, an attorney must promptly take objective steps which spontaneously demonstrate remorse or recognition of wrongdoing and which are designed to atone timely for any consequences of the attorney's misconduct. Respondent has not demonstrated that he either took prompt action or made timely atonement. Although the March 1990 notice to show cause in *Kaplan I* alerted respondent to ethical violations, most of his misconduct in *Kaplan II* occurred after March 1990. He did not immediately examine all his office procedures and systematically adopt reforms to avoid mismanagement. Instead, he made reforms from 1992 onward by trial and error in an evolving process. The record does not clarify the dates of specific significant reforms, and his review brief indicates that some reforms have been in place only since the middle or end of 1993. Nor were these reforms spontaneous, because he implemented them under the pressure of a disciplinary proceeding. (*In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 204.) Also, as indicated by respondent's own testimony and as reflected by the hedged statements of his review brief, he has not clearly and convincingly

17. At trial, respondent testified that although he had repeatedly revised his office procedures to ensure the return of clients' telephone calls, he "probably [still did not] have a foolproof system." Respondent's review brief states: "It appears that he may have finally gotten [his office management] right." Later, the brief asserts: "The indications are that he may well have finally reached [the] goal [of compliance with ethical requirements]."

shown that his current office reforms are sufficient to meet ethical requirements. He thus has not proven that his office reforms constitute a mitigating factor under standard 1.2(e)(vii).

6. Lack of experience in managing a law office

[9] On review, as at trial, respondent suggests that his lack of experience in managing a law office mitigated his misconduct. We agree with the hearing judge that it did not. (See *Rose* v. *State Bar, supra*, 49 Cal.3d at p. 667.)

E. Discipline

The hearing judge recommended a five-year stayed suspension and five-year probation, conditioned on actual suspension for three years and until respondent proves his rehabilitation. This recommendation rested on the determination that respondent had committed extensive ethical violations, but had not committed any acts of moral turpitude. Also, the hearing judge found that his office reforms strongly mitigated his wrongdoing.

Respondent suggests that he should be actually suspended for only ninety days if all his challenges are successful or for six months to one year if all his challenges are not successful. Although he admits numerous ethical violations, he calls them minor and argues that he committed no act of moral turpitude. According to respondent, his misconduct in *Kaplan II* closely resembled his misconduct in *Kaplan I* and resulted primarily from negligent office management, which he may have remedied.

The State Bar recommends disbarment. According to the State Bar, the numerous ethical violations of *Kaplan II* are worse than those of *Kaplan I* and are surrounded by extensive aggravating factors and no mitigating factors. The State Bar argues that respondent habitually and recklessly disregarded his clients' interests and that this disregard amounted to a pattern of misconduct involving moral turpitude.

We accept many, but not all, of the hearing judge's determinations. Respondent recklessly provided incompetent legal services in eight matters. Also, he did not cooperate with disciplinary investigators in fourteen matters, did not communicate properly with clients in nine matters, did not forward files promptly to clients in three matters, did not take reasonable steps to avoid foreseeable prejudice to his clients' rights upon withdrawal from employment in two matters, did not deliver trust funds promptly upon request in two matters, did not render an appropriate accounting in one matter, did not notify a client promptly about the receipt of funds in one matter, and did not obtain the written consent of all relevant parties when he represented conflicting interests in one matter. Substantial aggravating factors surrounded his misconduct; in particular, by habitually and recklessly disregarding his clients' interests, he engaged in a pattern of misconduct involving moral turpitude. He established no substantial mitigating factors and failed to prove that his office reforms merit any weight in mitigation.

In determining discipline, we look to the standards. (See *In re Morse, supra*, 11 Cal.4th at p. 206; *Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090.) Standard 1.3 identifies the primary purposes of discipline as protecting the public, courts, and legal profession; maintaining high professional standards by attorneys; and preserving public confidence in the legal profession. Under standard 1.6(a), the most severe sanction is appropriate if an attorney commits various ethical violations calling for different sanctions. Of the standards applicable to respondent's ethical violations, standard 2.6 calls for the gravest sanction: disbarment or suspension for violating section 6068, depending on the gravity of the offense or the harm to the victim with regard for the purposes of discipline.[18]

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18. We disagree with the State Bar's position that standard 2.4 applies to *Kaplan II*. Standard 2.4 calls for the disbarment of an attorney culpable of a pattern of wilfully failing to perform services when the pattern demonstrates the abandonment of clients' causes. Of the eight matters in which respondent recklessly failed to provide competent legal services, he effectively abandoned only the Boyer, Pyeatt, and Barela/Quillinan matters.

We also consider the discipline in other proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) Analogizing *Kaplan II* to *Kaplan I*, respondent advocates the same discipline: a 90-day actual suspension.

The analogy fails. The violations in *Kaplan I* occurred over a period of less than three years, resulted to a significant extent from negligent office management, seriously harmed only one client, and did not involve moral turpitude. The more extensive violations in *Kaplan II* occurred over a period of longer than seven years and resulted to a significant extent from recklessness rather than mere negligence. In particular, respondent recklessly disregarded the interests of eight clients, five of whom suffered serious harm. Such habitual disregard amounted to a pattern of misconduct encompassing moral turpitude. His violations in *Kaplan I* and his failure to appear at five conferences before trial strongly aggravate his wrongdoing in *Kaplan II* because they reflect an ongoing lack of commitment to comply with ethical requirements. Nor has he shown any significant mitigation in *Kaplan II*.

Although the State Bar discusses various cases, it stresses *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1. During a period of six years, Collins engaged in a pattern of misconduct encompassing fourteen matters and involving moral turpitude. Although Collins did some work in each case, he failed to act at an important point in the case, to communicate thereafter with the client, and to provide further services on the client's behalf. Clients lost their causes of action in eight cases. In nine cases, Collins failed to refund a total of over $17,000 in unearned fees, and he misappropriated most of the funds advanced for costs. Thus, disbarment was recommended.[19]

[10a] *In the Matter of Collins, supra*, 2 Cal. State Bar Ct. Rptr. 1, examines Supreme Court cases about patterns of misconduct and summarizes the teaching of these cases. "[W]hen 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 [and which was] followed by sufficient evidence of rehabilitation to give the court confidence that the attorney's pattern [of misconduct] would not repeat." (*Id.* at p. 15.)

[10b] The record in *Kaplan II* does not reveal a tragic event or set of circumstances explaining respondent's misconduct and does not contain necessary evidence of rehabilitation. Given the facts in the record and the extended period of time over which the numerous instances of misconduct occurred, we find that the attorney's pattern of misconduct is likely to continue or repeat. Considering the primary purposes of discipline, we conclude that disbarment is necessary to protect the public, courts, and legal profession; to maintain high professional standards by attorneys; and to preserve confidence in the legal profession.

III. RECOMMENDATION

We recommend that respondent be disbarred. Also, we recommend that he be ordered to comply with rule 955 of the California Rules of Court and to perform the acts in subdivisions (a) and (c) of rule 955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court's order. We further recommend that the State Bar be awarded costs under Business and Professions Code section 6086.10.

We concur:

NORIAN, J.
STOVITZ, J.

19. After the filing of the opinion, Collins submitted his resignation. The Supreme Court accepted the resignation and thus did not act upon the disbarment recommendation.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Lloyd Thomas Murphy, Jr.

A Member of the State Bar

No. 96-V-10909

Filed January 10, 1997, as corrected January 14, 1997

SUMMARY

A disciplined attorney petitioned for relief from actual suspension in a proceeding under standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. The hearing judge granted the relief from actual suspension. (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

The State Bar requested review on the ground that petitioner did not meet his burden of proof. The review department affirmed the hearing judge's decision and clarified the requirements of standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For State Bar: Kevin B. Taylor

For Petitioner: David A. Clare

HEADNOTES

[1 a-c] **135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers**
135.86 Procedure—Rules of Procedure
167 Abuse of Discretion

The standard of review in a proceeding for relief from actual suspension under standard 1.4(c)(ii) is abuse of discretion or error of law. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rules 300(b), 639.) The review department determines abuse of discretion by using the equivalent of the substantial evidence test.

[2] **167 Abuse of Discretion**
191 Effect/Relationship of Other Proceedings

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.

2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues

The State Bar Court determines whether a petitioner seeking relief from actual suspension has met the requirements of standard 1.4(c)(ii) without reevaluating the petitioner's prior discipline, whether perceived as lenient or harsh.

[3] **191 Effect/Relationship of Other Proceedings**
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

The State Bar Court considers the prior misconduct of a petitioner seeking relief from actual suspension under standard 1.4(c)(ii), as well as the aggravating and mitigating circumstances surrounding such misconduct, to determine the amount and nature of the required rehabilitation. In addition, other misconduct that predates the last discipline and was not considered in the underlying disciplinary matters should be considered in weighing the starting point for measuring discipline.

[4] **147 Evidence—Presumptions**
191 Effect/Relationship of Other Proceedings
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

Compliance with the terms of actual suspension and probation presumptively satisfies the discipline required for a petitioner seeking relief from actual suspension under standard 1.4(c)(ii) to become a productive attorney. However, the petitioner must also show rehabilitation, present fitness to practice law, and present learning and ability in the general law. That showing must be measured from the time of the last prior discipline.

[5 a, b] **191 Effect/Relationship of Other Proceedings**
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

Where a petitioner seeking relief from actual suspension under standard 1.4(c)(ii) had been disciplined several times, the misconduct underlying that discipline could not be used to rebut the petitioner's showing of rehabilitation, but can be used as a point from which to measure rehabilitation.

[6] **2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof**
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

Where a petitioner seeking relief from actual suspension under standard 1.4(c)(ii) had not been disciplined for failing to file income tax returns, it was proper to consider this failure, as well as the petitioner's indebtedness to the Internal Revenue Service and other unpaid obligations, in measuring the petitioner's rehabilitation.

[7] **151 Evidence—Stipulations**
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

Stipulations about culpability, aggravation, and mitigation provide a starting point to determine whether a petitioner seeking relief from actual suspension under standard 1.4(c)(ii) has shown rehabilitation and is unlikely to repeat misconduct.

[8 a-d] 135.86 Procedure—Rules of Procedure
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

A petitioner seeking relief from actual suspension is not ordinarily required to complete probation before he or she may present meaningful evidence of rehabilitation in a proceeding under standard 1.4(c)(ii). Rehabilitative sanctions in the form of continuing probation conditions may remain in place after a petitioner's relief from actual suspension. A disciplined attorney may show rehabilitation before his or her actual suspension expires in a proper proceeding under standard 1.4(c)(ii). (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rules 632, 640.)

[9] 2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

The evidence of rehabilitation required to relieve a petitioner from actual suspension in a proceeding under standard 1.4(c)(ii) varies according to the seriousness of the petitioner's misconduct.

[10] 191 Effect/Relationship of Other Proceedings
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

A petitioner seeking relief from actual suspension under standard 1.4(c)(ii) must show compliance with the terms of probation. Also, the petitioner must show by a preponderance of the evidence that (1) his conduct has been exemplary from the time of the imposition of the last prior discipline and (2) the conduct evidencing rehabilitation is such that the court may make a determination that the conduct leading to the discipline or other need for rehabilitation is not likely to recur.

[11] 191 Effect/Relationship of Other Proceedings
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof

In determining whether a petitioner seeking relief from actual suspension under standard 1.4(c)(ii) is likely to commit further misconduct, the State Bar Court should look to the nature of the petitioner's underlying offense or offenses; any aggravation, other misconduct, or mitigation that may have been considered; and any evidence about elimination of the cause or causes of such misconduct.

[12 a-n] 191 Effect/Relationship of Other Proceedings
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
2410 Standard 1.4(c)(ii) Proceedings—Suspension Lifted
2490 Standard 1.4(c)(ii) Proceedings—Miscellaneous

Substantial evidence supported a decision relieving a petitioner from actual suspension under standard 1.4(c)(ii) where the petitioner had eliminated the medical, emotional, and financial problems underlying his misconduct; had been disciplined for violating probation conditions and eventually had complied with the terms of his probation; had provided 13 declarations attesting to his major life changes and to his good character; had suffered from undiagnosed diabetes when he had been administratively suspended for failing to take the California Professional Responsibility Examination within the time prescribed by a Supreme Court order; had paid a great many debts; had reached an agreement with the Internal Revenue Service about failing to file federal income

tax returns and was paying the outstanding tax debt; had only three other debts, which were unrelated to the practice of law and which totalled $2,800 to $3,200; and had received and later paid a traffic ticket for speeding.

[13 a-c] **135.86 Procedure—Rules of Procedure**
2403 Standard 1.4(c)(ii) Proceedings—Expedited
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues

Given the summary nature and expedited schedule of a proceeding under standard 1.4(c)(ii), the petitioner remains on actual suspension until the finality of the decision in the State Bar Court, including review. (See Rules Proc. of State Bar, title II, State Bar Court Proceedings, rules 632, 633, 635, 638, 639, 640.)

Additional Analysis

[None]

OPINION

OBRIEN, P.J.:

Petitioner Lloyd Thomas Murphy, Jr., seeks relief from actual suspension, having been suspended from the practice of law for a period of five years, stayed on conditions, including actual suspension for three years, and until he demonstrates his rehabilitation, fitness to practice, and learning and ability in the law as required by standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[1]

The hearing judge granted the relief prayed; and the State Bar seeks review under rule 300 of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings (rules), asserting that the hearing judge abused her discretion and committed errors of law in granting the petition. (Rule 639.)

The State Bar Court has not previously published any decisions interpreting the provisions of standard 1.4(c)(ii) or the rules governing standard 1.4(c)(ii) proceedings (rules 630-641). We provide such assistance as we are able in applying standard 1.4(c)(ii) and in identifying the nature of the proceeding under rules 630 through 641. We determine that the hearing judge properly applied the standard and affirm her decision.

I. PROCEDURAL HISTORY

Petitioner was admitted to practice law in California on May 27, 1969. By order filed July 22, 1992, in case no. S026605 (State Bar Court case nos. 88-O-12582 & 89-O-12742) (*Murphy I*), the Supreme Court suspended petitioner from the practice of law for a period of five years, stayed the execution of the suspension, and placed petitioner on probation for five years on conditions, which included his actual suspension for three years and until he demonstrated his rehabilitation, fitness to practice, and learning and ability in the law pursuant to standard 1.4(c)(ii). This discipline was the result of a stipulation in which petitioner admitted several acts of misconduct, the most serious of which was the misappropriation of more than $42,000 in client funds between May 1984 and December 1988. By the time the stipulation in this matter was signed, petitioner had repaid the misappropriated funds.

In the less serious matters contributing to the July 22, 1992, order of the Supreme Court, petitioner failed to properly represent a client in a workers' compensation and medical malpractice matter. In addition, in each of those matters, petitioner failed to respond to the State Bar investigation.

By order filed November 30, 1993, in case no. S026605 (State Bar Court case nos. 92-N-18578, 92-P-20207 & 92-O-18987) (*Murphy II*), the Supreme Court suspended petitioner from the practice of law for a period of three years, stayed execution of that suspension, and placed him on probation for a period of one year, consecutive to the probation ordered in *Murphy I*.

Finally, by order filed April 26, 1995, in case no. S044911 (State Bar Court case no. 94-O-11074) (*Murphy III*), the Supreme Court suspended petitioner from the practice of law for a period of two years, stayed the execution of the suspension and placed petitioner on probation for a period of two years, on conditions which included an actual suspension of one year, commencing August 21, 1995.

As the result of *Murphy I*, petitioner was placed on probation terminating on or about August 21, 1997, and actual suspension terminating no earlier than August 22, 1995. (Rule 953(a), California Rules of Court [Supreme Court orders imposing discipline become effective 30 days after filing].) Due to violation of his terms of probation set forth in *Murphy I*, *Murphy II* extended petitioner's probation for one year to August 21, 1998.

1. "Standards" shall refer to Standards for Attorney Sanctions for Professional Misconduct, title IV, Rules of Procedure of the State Bar of California.

In *Murphy III*, the Supreme Court effectively extended petitioner's actual suspension to August 21, 1996.

In addition to the foregoing, on September 7, 1993, the Review Department of the State Bar Court filed its order additionally suspending petitioner from the practice of law for not passing the California Professional Responsibility Examination (CPRE) within the time allowed by the Supreme Court in *Murphy I*. Thereafter, petitioner passed the CPRE, and his suspension for failure to pass that examination was terminated.

II. REVIEW OF EVIDENCE

The evidence before this court consists of the petition filed along with its attachments; documentary evidence introduced by the State Bar, consisting of copies of petitioner's three prior records of discipline and the records of the Membership Services Office of the State Bar; and the testimony of petitioner, electronically recorded and untranscribed, together with his deposition, which was received into evidence without objection.

In each of petitioner's prior records of discipline, the facts and dispositions were agreed to by a written stipulation. These stipulations were approved by the State Bar Court, and the stipulated discipline was imposed by the Supreme Court.

In *Murphy I*, petitioner represented Evelyn Cremer and her son in a personal injury action. In January of 1984, petitioner settled these claims for $65,000, plus $5,000 in medical reimbursement and deposited the funds in his trust account, but failed to advise Cremer of the settlement or pay to her the portion of the settlement to which she was entitled, calculated to be $41,671. In May 1984, petitioner's trust account balance fell below $41,671, and in December of that year, the account balance fell below zero. Petitioner misappropriated Cremer's portion of the settlement proceeds for his own use.

In April 1990 following Cremer's complaint to the State Bar, petitioner interpled the misappropriated funds into the superior court, due to the fact that an insurance carrier was asserting a subrogation claim of in excess of a million dollars.

In addition, it was stipulated that petitioner failed to cooperate with the State Bar investigation. (See Bus. & Prof. Code, § 6068, subd. (i).)

In a consolidated matter as a part of *Murphy I*, it was stipulated that petitioner was employed by Gerold Maras to prosecute a workers' compensation claim and a medical malpractice claim. Petitioner failed to communicate with his client and failed to serve the malpractice action, resulting in its dismissal. Again, petitioner failed to cooperate with the State Bar investigation.

In mitigation, it was stipulated that, at the time of the foregoing events, petitioner was in the midst of an acrimonious dissolution proceeding involving his marriage of 22 years, which created "enormous" emotional and financial pressures on him. Further, petitioner was under "considerable stress" as the result of "extreme business problems." The stipulation recited that the stress of these situations has been successfully resolved.

It was further stipulated, in mitigation, that at the time of the misconduct, petitioner was an alcoholic "and his alcoholism distorted his value system and thought processes and influenced his misconduct in these matters." The stipulation recited that petitioner recognized his alcoholism and sought treatment as an inpatient at St. Joseph's Hospital alcohol abuse program in January 1991, thereafter joined Alcoholics Anonymous (AA), and has maintained his sobriety since.

It was also agreed that, although petitioner had failed to cooperate with the investigation, he was candid with the State Bar during the proceedings, acknowledged his wrongdoing, and showed remorse for it.

Murphy II was also resolved by stipulation. In that matter petitioner acknowledged that he had not timely filed an affidavit required under rule 955 and that he had failed to timely file a probation report in the fall of 1992. As a part of that same matter petitioner stipulated that, between 1988 and 1991, he failed to properly prosecute a matter for another client, Jose Valdez. In mitigation it was stipulated that, during the last half of 1992, petitioner had

difficulty functioning due to emotional distress from employment problems, financial reversals and marital difficulties. *Murphy II* resulted in the Supreme Court order filed November 30, 1993, *supra*, subjecting petitioner to additional discipline, adding conditions to his probation, and extending his probationary period for an additional year.

In *Murphy III*, petitioner stipulated that he failed to comply with the conditions of his probation in that he failed to file required reports from the latter part of 1992 through approximately the first half of 1994. That stipulation contained, as mitigating circumstances, the fact that petitioner suffered from diabetes, which remained undiagnosed and untreated until March 1994. In the opinion of petitioner's doctor, the complications of the disease "greatly effected [sic]" petitioner's judgment and resulted in his conduct in failing to comply with the terms of his probation. Once the disease was diagnosed and treated, the record shows that petitioner came into full compliance with the terms of his probation. As indicated, and as the result of this misconduct, petitioner was further disciplined by Supreme Court order filed April 26, 1995, extending his probation for an additional two-year period, and adding one additional year to his actual suspension.

By undisputed evidence, the record shows that petitioner has not consumed alcohol since his hospitalization in 1991, that his diabetes is under control, and that the stress from the marital dissolution, financial and business problems no longer exists. Petitioner is now in a solid marriage to a lawyer, and participates three times a week in AA meetings, acting as the secretary of those meetings. In addition, he participates in The Other Bar, a group serving alcohol-abusing lawyers and judges.

The record shows that petitioner made full restitution for the misappropriation in the Cremer matter in April 1990 by depositing the funds in court as a part of an action in interpleader. It further shows that he had extensive debts as the result of his divorce and business problems, and not related to the practice of law. These debts have been substantially reduced. There remain three debts totaling less than $3,000, and an obligation to the Internal Revenue Service (IRS) of approximately $150,000, which arose as the result of his failure to file personal income tax returns for the years 1986 through 1992. The record reflects an agreement with the IRS to pay these sums.

Accompanying petitioner's application are approximately 13 declarations from friends and fellow participants in AA attesting to petitioner's good character and fitness to practice law. Petitioner has acquired 52 hours of continuing legal education credits since the time of his suspension and, in addition, has worked as a law clerk for both his wife and for a period, another practicing attorney. He has passed the California Professional Responsibility Examination and completed the State Bar-sponsored Ethics School.

III. STANDARD OF REVIEW

[1a] The ordinary standard of review for the Review Department of the State Bar Court is de novo. (*In re Morse* (1995) 11 Cal.4th 184, 207; rule 305.) Nonetheless, review of all proceedings under rules 630 through 641 is conducted pursuant to the provisions of rule 300. (Rule 639.) That rule specifies the standard for review as abuse of discretion or error of law. (Rule 300(b).)

[1b] California decisional law is replete with definitions of abuse of discretion. We shall follow Mr. Witkin's lead (9 Witkin, Cal. Procedure (3d. ed. 1985) Appeals, § 277, p. 288, and quote the classic statement from *Bailey* v. *Taaffe* (1866) 29 Cal. 422, 424: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates."

[1c] Thus, the decision of the hearing judge is reviewed not with an intention of substituting the view of this court for that of the hearing judge, but rather with the intention of "employ[ing] the equivalent of the substantial evidence test by accepting the

trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences. [Citation.]" (*In re Executive Life Ins. Co.* (1995) 32 Cal.App.4th 344, 358; 9 Witkin, Cal. Procedure (1996 Supp.) Appeal, § 278, p. 98.)

[2] It is proper we recognize that, in prior proceedings, the petitioner has been disciplined for the misconduct found in those proceedings and that the discipline there ordered should not be reviewed or reconsidered in the matter before us. However, we look to the nature of that prior misconduct to determine the point from which we must measure 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 under standard 1.4(c)(ii). We caution, however, that great care must be taken to ensure that no part of the determination of rehabilitation and present fitness to practice is based on either an actual or an implied reevaluation of the discipline imposed in the prior disciplinary proceedings. To state our concern more clearly, it would be error to in any way attempt to reevaluate the discipline given in a prior proceeding, be it perceived as lenient or harsh, in evaluating petitioner's compliance with the requirements set forth in standard 1.4(c)(ii).

[3] This said, it is appropriate to consider the nature of the misconduct, as well as the aggravating and mitigating circumstances surrounding that misconduct for which petitioner was disciplined in determining the amount and nature of rehabilitation that may be required to comply with standard 1.4(c)(ii). In addition, other misconduct that predates the last discipline and was not considered in the underlying disciplinary matters should be considered in weighing the starting point for measuring discipline.

[4] We note that, in the type of proceeding before us, petitioner's name was not stricken from the roll of attorneys in this state, but rather he has been disciplined in a somewhat lesser manner, thought to afford protection to the public and to assure confidence in the legal system. (See, generally, *Cain v. State Bar* (1978) 21 Cal.3d 523, 525-526 [Supreme Court rejected State Bar's disbarment recommendation in original disciplinary proceeding because public adequately protected by extending the respondent's current probation for two years].) Presumptively, petitioner's compliance with the terms of his suspension and with the terms of his probation (discussed *post*) has satisfied the discipline required to permit him to become a productive attorney. However, it must be noted that, in addition to compliance with petitioner's actual suspension and the terms of his probation, petitioner must affirmatively show, by a preponderance of the evidence (rule 634) his "rehabilitation, present fitness to practice and present learning and ability in the general law before [he] shall be relieved of the actual suspension." (Std. 1.4(c)(ii).) That showing must be measured from the time of the last prior discipline.

The proceedings for relief from suspension must be distinguished from proceedings for reinstatement following disbarment or resignation. In the latter proceedings, under rule 662, no petition can be filed within a minimum of five years after disbarment or resignation. Reinstatement proceedings permit the State Bar an extended period for investigation before even determining whether to oppose such a petition. (Rule 663.) There are no provisions for either a summary proceeding or an expedited proceeding.

On the other hand, in "relief from suspension" proceedings, at least a portion of the emphasis is on expediting the matter. The petition may be filed up to six months prior to the expiration of the period of actual suspension. (Rule 632.) The State Bar has 45 days to respond to the petition (rule 633(a)), and the hearing must be set within 35 days of service of the response (rule 633(c)). Discovery is severely restricted. (Rule 635.) Other than declarations, documentary and oral evidence are severely limited. (Rules 636 and 637.) The hearing department decision is to be filed within 15 days of the conclusion of the hearing (rule 638), and if appealed, the review department is to render its decision within 30 days of the submission of the matter (rule 639).

In addition, a key distinction between "reinstatement" proceedings after disbarment or resignation and the present "relief from suspension" proceeding is the standard of proof in the latter is by "preponderance of the evidence" (rule 634), as contrasted with "clear and convincing evidence" in "reinstatement" proceedings (rule 665(b)).

We must also read the rules governing relief from suspension proceedings in light of the Supreme Court's comments on such proceedings in *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071, 1080, Fn. 6. In that Footnote, the Supreme Court makes clear the distinction between reinstatement proceedings and the proceeding before us. There the court expressed its concern that compliance with standard 1.4(c)(ii) would have the effect of increasing a period of actual suspension, given the period of time required for a petitioner to satisfy his or her burden of proof under that standard. The rules now in place attempt to meet that concern.

IV. POSITION OF STATE BAR AND DISCUSSION

The State Bar seeks review of the hearing department decision on the grounds that petitioner has not shown by a preponderance of the evidence (rule 634) that he has met his burden of proof under standard 1.4(c)(ii). In support of this position, the State Bar argues that the hearing judge was unduly influenced by the stipulations entered into in the underlying disciplinary matters. It takes exception to the hearing judge's following statement, included in the decision, "The fact that the Supreme Court was willing to approve a stipulation which allowed Petitioner to make his rehabilitation under a lower standard of proof than that required in readmission cases has influenced the Court's decision in determining that an adequate showing of rehabilitation has been made." The quoted statement clearly reflects the distinction between the preponderance of the evidence standard as required by rule 634 and the clear and convincing evidence standard required by rule 665(b) in reinstatement proceedings. We find no error in the hearing judge's use of the quoted language.

As we have made clear a reevaluation of the discipline in prior matters may play no part in determining rehabilitation for relief from suspension purposes, and reject any suggestions to the contrary.

[5a] In oral argument the State Bar emphasized that the present proceeding was not disciplinary, but rather regulatory, looking to public protection rather than discipline and that, as a consequence, we must consider petitioner's violation of terms of his probation in measuring rehabilitation for the purposes before us. We again point out that petitioner has been disciplined for those probation violations, and to again use such conduct to rebut rehabilitation is improper. If we were to again use it, other than as a starting point to measure rehabilitation, the effect would be to twice discipline petitioner for the same conduct. That is, his disciplinary suspension would be extended, whether in a "disciplinary proceeding" or a "regulatory proceeding." For the purposes before us, we reject the distinction.

With respect to the imposition of discipline, the State Bar Court's only authority other than reprovals is to make discipline recommendations to the Supreme Court. (Bus. & Prof. Code, §§ 6077, 6078, 6086.5.) Thus, except for the limited instances specified in rule 951 of the California Rules of Court that are not relevant here, the State Bar Court has no jurisdiction over Supreme Court disciplinary orders and, therefore, cannot reevaluate the level of discipline imposed in them.

It does not follow, however, that we disregard the underlying misconduct in evaluating rehabilitation. We must and do assume that the discipline in the prior matter was proper for the misconduct found. We then look to the nature of the prior misconduct, to the extent it is revealed in the record, and to what we may rely on, as shown by the record, as evidence that such misconduct is unlikely to recur.

[5b] The State Bar asserts that the continuing misconduct of petitioner since the original discipline ordered by the Supreme Court, in *Murphy I*, precludes a finding of rehabilitation. It points out that even as the *Murphy I* order was issued, petitioner was engaged in additional misconduct, reciting petitioner's failure to comply with the conditions of his probation on two separate occasions, and his misconduct involving Jose Valdez as evidenced by *Murphy II*. The State Bar's reliance on these acts of misconduct is misplaced. As to each of such acts, additional discipline was imposed upon petitioner. The Supreme Court order in *Murphy II* dealt with the first violation of conditions of probation and the subsequent misconduct involving Jose Valdez while the order filed April 26, 1994, in *Murphy III*, dealt

with petitioner's further failure to comply with conditions of probation. Discipline was imposed on petitioner in each of those orders. As a consequence, we will not use that misconduct as a basis to preclude a finding of rehabilitation for the purposes of relief from suspension, but we do use it as a point from which to measure rehabilitation.

[6] The State Bar properly points out that petitioner failed to file income tax returns for the years 1986 to 1992. No discipline having been ordered for such conduct, it is a proper factor to be considered in measuring rehabilitation for our purposes, as is his indebtedness to the IRS and his other unpaid obligations, all of which are discussed *post*.

[7] The State Bar challenges the hearing judge's reliance on the stipulations in the underlying matter concerning mitigation. As we have said, the nature and extent of rehabilitation and the factors that we may rely on to determine that there is a likelihood that a repetition of the misconduct will not occur must be ascertained from the record. That record includes in mitigation, in each matter, facts agreed to by the State Bar that may shed light on either the causes or other reasons for petitioner's misconduct. Just as we use the stipulations as to culpability and aggravation to assist in determining the starting point for rehabilitation, we use the stipulations as to mitigating circumstances to assist us in finding a starting point for making a determination as to whether the misconduct is likely to recur.

[8a] Without any apparent recognition of the differences between this proceeding and a reinstatement after disbarment proceeding, the State Bar draws from reinstatement following disbarment cases and argues that the same standard of rehabilitation must be demonstrated in relief from suspension matters. In support of this position the State Bar relies on *In re Menna* (1995) 11 Cal.4th 975, 989 (there is little value in a petitioner's maintaining good conduct while being watched on probation; he must demonstrate, over a prolonged period, his sincere regret and rehabilitation) and *In re Giddens* (1981) 30 Cal.3d 110, 116 (the concept of rehabilitation also includes a requirement of "sustained exemplary conduct").

[8b] Such a position ignores the concern expressed by the Supreme Court in *Silva-Vidor* v. *State Bar, supra*, 49 Cal.3d at p. 1080, fn. 6 when the court specifically addressed Standard 1.4(c)(ii). As indicated, the Supreme Court appears to have made a clear distinction between reinstatement proceedings and matters in which relief from suspension is sought. To accept the State Bar's position would amount to dooming all suspended attorneys to demonstrating the majority of their rehabilitation for suspension purposes to a period commencing with the termination of their probation. That is, any attorney required to meet standard 1.4(c)(ii) would ordinarily be required to complete his or her probationary period before being able to present meaningful evidence of rehabilitation in relief from suspension matters. We reject such a position.

The primary purposes of discipline are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Std. 1.3; *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111.) The imposition of rehabilitative sanctions (i.e. probationary terms) against an attorney is permissible only to the extent the imposition of such sanctions is consistent with the described primary purposes of attorney discipline. (Std. 1.3.) In the matter before us, rehabilitative sanctions have been determined to be appropriate for petitioner by the Supreme Court. Those sanctions were set in the prior matters by virtue of the various orders describing the discipline imposed on petitioner.

[8c] We also note that standard 1.3 uses the term "rehabilitative sanctions" in referring to, inter alia, terms of probation. In reinstatement matters the rehabilitation must generally be completed with no residual questions concerning applicant's qualifications to practice law. (See *Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1092 [an applicant for reinstatement "must show by the most clear and convincing evidence that efforts towards rehabilitation have been successful"].) In relief from suspension matters, rehabilitative sanctions in the form of continuing probation, may remain in place for some period of time following relief from suspension. If it were otherwise, again, no application for relief from

suspension could be properly granted until the expiration of probation, thereby effectively imposing actual suspension in all cases for the period of probation where a condition of complying with standard 1.4(c)(ii) is imposed. We reject that interpretation.

In the matter before the court, upon termination of actual suspension, petitioner will remain on probation until August 1998.

[9] In determining whether petitioner's evidence is sufficient to establish his rehabilitation we must first consider the prior misconduct from which he seeks to show rehabilitation. (Cf. *Pacheco* v. *State Bar* (1987) 43 Cal.3d 1041, 1048, 1051; see also *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403.) This is because the amount of evidence of rehabilitation required to justify termination of actual suspension varies according to the seriousness of the misconduct at issue. (Cf. *Kwasnik* v. *State Bar* (1990) 50 Cal.3d 1061, 1086 (dis. opn. of Lucas, C.J.).) We then consider petitioner's actions since April 1995, when he was last disciplined and for which actual suspension was imposed, and determine whether they, in light of all of his prior misconduct, sufficiently demonstrate his rehabilitation by a preponderance of the evidence. (Cf. *Pacheco* v. *State Bar*, *supra*, 43 Cal.3d at p. 1051.)

[8d] Absent the provisions of standard 1.4(c)(ii), upon a showing of compliance with the terms of his probation, petitioner would have been entitled to be returned to active practice on August 21, 1996. That standard, when imposed, requires "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. . . ." (Std. 1.4(c)(ii).) Such a showing may be made before the term of actual suspension expires. (Rule 632.) Thus, it is clear that, in a proper case, a disciplined attorney may show rehabilitation even before her or his actual term of suspension expires. (See rule 640.) In any event, one may show rehabilitation before the expiration of the term of probation. (Cf. *Silva-Vidor* v. *State Bar*, *supra*, 49 Cal.3d at p. 1080, fn.6.)

We also note that standard 1.3 uses the term "rehabilitative sanctions" in referring to, inter alia, terms of probation. As we have concluded, an attorney with actual suspension is entitled to seek relief from suspension under standard 1.4(c)(ii), during his or her period of rehabilitative sanctions. The purpose of disciplinary probation is, in part, to permit rehabilitation. The aim of disciplinary probation is the protection of the public, the profession, and the courts and rehabilitation of the errant attorney. (*In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298-299; cf. *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 319.)

These factors, combined with the lower standard of proof required in relief from suspension proceedings (rule 634 [preponderance of the evidence]) and the summary nature of the proceedings (rules 633 - 639), persuade us that "rehabilitation" as used in relief from suspension proceedings must be measured by a different standard than in reinstatement proceedings. We conclude that, in the absence of extraordinary circumstances, rehabilitation in relief from suspension matters must be measured by the disciplined attorney's conduct from the time of the imposition of the last discipline that led to the suspension.

[10] We further hold that, as a minimum, the petitioner in relief from suspension proceedings, where a standard 1.4(c)(ii) condition has been ordered must show strict compliance with the terms of probation, and must show by a preponderance of the evidence, exemplary conduct from the time of the imposition of the last prior discipline. Having made such a showing, petitioner must additionally, by a preponderance of the evidence, show that the conduct evidencing rehabilitation is such that the court may make a determination that the conduct leading to the discipline or other need for rehabilitation is not likely to be repeated.

[11] In weighing such a determination, the court should look to the nature of the underlying offense, or offenses; any aggravation, other misconduct or mitigation that may have been considered; and any evidence adduced that bears on whether the cause or causes of such misconduct have been eliminated. Such evidence might well consist of testimony or declarations showing change of character of the petitioner from one of greed, rapaciousness or recklessness to one of charity, care and compassion; from

a depressed and nonfunctional individual to one of proper adjustment and ability to deal with stress; or from a substance abuser to a person who has overcome those habits. The State Bar is, of course, entitled to rebut any such showing. There must be sufficient evidence upon which the trier of fact can base a determination that the causes of the misconduct have been eliminated and that there is a reasonable basis to believe such misconduct will not recur.

We believe such standards to be consistent with the State Bar's desires and obligation to provide due process to attorneys subject to discipline, while at the same time affording public protection and meeting other goals of lawyer discipline. We recognize that secondary to the public protection aspects of lawyer discipline, the purpose of discipline is not punishment, but rather rehabilitation. (See, generally, *In re Stevens* (1925) 197 Cal. 408, 424 ["The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burden upon them."]; *In the Matter of Marsh*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 299 ["[R]ehabilitation of the member is also a permissible goal of discipline so long as the rehabilitative sanction does not conflict with the primary aims."].)

[12a] We apply the standards set forth to the evidence before us. The petitioner was culpable of misappropriating in excess of $41,000 from a client and failing to communicate with and properly represent a client. In addition, petitioner failed to cooperate with the State Bar investigation in that matter. As stipulated in that matter, the misappropriated money was interpled, and at the time of that misconduct, petitioner was under enormous emotional stress resulting from the dissolution of his marriage of 22 years and extreme business problems. It was further stipulated that the stress of those situations has been successfully resolved.

[12b] At the time of that misconduct petitioner was an alcoholic, and his alcoholism distorted his value system and thought processes and influenced his misconduct. It is undisputed that petitioner has maintained his sobriety since January 1991. It appears in the record without contradiction that petitioner's marital situation is now stable and that he no longer suffers from extreme business problems. It is uncontradicted that the causes of the probation violations for which petitioner was disciplined were related to his undiagnosed diabetes and that, since its diagnosis and treatment, commencing in March 1994, there have been no further violations of probation.

[12c] In addition, petitioner has included, with his petition, 13 declarations of friends and acquaintances generally attesting to his good character and sobriety. The State Bar, citing *Pacheco* v. *State Bar*, *supra*, 43 Cal.3d at p. 1053, asks that the declarations be given reduced weight because some of them failed to indicate that the authors knew of the underlying misconduct and generally evidence knowledge of petitioner only since 1991. Five of the declarations are from practicing attorneys, all but one indicating that they had knowledge of the underlying misconduct. The declarations from the attorneys are entitled to added weight because of their understanding of the requirements of the practice of law. (Cf. *ibid.*) In addition, there are declarations from persons who were familiar with petitioner's alcoholism, and they each remark on the change in his character since the beginning of his sobriety.

[12d] As the hearing judge pointed out in her decision, because of the major changes in petitioner's life, including a divorce and remarriage, the attendance at AA and The Other Bar meetings three and four times a week, and surrounding himself with persons who support his sobriety, presumably a new circle of friends, it is appropriate that he seek recommendations from this new supportive group. We do, however, acknowledge the limitation of this proof, in that it does not show "an extraordinary demonstration of good character of the member attested to by a wide range of reference in the legal and general communities and who are aware of the full extent of the member's misconduct." (Std. 1.2(e)(vi); *In re Ford* (1988) 44 Cal.3d 810, 818.)

[12e] The State Bar asks us to consider petitioner's misconduct that followed the initial actual suspension. It points out that in *Murphy II*, the Supreme Court again disciplined petitioner for his conduct in the Jose Valdez matter, failure to timely file the declaration as required by rule 955, and other

violations of probation. We note that petitioner has been disciplined for the described misconduct, and on the basis of the rules we have enunciated, we decline to use it as evidence rebutting petitioner's evidence of rehabilitation.

[12f] We do, however, use that misconduct to assist us in determining the point from which we measure petitioner's rehabilitation. That additional misconduct, in light of the prior serious misconduct increases the burden that petitioner must meet in that he must now address not only the misappropriation and failure to perform issue that were a part of the first discipline, but also his apparent lack of concern for the Supreme Court order requiring him to perform certain acts, as well as the additional failure to perform in the Valdez matter.

[12g] We look as well to the mitigation found in *Murphy II*. There it was stipulated that petitioner continued to suffer from substantially the same problems that plagued him in the first discipline, except that he was no longer consuming alcohol. The mitigation that was agreed upon was that petitioner had difficulty functioning due to emotional distress from employment problems, financial reversal and martial dissolution difficulties. Again, we observe that petitioner presented evidence that these problems were overcome. The fact that the identical personal problems persisted through both the first and second discipline should put the trier of fact on notice that the conduct was not aberrational, and that the problems were deeply rooted. This, in turn, requires that a preponderance of the evidence show the elimination of a group of such deep-rooted problems.

[12h] Following *Murphy II*, petitioner again failed to comply with an order of the Supreme Court, raising the clear concern that he had absolutely no regard for his duties as an attorney. *Murphy III* adds to the elements that petitioner must establish by a preponderance of the evidence. As the result of that additional misconduct, petitioner must show a change of character, or other explanation, which permit the hearing department to find that, in fact, he has proper regard for his duties as an attorney.

[12i] The mitigating circumstances in *Murphy III*, as stipulated to by the State Bar, greatly assist the trier of fact in this area. The petitioner suffered from diabetes, which remained undiagnosed and untreated until March of 1994, long after his last prior misconduct. It was agreed that, in the opinion of petitioner's doctor, the complications of the disease "greatly effected [sic]" petitioner's judgment and resulted in his untimely filing of probation reports. There is no contrary evidence in the record. Upon diagnosis and treatment of the disease petitioner came into full compliance with the terms of probation, and the record reveals no recurrence of such of problems with probation reports.

[12j] The State Bar points out that petitioner was on administrative suspension for failure to take the California Professional Responsibility Examination within the time prescribed by Supreme Court order. We note that, in fact, this suspension was administrative, not disciplinary, and that it occurred during the time of petitioner's undiagnosed diabetes. Under the circumstances it contributes little to our evaluation of the hearing judge's exercise of discretion in finding that petitioner is to be relieved of actual suspension.

[12k] The State Bar relies on three other areas of evidence to show petitioner's lack of rehabilitation. First, the evidence demonstrates that petitioner has three separate debts that remain unpaid. There is a 1992 judgment in favor of a credit card company for debts incurred in the 1980's in the approximate amount of $1,400, a judgment in favor of an attorney in petitioner's divorce proceeding in an amount between $600 and $1,000, and an unpaid obligation to American Express in the amount of approximately $800, from a period of about five years ago. We decline to extend this opinion with a detailed analysis of the showing of petitioner's assets, and ability to pay these obligations, other than to observe that they are factors which must be considered in the exercise of discretion by the trier of fact. We observe that the hearing judge found that petitioner has paid off a great many debts resulting from his divorce and business problems and that the debts in question are not related to the practice of law.

[12l] The record also reveals that petitioner failed to file personal income tax returns with the IRS for the years 1986 through 1992. As a result of an

agreement reached with the IRS, petitioner is in the process of paying the IRS an agreed sum of approximately $150,000. This obligation resulted from petitioner's activities that predate the last misconduct. However, no discipline has been imposed for such activity. As a result, it is properly considered in establishing the point from which rehabilitation must be measured. The hearing judge provided a thoughtful analysis of this issue and concluded that it did not defeat a showing of rehabilitation, noting that at the present time there remains no dispute with the IRS.

[12m] Finally, the record reflects that, in September 1993, petitioner received a traffic citation for speeding and that he failed to either pay or appear as the result of that citation. The matter was resolved by payment at the time petitioner sought to renew his driver's license. This is a factor to be properly considered in measuring the starting point for rehabilitation even though it occurred before the imposition of the last prior discipline in April 1994. The hearing judge, as evidenced by the written decision, gave weight to this factor in exercising her discretion. Under rule 300 our standard of review is for abuse of discretion or error of law. As we have determined, no error of law appears.

[12n] We search the record for an abuse of discretion, taking care not to substitute our judgment for that of the hearing judge, who observed, and heard the testimony of petitioner. We further note the summary nature of the proceeding, being primarily resolved on the record, in addition to the testimony of petitioner. We find that, as to each item of evidence and the evidence taken as a whole we cannot determine that the discretion was exercised other than in conformity with the spirit of the law. This is certainly a case "where an impartial mind hesitates." (*Bailey* v. *Taaffe*, *supra*, 29 Cal. at p. 424.) While this court may or may not have reached a different result had we considered the evidence in the first instance, we conclude that there is substantial evidence to support the hearing judge's findings of rehabilitation, present fitness to practice, and adequate learning and ability in the law. Thus, we find no abuse of discretion.

V. STATUS OF PETITIONER DURING PENDENCY OF MATTER

[13a] There remains one issue to be considered. Upon learning that the records of the State Bar reflected that petitioner was entitled to practice following the issuance of the hearing judge's decision we issued an order preserving the status quo, and that order remains in effect.

[13b] We note the language in rule 640 provides in proceedings of the sort before us that the petitioner shall remain on actual suspension while the petition is pending in this court. In the event the petition is granted, petitioner remains on suspension only until the expiration of the actual suspension ordered in the underlying discipline. (Rule 640.)

[13c] Considering the summary nature of these proceedings, the expedited schedule for filing a response, discovery, hearing and review (rules 632, 633, 635, 638, 639), we conclude that the clear meaning of rule 640 is that the petitioner shall remain on actual suspension until the finality of the decision in the State Bar Court, including review. In the case before us, the issue has become moot as the result of our conclusion. Our discussion as to the time of termination of suspension is included only to avoid confusion in future cases.

VI. CONCLUSION

The hearing judge's decision granting the petition for relief from actual suspension in this matter is affirmed.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GORDON REY JOHNSTON

A Member of the State Bar.

No. 94-O-12212

Filed February 19, 1997, as corrected February 25, 1997

SUMMARY

In a single client matter, respondent failed to perform competently, failed to communicate with the client, and lied to the client about the status of the case. In addition, respondent failed to cooperate with the State Bar's investigation of the client's complaints. Respondent failed to file an answer and his default was entered. The hearing judge recommended one year stayed suspension, two years probation, and 45 days actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar sought review, seeking an additional finding of aggravation, an increase of the recommended period of actual suspension from 45 days to at least 90 days, and a recommendation that respondent be required to comply with the notification requirements of rule 955 of the California Rules of Court. The review department rejected each of the State Bar's requests, but concluded that the recommended period of actual suspension was insufficient and, therefore, increased it from 45 days to 60 days.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Del Cerro
Erica L. Markum

For Respondent: No Appearance

HEADNOTES

[1 a-c] 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Respondent recklessly provided incompetent legal services where he filed a compliant for a client, but did not serve the defendants within the three-year time limit or bring the case to trial within the five-year time limit under the Code of Civil 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.

[2 a-d] **221.00 State Bar Act—Section 6106**
230.00 State Bar Act—Section 6125

Where respondent misled client into believing that he was working on her case when he was on administrative suspension for failing to pay his State Bar dues, he improperly held himself out as entitled to practice law in violation of Business and Professions Code section proscribing acts of moral turpitude, dishonesty, and corruption.

[3 a, b] **130 Procedure—Procedure on Review**
139 Procedure—Miscellaneous
199 General Issues—Miscellaneous
213.40 State Bar Act—Section 6068(d)
565 Aggravation—Uncharged Violations—Declined to Find
695 Aggravation—Other—Declined to Find

Review department is very reluctant to consider State Bar's request for a holding that respondent's failure to comply with the terms of a civil settlement agreement was an aggravating circumstance because the State Bar did not request such a holding from the hearing judge, but requested it for the first time on review.

[4 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
107 Procedure—Default/Relief from Default
565 Aggravation—Uncharged Violations—Declined to Find
595.90 Aggravation—Indifference—Declined to Find
605 Aggravation—Lack of Candor—Victim—Declined to Find
695 Aggravation—Other—Declined to Find

In default proceedings, uncharged facts cannot be relied on as evidence of aggravating circumstances because the respondents are not fairly apprised that additional uncharged facts will be used against them. The use of uncharged facts in a contested proceeding presents a different question.

[5 a, b] **175 Discipline—Rule 955**
179 Discipline Conditions—Miscellaneous
199 General Issues—Miscellaneous

Where the recommended period of actual suspension was less than 90 days, State Bar's request for a recommendation that respondent be required to comply with rule 955 of the California Rules of Court as a means of forcing respondent to demonstrate submission to the disciplinary authority of the State Bar and the courts was rejected as no authority was found to support imposing a rule 955 requirement for this reason.

[6 a, b] **175 Discipline—Rule 955**
179 Discipline Conditions—Miscellaneous
199 General Issues—Miscellaneous

Where the recommended period of actual suspension was less than 90 days and the respondent had continuously been on administrative suspension for failing to pay bar dues for more than five years

and on involuntary inactive enrollment for more than a year, there was no identifiable preventative benefit sufficient to recommend that respondent be required to comply with rule 955 of the California Rules of Court.

Additional Analysis

Culpability

Found

213.91 Section 6068(i)
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Aggravation

Found

582.10 Harm to Client
601 Lack of Candor—Victim

Mitigation

Found

710.10 No Prior Record

Discipline

1013.06 Stayed Suspension—1 Year
1015.02 Actual Suspension—2 Months

Probation Conditions

1017.08 Probation—2 Years

Other

175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

Norian, J.:

The State Bar, through its Office of the Chief Trial Counsel (OCTC), seeks review of a hearing judge's decision recommending that respondent Gordon Rey Johnson be suspended from the practice of law for one year, that execution of the one-year suspension be stayed, and that he be placed on two years probation subject to conditions, including a 45-day period of actual suspension. The recommendation is based on the hearing judge's determinations: (1) that, in a single client matter, respondent failed to perform competently, failed to communicate with the client, and lied about the status of the case to the client; and (2) that respondent failed to cooperate with OCTC's investigation of the client's complaint.

On review OCTC seeks an additional finding of aggravation and raises one point of error. We deny OCTC's request to find an additional aggravating circumstance and reject its single point of error, but increase the recommended period of actual suspension from 45 days to 60 days.

I. RESPONDENT'S DEFAULT AND INACTIVE ENROLLMENT

Respondent did not timely file an answer, nor has he otherwise appeared in this case. Respondent's default was properly entered, and effective June 11, 1995, he was involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (e),[1] because of his failure to answer. Respondent will remain enrolled inactive until the earlier of the date on which he files a motion for relief from default or the date on which the Supreme Court order in this matter becomes effective. (See § 6007, subd. (e)(2).)[2]

II. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Respondent was admitted to the practice of law in this state December 14, 1972, and has been a member of the State Bar since that time.

On review OCTC does not challenge any of the hearing judge's findings of fact or conclusions of law. After independently reviewing the record, we adopt each of the hearing judge's factual findings, summarized as follows.

A. The Brown Matter

[1a] In January 1984 Beatrice Brown hired respondent to represent her in personal injury case arising out of an automobile accident. Respondent filed a complaint for Brown in January 1985, but never did any additional work on the case.

Brown telephoned respondent about her case often. After April 1989 respondent quit returning Brown's calls. When Brown telephoned respondent's office in April 1990, the receptionist told her that respondent no longer had an office there.

Effective August 10, 1992, respondent was suspended for failing to pay his State Bar dues.

Eventually, in August 1993, Brown had another attorney send respondent a letter requesting her file. The attorney sent the letter to respondent's official address. Respondent did not reply to the letter. **[2a]** Therefore, Brown drove to respondent's home in October 1993 and met with respondent about her case.

[2b] During that meeting respondent did not tell Brown that he was suspended from the practice of law for not paying his dues. He did, however, tell her

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

2. Even though section 6007, subdivision (e)(2) was amended effective January 1, 1997, this amendment is not applicable to respondent's inactive enrollment. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 504 [as amended eff. Jan. 1, 1997].) Under this amendment, the member's default must be set aside before the involuntary inactive enrollment will be terminated.

that he was waiting for her case's trial date and expected a settlement soon, and he gave her a portion of her file. In addition, respondent led Brown to believe that he was still working on her case when he was not. In fact, when respondent mislead Brown into believing he was still working on her case, he knew her claim was barred because he did not serve the defendant within three years or bring it to trial within five years after it was filed, as required by the Code of Civil Procedure.

In March 1994 Brown sued respondent for malpractice. That case was settled in November of that same year. The terms of the settlement require respondent to pay Brown a total of $19,133.50 in monthly installments of $150 plus 10 percent interest beginning in January 1995. As of July 1995, respondent had made only four of the required seven payments.

The hearing judge held that respondent willfully failed to communicate with Brown in violation of section 6068, subdivision (m). **[1b]** In addition, she held he recklessly failed to perform competently in violation of rule 6-101(A)(2) of the former Rules of Professional Conduct and its successor rule, rule 3-110(a) of the Rules of Professional Conduct by not serving the defendant in Brown case within the three years and not bringing the case to trial in five years as required by the Code of Civil Procedure. **[2c]** She also held that, during respondent's October 1993 meeting with Brown at his home, respondent improperly held himself out as entitled to practice law by misleading Brown into believing he was still working on her case while he was on suspension for not paying his dues in violation of section 6106. **[1c] [2d]** We adopt each of these conclusions of law.

B. Failure to Cooperate

The hearing judge found that respondent failed to respond to two letters sent to him by a State Bar investigator regarding Brown's complaint and held that respondent wilfully violated his duty to participate in State Bar investigations under section 6068, subdivision (i). We adopt that finding and conclusion.

III. AGGRAVATING AND MITIGATING CIRCUMSTANCES

Other than seeking an additional finding in aggravation, OCTC does not challenge any of the hearing judge's determinations on aggravating and mitigating circumstances. We summarize them here and adopt them in their entirety. Respondent's practice of law for more than 12 years without a prior record of discipline is an important mitigating circumstances under standard 1.2(e). (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards).)

Respondent's misconduct significantly harmed Brown because she lost her cause of action. (Std. 1.2(b)(iv).) In addition, respondent's failure to file a response to the notice of disciplinary charges in this proceeding is an aggravating circumstance under standard 1.2(b)(vi).

IV. REQUEST FOR ADDITIONAL AGGRAVATING CIRCUMSTANCE

[3a] [4a] OCTC requests that we hold that respondent's failure to make three of the $150 monthly malpractice settlement payments to Brown during the first seven months of 1995 to be an aggravating circumstance under standard 1.2(b)(v). We decline the request.

[3b] Initially, we note that OCTC never requested such a holding from the hearing judge either at the default trial or in a motion for reconsideration. Thus, we are hesitant to consider it for the first time on review. (*In the Matter of Wolfgram* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 355, 361.)

[4b] Second, we note that OCTC did not allege respondent's failure to make the three monthly settlement payments in the notice of disciplinary charges. Uncharged facts cannot be relied upon for evidence of aggravation in a default matter because the respondent is not fairly apprised of the fact that additional uncharged facts will be used against him. (*In the Matter of Hazelkorn* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 602, 606; see also *In the*

Matter of Heiner (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 316, fn. 32.) Of course, "[t]he use of uncharged aggravating factors in contested proceedings presents a different question. [Citation.]" (*In the Matter of Hazelkorn, supra*, 1 Cal. State Bar Ct. Rptr. at p. 606, fn. 3.)

V. APPROPRIATE LEVEL OF DISCIPLINE

In its sole point of error, OCTC contends that the hearing judge's discipline recommendation is insufficient. On review OCTC argues that (1) we should increase the recommended period of actual suspension from 45 days to somewhere between 90 days and one year and (2) we should recommend that respondent be ordered to comply with rule 955 of the California Rules of Court regardless of whether we increase the recommended period of actual suspension. We reject both arguments, but nevertheless increase the recommended period of actual suspension from 45 days to 60 days.

A. Actual Suspension

The hearing judge based her recommendation of a 45-day period of actual suspension on *Wren* v. *State Bar* (1983) 34 Cal.3d 81, 90. In *Wren* the Supreme Court imposed a 45-day actual suspension on the attorney because he failed to communicate with a client, misrepresented the status of a case to the client, failed and refused to perform, failed to use reasonable diligence, and gave false and misleading testimony during the disciplinary hearing in the State Bar Court.

Like respondent, Wren did not have a prior record of discipline. However, we agree with OCTC that respondent should receive a greater period of actual suspension than did Wren because: (1) respondent defaulted, and Wren did not; and (2) respondent improperly held himself out as entitled to practice law, and Wren did not. Yet, we reject OCTC's contentions that *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, supports increasing the recommended actual suspension to 90 days and that *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, supports increasing it to one-year.

The misconduct in *Ward* was much more extensive than the misconduct in this proceeding. *Ward* involved two client matters, the misappropriation of a substantial sum of money involving moral turpitude, and the serious disregard of trust account responsibilities. In *Conroy* the attorney had two prior records of discipline. (See std. 1.7(b) [requiring disbarment if the attorney has two prior records of discipline unless the most compelling mitigating circumstances predominate].)

Thus, while we view the 45-day actual suspension in *Wren* as inadequate for the misconduct in the present case, we view the 90-day actual suspension in *Ward* as excessive. We conclude that a 60-day period of actual suspension is appropriate. The Supreme Court's opinion in *Calvert* v. *State Bar* (1991) 54 Cal.3d 765, supports our conclusion. In *Calvert* the Supreme Court imposed a 60-day actual suspension on the attorney because, in a single client matter, she failed to perform competently, continued to represent the client when she knew that she did not have the time to do so, and improperly withdrew.

B. Rule 955

[5a] [6a] OCTC requests that we recommend that respondent be ordered to comply with rule 955 of the California Rules of Court even though compliance with rule 955 ordinarily is not recommended when the period of recommended actual suspension is less than 90 days. (*In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 341.) OCTC contends that a rule 955 requirement is necessary (1) to "force respondent to demonstrate submission to the disciplinary authority of the State Bar and the courts ..." and (2) to insure that all of respondent's clients know that he is on suspension for failing to pay his bar dues and that he has withdrawn from their cases. OCTC asserts that, if respondent did not tell one of his clients of his suspension which would cause his withdrawal from the matter, he may have not told his other clients of his suspension and failed to withdraw from their cases.

[5b] We decline to use rule 955 as requested by OCTC as a means of forcing an attorney to demon-

strate submission to the disciplinary authority of the State Bar and the courts. We find no authority to impose the 955 requirement for this reason. In addition, we do not find the circumstances of this case compel client notification for the protection of the public, the courts, and the profession.[3]

[6b] As of the date of this opinion, respondent has continuously been on administrative suspension for failing to pay his dues for more than five years and on involuntary inactive enrollment for more than a year. Accordingly, there is, at this time, no identifiable preventative benefit sufficient to recommend a rule 955 requirement.

VI. DISCIPLINE RECOMMENDATION

We modify the hearing judge's discipline recommendation to increase the recommended period of actual suspension from 45 days to 60 days, and to provide that respondent be required to take and pass the Multistate Professional Responsibility Examination within one year from the effective date of the Supreme Court's order instead of the California Professional Responsibility Examination. As modified, we adopt the hearing judge's discipline recommendation in its entirety. We modify the hearing judge's costs recommendation in view of the recent statutory amendments. We recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that those costs be payable in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997).

We concur:

OBRIEN, P.J.
STOVITZ, J.

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3. We note that respondent has a duty to keep his clients informed of significant developments. (See § 6068, subd. (m); rule 3-500, Rules Prof. Conduct of State Bar.) This duty applies to any remaining clients that respondent might currently have. However, as the next paragraph of our opinion points out, respondent has been continuously suspended from practice for over 5 years.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Respondent X

A Member of the State Bar.

No. 90-O-15007

Filed February 26, 1997

SUMMARY

A hearing judge found respondent culpable of violating of his statutory duty to obey court orders issued in connection with his practice of law. Respondent admitted to deliberately violating the confidentiality provision of a superior court order enforcing a settlement agreement in a lawsuit in which he represented the plaintiff, but contended that the order was void because it was an illegal agreement to suppress evidence, violated his First Amendment rights of free speech, and improperly restricted his right to practice law. Respondent sought appellate review of the order, but was unable to have it declared void.

The hearing judge held that, regardless of whether the superior court's order was void, respondent was required to obey it unless and until it was reversed on appeal. Thus, the hearing judge concluded that respondent's violations of the order were disciplinable violations of his statutory duty to obey court orders issued in connection with his practice. In light of the unusual circumstances surrounding respondent's misconduct, the hearing judge ordered only that respondent be privately reproved. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent requested review. The review department agreed with the hearing judge's conclusion that respondent was culpable of misconduct for violating the superior court order but for a slightly different reason. The review department also agreed with the hearing judge's determination that a private reproval was the appropriate level of discipline.

COUNSEL FOR PARTIES

For State Bar: Harold A. Justman

For Respondent: Respondent X

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] 220.00 **State Bar Act—Section 6103, clause 1**

To establish a violation of an attorney's statutory duty to obey court orders issued in connection with the attorney's profession, State Bar must prove by clear and convincing evidence (1) that the attorney willfully disobeyed an order of a court and (2) that the court order required the attorney to do or forbear an act in connection with or in the course of the attorney's practice of law that he ought in good faith to have done or not done.

[2 a-d] 191 **Effect/Relationship of Other Proceedings**
192 **Due Process/Procedural Rights**
193 **Constitutional Issues**
194 **Statutes Outside State Bar Act**
199 **General Issues—Miscellaneous**
220.00 **State Bar Act—Section 6103, clause 1**

The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment. A person affected by an injunctive order may challenge the validity of the order on the ground that it was issued without or in excess of the court's jurisdiction by (1) complying with the order while seeking a judicial determination as to its jurisdictional validity or (2) disobeying it and then raising the jurisdictional challenge if and when he is sought to be punished for his disobedience. If a person affected by an injunctive order chooses to challenge the validity of the order on the ground that it was issued without or in excess of the court's jurisdiction by disobeying it and then raising the jurisdictional challenge as a defense against any contempt charges brought against him, his violation of the order constitutes no punishable wrong if it is ultimately determined that the order was issued without or in excess of jurisdiction. However, the contempt order here was final and there was no valid reason to go behind a now-final order. The State Bar Court properly defers to the judgements of the courts of record that rendered contempt judgements against respondent and that considered respondent's subsequent appeals, requests for reconsideration, and certiorari.

[3 a, b] 220.00 **State Bar Act—Section 6103, clause 1**
430.00 **Breach of Fiduciary Duty**

Even though respondent withdrew from employment because his client accepted a settlement agreement with a confidentiality order, he still had a fiduciary duty to his former client. The client, not respondent, had the right to decide to settle her lawsuit on the chosen terms. Thus, respondent had a good faith duty to act consistently with the client's settlement agreement to, at least, not reveal the settlement amount or the evidence obtained in the case except as allowed by the settlement judge. Respondent's failure to do so violated his statutory duty to obey court orders issued in connection with his profession.

[4 a-e] 220.00 **State Bar Act—Section 6103, clause 1**
715.10 **Mitigation—Good Faith—Found**
791 **Mitigation—Other—Found**
801.30 **Standards—Effect as Guidelines**
801.41 **Standards—Deviation From—Justified**

801.49 Standards—Deviation From—Generally
865.20 Standards—Standard 2.6—Declined to Apply
865.40 Standards—Standard 2.6—Declined to Apply
865.90 Standards—Standard 2.6—Declined to Apply
1099 Substantive Issues re Discipline—Miscellaneous

Even though an attorney's willful violation of his statutory duty to obey court orders issued in connection with his profession is stated grounds for disbarment or suspension, discipline within that range is not mandated. Thus, in light of the unusual circumstances surrounding respondent's violation of this duty, a private reproval was the appropriate level of discipline.

[5] **130 Procedure—Procedure on Review**
1090 Miscellaneous Substantive Issues re Discipline
1099 Substantive Issues re Discipline—Miscellaneous

Even though the review department's duty to independently determine the appropriate level of discipline precludes it from giving excess weight to the State Bar's discipline recommendation, the review department gave it some consideration.

Additional Analysis

Culpability
Found
220.01 Section 6103, clause 1
Mitigation
Found
710.10 No Prior Record
Discipline
Probation Conditions
1055 Private Reproval—Without Conditions
Other
135.10 Division I, General Provisions (rules 1-32)

OPINION:

STOVITZ, J.

In this matter the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charged respondent X[1] with three counts of violating his duty, under Business and Professions Code section 6103,[2] to obey court orders issued in connection with his practice of law. The hearing judge, however, held that respondent was culpable of misconduct under only one of the counts.[3] Under that count, the hearing judge held that respondent violated section 6103 by deliberately violating the confidentiality provision of a superior court order enforcing the settlement agreement in a legal malpractice lawsuit in which respondent represented the plaintiff. That confidentiality provision purported to prohibit respondent from discussing the case or its settlement with anyone other than the district attorney's office or the State Bar.

The hearing judge ordered respondent privately reproved. After independently reviewing the record in this very unusual case on the respondent's request for review,[4] we adopt most of the hearing judge's findings, affirm the hearing judge's decision and impose a private reproval.

I. STATEMENT OF FACTS

A. The Legal Malpractice Lawsuit

In 1984 Maria S (hereafter "S") hired respondent to file a lawsuit against a number of individuals who were involved in a prior lawsuit she brought to recover damages she suffered in an automobile accident. Thereafter, in July 1984 respondent filed such a lawsuit for S in San Francisco Superior Court. The suit included legal malpractice claims against the partners of the firm of attorneys that represented S in her prior personal injury lawsuit.[5]

In her malpractice lawsuit, S alleged: (1) that the firm did not adequately handle and prepare her personal injury case for trial; (2) that the firm charged and collected, from her, bogus or fraudulently inflated costs and expenses in that case; (3) that one of the firm's partners advised her to accept a $100,000 pre-trial, settlement offer in that case to cover his and another partner's failure to prepare her case for trial; (4) that she accepted the $100,000 settlement only because of the partner's advice; and (5) that, if the firm had properly prepared her case for trial, she would have recovered at least $200,000 or $300,000.

After he filed the malpractice lawsuit, respondent obtained strong evidence, outside of normal discovery channels, including from a former secretary of the firm who was the widow of a firm partner, that the firm routinely charged, and collected from, their clients, including S, bogus or inflated investigative costs and expenses.[6] This information was obtained only on assurance of anonymity to the informant.

S claimed in her malpractice lawsuit, that the firm never informed her that they would or did charge her a "marked up" price for the investigative costs and expenses they incurred on her behalf. She

1. Since this proceeding did not result in the imposition of any public discipline. we follow our usual practice of not identifying the respondent in this published opinion. (See, e.g., *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1.) The proceeding is, however, public.

2. Unless otherwise noted all future "section" references are to sections of the Business and Professions Code.

3. The other two counts were implicitly dismissed when the hearing judge refused to find respondent culpable under them. The State Bar has not sought review and we adopt that disposition.

4. The State Bar did not seek review, but urged that we uphold the hearing judge's decision.

5. Later references to these defendant attorneys or their law firm will be to "the firm" or "firm partners" even though S did not sue the firm as an entity.

6. Concurrently with the filing of this opinion, we refer to the Office of the Chief Trial Counsel for appropriate investigation and action, the matter alleging that these members of the State Bar engaged in unethical conduct not only as to the matters set forth here but as to an alleged violation of former rule 1-500, Rules of Professional Conduct, discussed *post*, page 11. (See Rule Proc. of State Bar, title II, State Bar Court Proceedings, rule 218.)

also claimed that the firm's surreptitious "mark ups" violated the plain language of their fee agreement.

According to respondent, the firm converted from S slightly over $1,000 in investigative services billed to her but not paid for investigative work.

Shortly before trial, respondent retained, at his own expense and in accordance with his fee agreement with S, one local attorney and one out-of-state attorney as co-counsel. Both co-counsel agreed that respondent would remain the lead attorney on the case. It is not disputed that the out-of-state attorney was permitted to appear in the case pro hac vice.[7]

B. Settlement of the S Suit and the Imposition of a Confidentiality Order

Within days of a conversation respondent had with the former law firm secretary, the parties resumed settlement negotiations in mid-trial. Then, on the afternoon of Tuesday, March 6, 1990, the parties engaged in settlement discussions before the superior court. Respondent left during that discussion at 5:30 p.m. because of a prior family commitment. However, before he left, he instructed his two subordinate co-counsel not to continue the discussions in his absence. Respondent gave that instruction, at least iu part, because he believed that S was under too much stress to rationally continue discussing settlement.

However, respondent's two co-counsel, continued the discussions in respondent's absence with the superior court's "approval." Sometime around 8 p.m. that evening, the parties reached a tentative settlement agreement in which S would receive a total sum of $750,000 from firm partners and their insurance carrier. Before dismissing the parties that night, the superior court told them that, if the settlement agreement was not finalized by 9:30 the next morning, testimony would promptly resume.

Respondent did not learn of the tentative settlement agreement until he returned to court the following morning, Wednesday, March 7, 1990. While the terms of the settlement agreement were being read into the record, respondent requested permission to tape record the proceeding because one of the settlement terms was that the entire record in case would be sealed, and respondent wanted to make sure he had a record of the proceeding available to him in case of an appeal. The superior court refused respondent's request.[8]

After all of the settlement terms were read into the record, all of the parties and attorneys except respondent accepted them on the record. Respondent disapproved and objected to them.[9] He also stated that, in his view, S was too distraught from the pressures of trial and the discord among her three attorneys to be capable of giving her informed consent to any settlement at the time.

According to one law firm partner, his original attorney in the malpractice case improperly turned over to respondent during discovery, a large amount of allegedly confidential firm information (financial and personal) that was private and privileged without objection, confidentiality agreement, or protective order. According to this partner's admissions before the superior court, one of the primary reasons that he agreed to settle the malpractice case and to force his insurance carrier to pay S such a large sum of money, was to buy his peace and get back all of those allegedly confidential records.

There were at least seven separate provisions in the settlement agreement that collectively (if not individually) affected the evidence in the case. Moreover, at least three of those provisions also purported to adversely affect respondent's personal rights as if he were a party to the litigation or the settlement agreement.

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7. See California Rules of Court, rule 983.

8. See California Rules of Court, rule 980(c) [a party may tape record a court proceeding to aid in note taking *unless otherwise ordered by the court*].

9. In so doing, he told the superior court "that I do not assign to my client the right to bind me personally as a party to this settlement ...."

First, there was a provision that required the parties and their attorneys to keep both the existence of the settlement agreement and its terms strictly confidential unless it was necessary to disclose them on an application for professional liability insurance or their disclosure was ordered by a court in "some other subsequent litigation."

Second, there was a provision requesting the superior court to seal its entire file in the case. A third provision requested the superior court, before dismissing the jury, to inform it that the case had been disposed of without its assistance and to instruct each member of it never to disclose any of the evidence they heard to anyone.

A fourth provision required the parties to terminate the suit (1) by S immediately resting her case once the superior court accepted the settlement agreement; (2) by the firm then moving for nonsuit, which S was not to oppose; and (3) by the superior court immediately granting the unopposed motion for nonsuit, entering a judgement of nonsuit, and sealing its entire file in the case.[10]

A fifth provision required S to transfer ownership "of her complete files, all copies of her files," in or relating to the malpractice lawsuit (except her personal medical records) to the firm and directed all three of her attorneys to give all of her original files and all copies of them to the firm.[11]

A sixth provision purported to toll limitations on any claim that the firm, or any other defendant, might have against respondent for abuse of the civil process "until and unless" respondent breaches a provision of the settlement agreement.

Another provision purported to prohibit respondent from soliciting any of the firm's former, current, or future clients for purposes of pursuing any similar fraud or malpractice claims against them. Moreover, that provision purported to provide that respondent could not use, directly or indirectly, any information he gained during his representation of S in any other lawsuit he might be involved in then or in the future.

Again, as noted *ante*, respondent emphatically stated, on the record before the superior court, that he was not a party to the settlement agreement and that he would not agree to become one. In addition, he sternly objected, on the record, to the terms purporting to affect his personal, individual rights and interests. Next, the superior court permitted respondent to question S, on the record, to determine whether she was entering into the settlement agreement freely and with informed consent. S insisted that she freely and knowingly wanted to accept the settlement agreement even though respondent strongly recommended against it. At that point, respondent concluded that he could no longer adequately represent S because he believed that various provisions of the settlement agreement were unethical and possibly illegal. Therefore, he moved to withdraw as counsel, but his motion was denied.

The superior court judge accepted the parties' settlement agreement and decreed that the case was settled. The judge also ordered that all court records in the case (including transcripts of hearings and testimony) be placed under seal. Finally, he decreed that all of the "real-parties-in-interest" and their attorneys were bound by terms of the settlement agreement.

At that point, respondent requested a transcript of the hearing for purposes of appeal, but the judge

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10. Under Code of Civil Procedure section 581c, subdivision (c), a judgment of nonsuit operates as an adjudication upon the merits unless the court expressly provides otherwise. Under a judgment of nonsuit, the firm would not have to report the $750,000 malpractice settlement to the State Bar under Business and Professions Code section 6068, subdivision (o)(2). Nor would the superior court have to report it to the State Bar under Business and Professions Code section 6086.8, subdivision (a).

11. According to the firm's assertions in superior court, the turnover provision required respondent to turn over every document (original and copies) and any item in his possession relating to S's malpractice lawsuit in any way. Under the turnover provision, respondent was required to turnover even his own copies of each document that was introduced into evidence during trial and all other relevant documents in his possession regardless of whether obtained through formal discovery or his own investigation.

summarily denied his request. The superior court did, however, indicate that it would consider sending a copy of the transcript to the court of appeal under seal.

Next, respondent renewed his motion to withdraw, and S withdrew her objection to his withdrawal. Accordingly, the superior court granted it. Then, the superior court ordered respondent, under the threat of contempt, to turn over all of his files (including all copies of everything in it) relating to S's lawsuit to S within 10 days. Respondent curtly stated that he would not turn over his records, and the superior court ordered the bailiff to take him into custody for contempt. After he was taken into custody, the superior court permitted respondent to make a few additional statements for the record. Shortly, thereafter, the superior court revoked its order seizing respondent, and respondent was released from custody.

In accordance with the settlement agreement, S rested. Firm partners made a motion for nonsuit, and the superior court granted it. The superior court called the jury back into the courtroom, ordered them not to disclose anything they heard during the trial with anyone, and then thanked and discharged them.[12]

Once the jury left the courtroom, S moved the court to enforce the settlement agreement by ordering respondent to comply with its terms. The superior court took S's motion under submission and ordered the parties and respondent to file briefs on the issue of whether the court may properly issue a confidentiality order against respondent prohibiting him from discussing the case with anyone in the future even though the case was settled and a judgement would soon be entered in favor of the defendants. To maintain the status quo pending its ruling on S's motion for an order forcing respondent to comply with the settlement agreement, the superior court ordered the parties and attorneys not to discuss the case with anyone before the hearing resumed the next day, March 8, 1990.

As soon as the March 8 hearing resumed, respondent again requested permission to tape record the hearing or to be permitted to obtain a transcript of it. The superior court refused to allow respondent to record the hearing and stated that "if there is a necessity for transcripts there are means to avail you with that."

Next, respondent presented a number of substantive arguments with supporting authority to the superior court to justify his refusal to comply with the court's order. For example, respondent argued that, even though his client file belonged to S under Supreme Court precedent, he had an absolute right to make and keep a copy of it at his own expense. (See Draftsman's discussion, Rules Prof. Conduct of State Bar, rule 3-700 [silent on the effect of a turnover order].) Moreover, he argued that because S agreed to permit him to conduct his own investigation into her claims and agreed not to ask him to identify to her any person who provided information to him on the condition that he not disclose their identity, he had an independent obligation to those individuals not to turn over any document that would reveal the identity of any such individual.[13]

Respondent also pointed out that former rule 1-500 of the Rules of Professional Conduct ("former rule 1-500"),[14] not only precluded him from entering into an agreement that restricted his right to practice law,[15]

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12. On March 28, 1990, the California First Amendment Coalition and the *San Francisco Banner Daily Journal* filed a motion objecting to the sealing and gag provision in the superior court judge's order enforcing settlement agreement. That motion pointed out a number of infirmities with the sealing and gag provisions and was argued on April 27, 1990. On June 19, 1990, the judge filed a minute order granting the motion in part and releasing the jurors from the gag order and some of the documents from the sealing order.

13. The requirement that upon termination of employment members of the State Bar turn over to the client certain papers and property is subject to "protective" orders or non-disclosure agreement. (Rule Prof. Conduct of State Bar, rule 3-700(D)(1).)

14. Former rule 1-500 was effective from May 27, 1989, to September 13, 1992. Former rule 1-500 was carried forward into the current Rules of Professional Conduct with minor modification. (See Rules of Prof. Conduct of State Bar (eff. Sept. 14, 1992), rule 1-500.)

15. However, see the later decision in *Howard* v. *Babcock* (1993) 6 Cal.4th 409, in which the Court held that rule 1-500 did not forbid an agreement that a retiring law partner not practice in competition with the firm.

but also precluded the defense counsel, the firm, and S's remaining two attorneys from participating in offering or making such an agreement. The firm argued that the settlement agreement did not restrict respondent's right to practice law because it only precluded him from soliciting the partners' clients and because, as they contended, attorneys do not have a right to solicit specific clients.[16]

Throughout the days of closed court proceedings from March 7, 1990, to March 9, 1990, respondent made it clear that he would willingly turnover to S (or any one she designated) all of her medical and personal history records and all copies of them. However, he steadfastly refused to agree to release to anyone any document that would disclose the identity of anyone who supplied him with information on the condition that their identity be kept confidential. As for all of the remaining documents in S's file, respondent indicated to the superior court that he would willingly turn them over to a court appointed "master" so long as the firm would never have access to them.

Moreover, respondent argued that he needed to keep a copy of almost everything in S's file to establish his quantum merit claim against S for attorney's fees, to use in a lawsuit he intended to bring against a firm partner for abuse of the civil process,[17] and to use in his representation of other future clients with fraud claims against the firm for over billing.

Thereafter, the superior court eventually conceded that respondent had, at least, a right to keep copies of or have access to various documents in S's file to establish his claim against a firm partner for abuse of the civil process. In that regard, the superior court indicated that it would permit respondent to obtain anything he needed from S's file for his lawsuit against that partner by an application showing his need. At that time it was after 5 p.m., so the superior court continued the hearing until the next afternoon, Friday, March 9, 1990, at 2:30 p.m. Before the hearing was adjourned for the day, respondent told the superior court that he needed the superior court to reduce his final order to writing so that he would have something from which to appeal. The superior court told respondent he would get such a written order.

Sometime during the day on March 8, 1990, and unknown to respondent, the superior court signed a minute order sealing the case file. That sealing order, however, was not filed until March 16, 1990, and was not served on respondent until March 23, 1990.[18] Respondent received his copy on March 26, 1990.

When the hearing resumed the next afternoon, Friday, March 9, 1990, a firm partner asserted that the provisions of the settlement agreement (1) regarding confidentiality, (2) requiring respondent to turnover S's complete file and all copies of everything in it, and (3) prohibiting respondent from soliciting any of his clients, were not mere contractual provisions, but conditions precedent. Then, after concluding that respondent never had any intention of complying with these three "conditions precedent," the partner moved for a mistrial. In response, the superior court immediately granted the partners' motion.

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16. However, the United States Supreme Court put that issue to rest more than two years earlier when it held that an attorney's right to solicit business for pecuniary gain by sending truthful and non-deceptive letters to specific potential clients known to face particular legal problems is protected by the First Amendment, which is made applicable to the states through the Fourteenth Amendment. (*Shapero* v. *Kentucky Bar Ass'n* (1988) 486 U.S. 466, 478-480.) In addition, California abolished its blanket proscription of attorney solicitation of specific potential clients regarding their specific individual cases in former rule 2-101(B) of the Rules of Professional Conduct (effective January 1, 1975, to May 26, 1989) by deleting it from the then "new" Rules of Professional Conduct, effective May 27, 1989. (See former Rules Prof. Conduct of State Bar [eff. May 27, 1989, to Sept. 13, 1992], rule 1-400(B); Rules of Prof. Conduct of State Bar, rule 1-400(B).)

17. This partner had filed suit against respondent for fraud that, at the time, was due to be dismissed for failure to bring it to trial within five years of its filing.

18. The clerk's certificate of service states that it was served on respondent on March 19, 1990; but the envelope in which respondent received it was dated by the court's postage franking machine as being mailed on March 23, 1990.

Yet, later during the hearing, the superior court found "that there was no mistake in reference to the settlement, neither mutual or unilateral, that there was a settlement and is a settlement." That finding is, of course, a judicial determination vis-à-vis the named parties in the lawsuit. The superior court also rejected as implausible a firm partner's contention that those three provisions were conditions precedent and, therefore, denied the partner's motion for mistrial.

The superior court judge then pronounced from the bench the court's order enforcing the settlement agreement.[19] The judge again ordered the court's file and transcripts of the proceedings in the case sealed. In addition, it again ordered the parties not to discuss the settlement agreement or any of the hearings on it with anyone. It ordered respondent to forthwith turn over, to S, all of her medical records and all records containing intimate details of S's personal life. Furthermore, it ordered respondent to collect the originals and all copies of everything else (e.g., documents, etc.) in his possession relating to S's legal malpractice lawsuit. Moreover, it ordered respondent to turn everything over to the court appointed receiver by 9 a.m. on the following Monday, March 12, 1990.

The superior court appointed the receiver to take possession of all of respondent's files relating to S and to keep them "under seal." Even though the receiver was to keep the records confidential, he was directed to make them available to law enforcement officials, the State Bar, and the Commission on Judicial Performance. No one else was to have access to them except by court order issued pursuant to an application showing good cause and a legitimate need for access.

In addition, the court would review the necessity of keeping the records confidential every three months and then, when it determined that there was no longer a need to keep them confidential, the receiver would destroy them. Finally, the parties and attorneys were not to contact or otherwise communicate with the receiver in an attempt to obtain access to the files. The superior court judge instructed one of S's remaining attorneys to prepare a written order for the judge to sign by Monday, March 12, 1990.

Because it was late in the afternoon on a Friday, respondent asked the superior court to stay his order enforcing the settlement agreement so that respondent would have to time to seek a stay and review from the court of appeal. The superior court denied respondent's request and directed respondent to comply with the order even though it was not then reduced to writing.

Sometime over the following weekend, S telephoned respondent and left a message on his answering machine instructing him to comply with the superior court's order enforcing the settlement agreement and to turn over her file to the court appointed referee. However, when the referee appeared at respondent's office at the appointed time on Monday, March 12, 1990, respondent turned over only S's medical and personal records. As respondent maintained he would throughout the three-day settlement hearing, he refused to turn over any other of his records to the referee.

On March 16, 1990, respondent sent, by messenger, the following pleadings to the superior court for filing: (1) a notice of appeal as to the order enforcing settlement agreement;[20] and (2) a notice to prepare transcript for his use in preparing a petition to the court of appeal for a writ of prohibition. Respondent properly instructed the court clerk that both of those pleadings were to be filed under seal in accordance with the superior court's sealing order. However, the same deputy clerk who filed the superior court's March 8, 1990, sealing order on March

19. Thereafter, on April 4, 1990, the superior court judge signed and filed a written order memorializing this oral order. The confidentiality provisiou in his written order states: "All parties to this action, including all lawyers of the parties and former lawyers of the parties, are prohibited from discussing this case, or this settlement, with the press or with any other person pending further order of the court."

20. Contrary to respondent's assertions, the notice of appeal he presented for filing appears to pertain only to a December 22, 1987, oral order, which was reduced to writing and signed by the judge on April 8, 1988, aud filed on April 15, 1988.

16, 1990, rejected respondent's pleadings for filing and mailed them back to him with the following "explanation": "We cannot file this under seal without an order of court." Respondent did not know that these pleadings had not been filed until he received them back from the clerk on March 22, 1990.[21]

According to respondent, he believed that all of the mandatory injunctive provisions (i.e., provisions compelling a party to perform an act) in the superior court's oral order of March 9, 1990, were stayed by his submission of the notice of appeal for filing on March 16, 1990. In other words, respondent claims that, from March 16, 1990, through March 22, 1990, he believed that he was required to obey only the prohibitory injunctive provisions (i.e., provisions seeking to maintain the status quo by prohibiting a party from doing something) in the order.

On March 16, 1990, respondent hand-delivered a nine-page, single-spaced letter to the judge of an unrelated civil case in which a firm partner represented a number of plaintiffs. That unrelated case was a judicial council coordination proceeding in which the many lawsuits for personal injuries arising from an airplane crash were "consolidated." Accompanying respondent's letter were: (1) a separate, sealed envelope of exhibits to the letter and (2) an unfiled and unserved motion to intervene, as a "potential" lienholder, in the airplane crash case. Respondent sent a copy of this letter to the superior court in S's malpractice lawsuit.

According to respondent, he wrote his March 16, 1990, letter to the judge in the airplane crash case as a friend-of-the-court in hopes of preventing a firm partner from overbilling the partner's clients for costs and expenses in the airplane crash case as he had allegedly done to S in her personal injury case. During the time he was preparing S's case for trial, respondent learned that the airplane crash case had settled and that the partner had submitted, to the court in that case, a request for reimbursement of approximately $250,000 for investigation expenses he paid for his clients.

In his March 16, 1990, letter, respondent described the method the firm partner allegedly used to overbill S for advanced costs and expenses in her personal injury lawsuit. In addition, he recited that S settled her malpractice lawsuit for $750,000 and that the settlement agreement contained a strict confidentially provision. However, the majority of the letter is a recitation of the injustices allegedly done by the superior court in S's malpractice lawsuit, including his injunctive order enforcing the settlement agreement.

In a separate, sealed envelope that accompanied his March 16, 1990, letter were copies of many of the documents respondent referred to in the letter. Respondent also pointed out that some of the "originals" of the copied documents in the envelope were in the sealed record in S's malpractice lawsuit.

On March 19, 1990, the judge in the airplane crash case signed an order reciting that he received these items from respondent, that they were returned to respondent unread, and that he would consider them only if they were properly filed and served. Even though the judge did not mention sealing court records in his March 19, 1990, order and even though respondent did not attempt to file anything in that court under seal, respondent understood the judge's order to mean that he was under a blanket prohibition against filing documents under seal in the judge's court.

Therefore, on March 23, 1990, respondent sent his motion to intervene to the court clerk for filing, but did not serve it on the parties. At the same time, he sent the judge in the airplane crash case a cover letter enclosing (1) a courtesy copy of his motion and (2) his March 16, 1990, letter and its envelope of exhibits.

Respondent served copies of the his March 23, 1990, cover letter without any of its enclosures on the parties in the airplane crash case. He also served copies of his cover letter and all of its enclosures to the superior court in S's malpractice lawsuit and to a firm partner.

21. Respondent was finally able to file them on May 25, 1990, by deleting any reference to the sealing order. Respondent did not pursue this appeal because he never got a copy of the transcripts from the clerk.

In his cover letter, respondent stated that he had not served and would not serve copies of his motion on the parties until March 31, 1990, so that the partner would have time to move to have it sealed if the partner wanted to. Moreover, even though respondent presented the partner his motion to intervene for filing on March 23, 1990, it was not filed until April 5, 1990.

On March 23, 1990, respondent signed a "petition for writ of mandate, prohibition, certiorari, etc." ("petition for writ of mandate") for filing in the court of appeal seeking review of the superior court's order enforcing the settlement agreement. He served copies of that petition for writ of mandate on the parties on March 30, 1990. The record does not reflect when it was actually filed with the court. Nevertheless, it was summarily denied, on April 11, 1990, as premature until and unless respondent was held in contempt.

A firm partner filed an objection to respondent's motion to intervene in the airplane crash case. The partner's objection included a request for sanctions against respondent for filing a frivolous motion. On July 3, 1990, the judge in the airplane crash case denied both respondent's motion to intervene and the partner's request for sanctions against him.

In May 1990, two firm partners and S filed a request for an order requiring respondent to show cause why he should not be held in contempt for not obeying the superior court's order enforcing the settlement agreement in S's malpractice lawsuit. On May 23, 1990, the San Francisco Superior Court issued such an order to show cause against respondent.

Even though the order to show cause had been issued against respondent, he was still unable to obtain a copy of the transcript of the three-day settlement hearing, which was first sealed under the March 8, 1990, sealing order. Finally, after respondent complained of this to the judge who issued the order to show cause against him, that judge issued an order directing the clerk promptly to provide respondent with a copy of the transcript. That order also provided that, if respondent was not provided with a copy of the transcript, the order to show cause would be dismissed.

The clerk thereafter provided respondent with a copy of the transcript. On August 10, 1990, a hearing was held on the order to show cause. Respondent attended that hearing, but waived his right to be present when it resumed on August 24, 1994. Nevertheless, respondent sent his attorney to appear for him when the hearing resumed on August 24, 1990. The court closed the hearing from the public, excluded respondent's attorney from the hearing and then convicted respondent of one count of civil and criminal contempt and two additional counts of criminal contempt for violating the Superior Court's order enforcing the settlement agreement.

In adjudicating respondent guilty of contempt, the court expressly refused to even consider respondent's contentions that the order was void in excess of the court's jurisdiction. The court then found respondent guilty of the following three counts of contempt: (1) civil and criminal contempt for not turning over S's files and all copies of everything in them to the court-appointed receiver on March 12, 1990; (2) criminal contempt for filing his March 23, 1990, petition for writ of mandate in the Court of Appeal without its being filed under seal;[22] and (3) criminal contempt for filing his motion to intervene in the airplane crash lawsuit on April 5, 1990, without its being filed under seal. The judge pro tem also fined respondent $1,000 per contempt for a total of $3,000. In addition, respondent was ordered to pay sanctions of approximately $2,300.

On October 5, 1990, respondent filed a "petition for writ of certiorari of [sic] prohibition" in the Court of Appeal again seeking review of the order enforcing the settlement agreement. Respondent also first sought review of the contempt judgment in that petition. The Court of Appeal denied that petition. On February 4, 1991, respondent filed a petition for review of the Court of Appeal's denial of that peti-

22. As noted, *ante*, the record does not reflect when the petition for writ of mandate was actually filed.

tion. The Supreme Court denied respondent's petition for review on March 28, 1991. The United States Supreme Court denied certiorari in October 1991.

Even though respondent's October 5, 1990, "petition for writ of certiorari of [sic] prohibition" was still pending at the time, on October 25, 1990, respondent filed a notice of appeal from the contempt judgment and sanction order. Almost a year later, the Court of Appeal issued an order, on October 22, 1991, conditionally granting S's motion to dismiss his October 25, 1990, appeal. In that order, the Court of Appeal ordered respondent to comply with the turn-over provision of the superior court judge's April 4, 1990, order enforcing settlement agreement by giving S's file and all copies of everything in it to the referee no later than November 5, 1991. The order further provided that if respondent did not so comply, his appeal would be dismissed.

On October 28, 1991, respondent filed a motion for clarification and reconsideration of the Court of Appeal's October 22, 1991, order. In his motion for clarification, respondent pointed out that if he complied with the turn-over order, he would not have the documents needed to prepare his appeal. The Court of Appeal denied respondent's motion for clarification. Respondent did not comply with the turnover provision, and the court of appeal dismissed his appeal on November 19, 1991, in accordance with its October 22, 1991, order. Thereafter, respondent sought reconsideration of the dismissal order from the Court of Appeal, which was denied. He also petitioned the California Supreme Court and United States Supreme Court for review of the dismissal order, but both courts denied his petitions.

II. DISCUSSION

A. Rulings on Motions.

At the outset, for a clear record, we recite the rulings we made from the bench at oral argument on motions brought prior to that time. We deny: respondent's motions for judicial notice and to augment the record filed June 16, 1995, the State Bar's request for relief from briefing requirements filed August 14, 1995, respondent's requests for sanctions, etc., filed August 14, 1995, and respondent's request for rulings filed March 8, 1996.

Shortly prior to the filing of this opinion, respondent filed a motion to advance the disposition of this case and to take judicial notice of certain authorities. The State Bar opposed the motion insofar as it concerned judicial notice. We decline to consider the additional authorities as there was ample opportunity given respondent to file briefs and cite authorities to us. Our filing of this opinion renders the remainder of respondent's motion moot.

Under the authority of rule 23, Rules of Procedure of the State Bar, we continue in effect the supplemental sealing order filed by the hearing judge on July 27, 1994.

B. Culpability.

[1] The portion of section 6103 at issue here reads as follows: "A wilful disobedience or violation of an order of the court requiring [the attorney] to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, . . . constitute[s] cause for disbarment or suspension." For respondent to be disciplined under this law, we hold that the State Bar must prove two elements by clear and convincing evidence: 1) that respondent wilfully disobeyed an order of the court; and 2) that the court order required respondent to do or forbear an act in connection with or in the course of respondent's profession which he ought in good faith to have done or not done.

As to the first issue, respondent admitted deliberately violating the confidentiality order. On this record, there can be no doubt that his violation of the court order was wilful, even applying the somewhat more specific level of wilfulness required for violations of the State Bar Act, as opposed to violations of the Rules of Professional Conduct. (Compare, e.g., *Call* v. *State Bar* (1955) 45 Cal.2d 104, 110-111, with *Zitny* v. *State Bar* (1966) 64 Cal.2d 787, 791-792.)

As to the second issue, again respondent admits that the superior court order directed him to do or

forbear acts in connection with his profession. (Compare *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 950 [an attorney's deliberate violation of a court order directed at him in his capacity as a removed representative of a decedent's estate cannot be a violation of section 6103 because the order was not issued in connection with or in the course of the attorney's profession as a lawyer].) Respondent contends, however, that he was not required in good faith to obey the court order as in his view it was void. According to respondent, the order allegedly enforces an illegal agreement to suppress evidence, violates his First Amendment rights of free speech, and improperly restricts his right to practice law.

The hearing judge rejected respondent's contention that the superior court order was void. Although the hearing judge found that respondent honestly believed that the superior court order was void, the hearing judge, citing and quoting from our opinion in *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9, concluded that "'Respondent's belief as to the validity of the order is irrelevant to the section 6103 charge.'" Accordingly, relying on our opinion in *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403-404, the hearing judge held that, regardless of whether the superior court's order was void, respondent was required to obey it under section 6103 unless and until it was reversed on appeal. We agree with the hearing judge's overall conclusion that respondent is culpable of a violation of section 6103 but our agreement is based on somewhat different reasoning than that of the hearing judge.

The hearing judge's holding that respondent is bound to comply with the superior court order unless and until he successfully challenged its validity on appeal is apparently based on the same beliefs and policy considerations underlying what is referred to as the "collateral bar rule." (See *People* v. *Gonzalez* (1996) 12 Cal.4th 804, 818.) The collateral bar rule ordinarily prohibits a contemnor from raising the invalidity of a court order as a defense to a *criminal* contempt charge so as to permit even a void court order to be enforced through *criminal* contempt[23] unless and until it is vacated on appeal. (*United States* v. *United Mine Workers* (1947) 330 U.S. 258, 293-294; see also *Zal* v. *Steppe* (9th Cir. 1992) 968 F.2d 924, 927.) Its "genesis ... stems from the widely held belief that a smoothly functioning judicial process may be jeopardized if parties are able to determine for themselves when and how to obey court orders." (*In re Establishment Inspection of Hern Iron Works*, *supra*, 881 F.2d at p. 726.)

[2a] Yet, the collateral bar rule is not the rule in California. (*People* v. *Gonzalez*, *supra*, 12 Cal.4th 804 at p. 818-819.) As the Supreme Court stated in *Gonzalez*, "The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment." (*Id.* at p. 817.) Moreover, in California, "'a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial determination as to its jurisdictional validity. [Citation.] On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions *when he is sought to be punished for such disobedience*. If he has correctly assessed his legal position, and it is therefore, finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong. [Citations.]'" (*Id.* at pp. 818-819, emphasis and citations omitted in original, quoting from *In re Berry* (1968) 68 Cal.2d 137, 148-149.)

[2b] In the case before us, respondent sought appellate review as soon as the superior court issued its confidentiality order. When he was unsuccessful, he exercised his right under California law to choose to violate the order. When faced with a contempt hearing, respondent waived personal appearance and the court found respondent guilty of civil and crimi-

23. Of course, the invalidity of the underlying order is always a defense to a civil contempt charge. (*In re Establishment Inspection of Hern Iron Works* (9th Cir. 1989) 881 F.2d 722, 726, fn. 11.)

nal contempt, declining to consider his constitutional claims. When faced with contempt judgments, respondent appealed unsuccessfully. The contempt judgments became final.

[2c] This record contrasts with *Gonzalez* where the lower courts concluded that they had no jurisdiction to entertain the contemnor's challenges during the contempt proceeding or subsequent appeals. Accordingly, we do not read *Gonzalez* to permit us in this record to entertain a collateral attack before us of the underlying superior court order leading to the contempt judgment. Respondent had his opportunities to litigate in the courts of record his claims that the order he violated was void. We are given no valid reason to go behind the now-final order.

[2d] As to the validity of the court's confidentiality order, we are therefore faced with a case in which we properly defer to the collective judgment of the courts of record which heard the contempt proceeding and which found respondent guilty and to the courts which considered respondent's subsequent appeal and requests for reconsideration and certiorari.

[3a] Although respondent withdrew from employment as soon as S insisted on accepting the settlement agreement with its confidentiality order, respondent still had a fiduciary duty to his former client. (See *Tri-Growth Centre City, Ltd.* v. *Sildorf, Burdman, Dunigan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1151.) It is without dispute that S, not respondent, had the right to decide to settle her legal malpractice case on the chosen terms. (See generally, *Linsk* v. *Linsk* (1969) 70 Cal.2d 272, 276-278; 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 272, pp. 336-337.) As S's former lawyer, respondent was under a good faith duty to act consistently with his client's settlement agreement at least to avoid revealing to others the amount of the settlement as well as the evidence obtained in the case, except as allowed by the civil settlement judge.

[3b] Under the circumstances, respondent was culpable as found by the hearing judge of violating section 6103.

C. Degree of discipline

[4a] The well-settled rule is that the degree of professional discipline is not derived from a fixed formula but from a balanced consideration of all factors. (E.g., *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 618.) Although a wilful violation of section 6103 is stated by statute to be a ground of disbarment or suspension (also see std. 2.6, Rules Proc. State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct), discipline within that range is not mandated. (Cf. *In re Cooper* (1971) 5 Cal.3d 256 [imposing a public reproval in a conviction in which the facts and circumstances involved moral turpitude].)

[4b] We have examined the Supreme Court's and our past decisions in which attorneys have been disciplined for wilful disobedience of a court order. The discipline in those cases appears to have turned on many factors not comparable to the case before us, including the involvement of other violations of the standards of attorney conduct.

[4c] The hearing judge found no factors in aggravation. We agree. We also agree with the several factors in mitigation which the hearing judge found. These include respondent's 18-year practice without prior discipline (see *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 596); that respondent was under great pressure in that his client and co-counsel disagreed with his principled approach to the basic settlement and the confidential terms which were a part of it; and that respondent held sincere beliefs that he was acting in support of sound public policy by revealing the confidential information to the judge in the airplane crash case.

[4d] [5] The State Bar does not seek to increase the discipline recommended by the hearing judge. Although our duty to independently recommend appropriate discipline cannot cause us to give excess weight to the State Bar's recommendation (*In re Morse* (1995) 11 Cal.4th 184, 207), we do give it some consideration. Also worthy of consideration is the unique nature of the violation here and that respondent sought first to test by extraordinary writ the court order he violated.

[4e] Balancing all relevant factors, and especially taking into account the unique nature of this matter, we deem a private reproval to be the appropriate discipline.

III. DISPOSITION

Respondent X is hereby privately reproved. Considering the very specific nature of the violation and the other unique facts of this proceeding, we do not adopt the hearing judge's recommendation that respondent take and pass a professional responsibility examination.

I concur:

NORIAN, J.

OBRIEN, P.J., concurring:

I concur in the result, but for reasons different from those enunciated by the majority.

As the majority points out, *People* v. *Gonzalez* (1996) 12 Cal.4th 804, 817, states "The rule is well settled in California that a void order can not be the basis for a valid contempt judgment." *Gonzales* further directs that in a criminal prosecution, even an inferior court has the duty to determine the validity of a superior court order, when that order is an element in the crime for which the defendant has been required to answer. (*Id.* at pp. 820-822.) The defendant's failure to challenge the order when issued does not preclude him from asserting the invalidity of such an order. (*Id.* at 818.)

As the majority notes, respondent sought appellate review of both the original order that he is charged with violating, and, after being found in contempt, he unsuccessfully sought review of his contempt judgement.

I note that at no point in either the hearing on the contempt charges or the review proceedings did any court rule on the substance of respondent's claims that the superior court order that respondent is charged with violating was constitutionally void. The record demonstrates that the superior court judge hearing the contempt proceedings specifically refused to consider respondent's constitutional claims, and that each of the matters on review were dismissed for various reasons. The fact that respondent sought writs in both the California Supreme Court and the Supreme Court of the United States (all of which were denied) does not change the fact that there is no showing that there was ever a consideration of respondent's substantive issues, nor do they appear to have been waived.

I see little difference between a situation in which one fails to challenge a superior court order, as in *Gonzales*, and where, as in this case, one makes the challenge in such a manner as to fail to have such an order considered on the merits.

The sole procedural distinction between the matter before us and *Gonzales* is that in the present matter the superior court found that respondent was guilty of both civil and criminal contempt, while in *Gonzales* the initial challenge to the constitutionality of the order was made at the time of the criminal matter, which was on direct appeal. We are confronted with whether this court, under these circumstances, is collaterally estopped from considering the validity of the underlying superior court order, since respondent has been found guilty of violating that order.

"If the parties expressly exclude a particular issue from consideration, or the court expressly refrains from determining it, no collateral estoppel results." (7 Witkin, Cal. Procedure (3rd ed.) Judgment, § 266, p. 707, and cases cited.) At the time of the hearing on respondent's quasi-criminal and civil contempt matters, the superior court specifically indicated that it would not consider respondent's constitutional challenges to the underlying court order that he was charged with violating.

While respondent may or may not be able to challenge the validity of the superior court order in this disciplinary proceeding, he must, nonetheless comply with the provisions of Business and Professions Code section 6103.[1] That section provides in

1. All future references to "section" are to sections of the Business and Professions Code.

effect that willful violation of an order of court requiring an attorney to do or forbear an act connected with the practice of law, "which he ought in good faith to do or forbear," is a basis for discipline.

Although orders imposing confidentiality on settlement agreements are not uncommon, most of those orders result from the agreement of all of the parties, including the attorneys representing those parties in the settlement agreement. Our research has revealed no cases in California dealing with a situation in which the attorney has refused to join in the settlement agreement. The question becomes, under the described circumstances, must an attorney "in good faith," under section 6103, comply with such an order.

It is my view that where the failure to comply with such an order does or reasonably may adversely impact the rights of the client seeking the settlement, and compliance with the order will not adversely affect any person to whom the attorney has a fiduciary duty, compliance with such an order is mandated under section 6103. (Cf. *Hughes* v. *Superior Court* (1980) 106 Cal.App.3d 1.) This does not mean that the attorney does not have the right to otherwise challenge the order through the conventional channels of appeal or writ.

I agree with the majority that the delivery of the information concerning the settlement to a judge in another matter in which respondent had no legal standing or interest constituted a violation of section 6103, and subjects respondent to the discipline herein imposed. Respondent ought, in good faith, to have complied with this provision of the superior court order, whether that order was valid or not.

In addition, respondent violated several other portions of the superior court order. Those portions of the order required respondent to deliver all of his work product to the court, and required him to, in effect, divulge to court under seal the identity of a secret informant whom he had assured of confidentiality. The order also purported to prohibit respondent from soliciting any of the defendant law firm's clients for the purpose of pursuing any similar fraud or malpractice claims against the firm.

Restraint of publication of anything that occurred in an open court proceeding plainly violates First Amendment principles. (*Nebraska Press Ass'n* v. *Stuart* (1976) 427 U.S. 539, 568.)

An order based on good cause restricting the dissemination of information obtained only through discovery, and not other sources, does not violate the restricted party's First Amendment rights. (*Seattle Times Co. v Rhinemart* (1984) 467 U.S. 20, 37.) The concomitant rule is that an order restricting the dissemination of information not obtained through discovery is violative of the restricted party's First Amendment rights. An order restricting dissemination of information lawfully obtained in the course of court proceedings independent of discovery also violates the "free speech" provision of the California Constitution. (*In re Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 724.)

To the extent that the superior court order purported to prohibit respondent from distributing information or records that he lawfully obtained outside of the discovery process I would hold it not a matter for disciplinary purposes in seeking culpability under section 6103, under the circumstances of this case.

I also note that the settlement agreement proposed by the firm and approved by the trial court, which respondent refused to sign, purported to prohibit him from using any information he gained while representing S in any other law suit. That agreement also purported to prohibit respondent from soliciting any of the firm's former, current or future clients for purpose of pursuing similar fraud claims against them. This raises a question of whether the agreement proposed by the firm and ordered by the trial court was violative of former rule 1-500(A) of the Rules of Professional Conduct. (As noted in footnote 14 of the majority opinion, former rule 1-500 was carried forward into the current rule with minor modifications, not applicable here.) The discussion under the former rule (as well as the current rule) states, "Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited." I would hold that the above portion of the order may not give rise to disciplinary sanctions under section 6103 under the circumstances of this case. (Cf. *Hughes* v. *Superior Court*, *supra*, 106 Cal.App.3d 1.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Harold V. Sullivan II

A Member of the State Bar

Nos. 92-O-11298, 93-O-13549

Filed February 28, 1997, as corrected March 3, 1997

SUMMARY

The hearing judge found respondent culpable of failing to communicate properly with clients in two matters and of recklessly or repeatedly failing to provide competent legal services in four matters. The judge recommended a one-year stayed suspension and three-year probation, conditioned on an eighty-nine-day actual suspension. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Respondent requested review, challenging some of the culpability determinations and arguing for less discipline. The State Bar supported the hearing judge's decision except that it sought a ninety-day actual suspension and an order requiring compliance with rule 955 of the California Rules of Court.

The review department agreed with all but one of the hearing judge's six culpability determinations: an alleged failure to communicate properly. The review department also determined that respondent was culpable of failing to forward a client's file promptly upon request. Stressing respondent's mitigation, the review department recommended a one-year stayed suspension and three-year probation, conditioned on a sixty-day actual suspension.

COUNSEL FOR PARTIES

For State Bar: David C. Carr

For Respondent: Kenneth Kocourek

HEADNOTES

[1] 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

The failure to maintain an effective calendaring and follow-up system as a means of supervising employees and monitoring cases subjects an attorney to the risk of recklessly and repeatedly failing to provide competent legal services. It is his or her obligation to know the status of cases, and failure

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.

to have effective systems in place to provide that information is likely to be reckless and may be repeated. The absence of such a system was reckless in this case.

[2] 214.30 State Bar Act—Section 6068(m)

Under the State Bar Act and Rules of Professional Conduct clients have the right to expect that attorneys will reasonably supervise the progress of cases for which they accept responsibility. The fact that the file was misplaced, or that there was misconduct by an employee, cannot excuse the failure to maintain an information system that permits a lawyer to periodically check the status of his or her cases. The failure to have such a system resulted in culpability for failing to keep the client reasonably informed of significant events.

[3] 277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]

An attorney did not promptly release a client's papers where the attorney failed to turn over the client's file for six months after a request from the client's new counsel.

[4 a-c] 710.10 Mitigation—No Prior Record—Found
745.10 Mitigation—Remorse/Restitution—Found
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension
844.14 Standards—Failure to Communicate/Perform—No Pattern—Suspension
844.19 Standards—Failure to Communicate/Perform—No Pattern—Suspension

The review department recommended a one-year stayed suspension and three-year probation, conditioned on a sixty-day actual suspension, where an attorney had recklessly failed to provide competent legal services in four matters, had failed to communicate properly with a client in one matter, had failed to forward a client's file promptly upon request in one matter, and had significantly harmed two clients, but where the attorney had practiced law without discipline for over 21 years, had recognized his misconduct, had reshaped his office procedures, and had demonstrated full candor and acknowledgment of responsibility for his misconduct before the State Bar Court.

Additional Analysis

Culpability
Found
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
Not Found
214.35 Section 6068(m)
Aggravation
Found
582.10 Harm to Client
Discipline
1013.06 Stayed Suspension—1 Year
1015.02 Actual Suspension—2 Months
1017.09 Probation—3 Years
Probation Conditions
1024 Ethics Exam/School

OPINION

Obrien, P.J.

Respondent Harold v. Sullivan II seeks review of a hearing department decision recommending that he be suspended for one year, stayed, with three years probation, conditioned upon eighty-nine days actual suspension, among other conditions. The State Bar urges support for the decision, recommending only that the actual suspension be increased to 90 days and that respondent be ordered to comply with the provisions of the California Rules of Court, rule 955.

Respondent's opening brief does not challenge the hearing judge's findings of culpability in two matters for violation of Business and Professions Code section 6068, subdivision (m)[1] (requiring an attorney to respond promptly to clients' reasonable status inquiries and to keep clients reasonably informed of significant developments in their matters), and in four matters for violation of rule 3-110(A) of the Rules of Professional Conduct[2] (proscribing an attorney's intentionally, recklessly, or repeatedly failing to perform legal service with competence) but asserts that the recommended discipline is excessive. However, in respondent's closing brief he seeks to assert that four of the six findings of culpability were erroneous. In that closing brief respondent indicated no objection to the State Bar's responding to the new claims of lack of culpability. At oral argument the State Bar was given time to file a written response to respondent's brief. The State Bar's "Second Responsive Brief" has been filed and considered.

We agree with and affirm the findings of culpability on all but one charge: the allegation of failure to keep a client reasonably informed under section 6068, subdivision (m) in the Boyette matter. We modify the discipline to recommend actual suspension for 60 days and otherwise affirm the decision of the hearing judge.

I. DISCUSSION

The record reveals that respondent was admitted to the bar in January of 1967 and that he has no record of discipline, other than the matters before us. Commencing shortly after his admission, respondent's practice emphasized personal injury matters. During most of the period covering 1989 through 1993 he maintained four law offices and employed seven attorneys and fifteen other staff to operate the offices and take day-to-day charge to the cases. During this time respondent maintained a volume of approximately 1,600 cases, all of which were serviced by respondent and the seven attorneys.

Respondent speaks both Vietnamese and Spanish, and the majority of his clients are Indo-Chinese or Hispanic.

The record is uncontradicted that commencing in early 1991 secretary C, an employee of respondent, entered a period of serious personal problems and as a result began hiding and throwing away files, incoming pleadings, notices, and other documents. In April of 1992 secretary C went on vacation, from which she did not return. She was terminated; and a review of her desk revealed a "large drawer" filled with pleadings and other documents, including at least one motion to dismiss an action.

It is in this framework that we look to the charges before us.

Commencing in 1990 respondent represented Tony B. Yang in a matter in Fresno County. An arbitration hearing was set for July 2, 1991, at which respondent did not appear. The matter was continued to July 9, and again respondent failed to appear, and was sanctioned $85. The matter was reset for July 23, and still respondent failed to appear. A body attachment was issued for respondent, with bail set at $1,000. A settlement conference was set for November 25; and trial, for December 9, 1991. Respondent failed to appear at either of these dates, and as a result the action was dismissed.

1. All references to "section" are references to the Business and Professions Code, unless otherwise noted.

2. All references to rules are references to the Rules of Professional Conduct, unless otherwise noted.

After the departure of secretary C respondent found notices of the various dates and proceedings in the Yang matter in her desk, which was the first knowledge that he had of the problem. With the aid of a declaration from secretary C respondent was able to have the dismissal set aside, and thereafter bring the case to conclusion.

The hearing judge concluded that respondent was culpable of violating rule 3-110(A) in that respondent's failure to act extended over a six-month period. Had there been in place an effective system for periodic attorney review, the problem would have been discovered much earlier; and the client, better served. Under the circumstances we agree that respondent demonstrated a reckless failure to act competently and further agree with the hearing judge's determination of culpability.

In the Nguyen matter respondent represented a minor. The case settled in approximately November of 1990. Respondent advised opposing counsel that he would seek court approval of the minor's compromise, but failed to do so. Defense counsel filed a motion for dismissal that was set for hearing on February 14, 1992, and respondent failed to appear. An Order to Show Cause was set for hearing February 28, 1992, and again respondent failed to appear. The matter was dismissed by the court. Some time later respondent discovered the notices of the various hearings in the Nguyen matter in secretary C's former desk, and with the aid of her declaration he was able to set aside the dismissal and complete the settlement.

We agree with the determination of the hearing judge that there was a violation of rule 3-110(A). Respondent had more than a year to seek court approval of the minor's compromise and failed to do so. The failure to appear at the two hearings in February 1992 might be explained by the misconduct of secretary C, but the delay in seeking court approval is determined to be reckless. Further, had proper supervision been in place, a routine review of the matter would have avoided the problem.

The hearing judge's determination of culpability of violating rule 3-110(A) in the Garnett matter is not challenged by respondent, and our independent review of that charge confirms the correctness of the hearing judge's determination. We also note that in that matter respondent was unable to set aside the resultant dismissal, resulting in harm to Garnett.

In his closing brief respondent challenges the hearing judge's finding of culpability of violating rule 3-110(A) in the Pham matter, where respondent represented the plaintiff. That matter was handled in respondent's Westminster office. The case was arbitrated in 1989, with a ruling for the defendant. Following a request for a trial de novo a mandatory settlement conference was set in March 1990, with a trial date shortly thereafter. Pham claimed the need for surgery at the time of the mandatory settlement conference, and as a result the trial was taken off calendar. Shortly thereafter respondent closed his Westminster office.

In the move the Pham file was inadvertently closed and placed in storage. Respondent had many clients with the surname "Pham," which, according to respondent, is a common Vietnamese name. No effort was made to restore the Pham matter to the trial calendar, and in May 1991, the court, on its own motion, dismissed the matter for lack of prosecution. Although the action had been dismissed in May 1991, respondent did not learn of the dismissal until January 1993 and did not notify the client until June 1993. Respondent discovered that matter had been dismissed as the result of the denial of a motion to specially set for trial. That was followed by a motion to set aside the dismissal, which was also denied. The record reveals that the denial of that motion was on appeal at the time of the hearing below.

[1] Again, respondent had no effective system for periodic review. The mere fact that he did not have actual knowledge of the proposed dismissal does not exonerate him from his obligation under rule 3-110(A). The failure to maintain an effective calendaring and follow-up system as a means of supervising employees and monitoring cases places the attorney at risk of violating rule 3-110(A), regardless of whether that attorney has actual knowledge of the status of the case. It is his or her obligation to know the status of cases, and failure to have effective systems in place to provide that information is likely to be, within the meaning of rule 3-110(A), "reck-

less" and may be "repeated" within the meaning of that rule. Such a system should be appropriate to the volume and nature of an attorney's practice. We determine that the absence of such a system was reckless on the part of respondent in this case.

The remaining counts of which respondent was found culpable involve his failure to keep clients reasonably informed regarding significant events, as required by section 6068, subdivision (m).

The first of these arises out of the Pham matter. In that matter in a meeting with respondent in July 1992 the clients learned that respondent could not locate the file. This was followed by visits from the clients on August 5, and again on August 12, 1992. Following an October 1992 letter from the clients respondent located the file and caused the filing of a motion to specially set the Pham matter for trial. In spite of frequent phone calls from the clients, the next word the clients received was a letter dated January 25, 1993, notifying them of a hearing on the motion to specially set on January 28. The clients were first notified of the dismissal of their action in June 1993.

[2] On this record we have no difficulty in affirming that respondent was culpable of failing to keep his client reasonably informed of significant events as required by section 6068, subdivision (m). The fact that the file was misplaced, or that there was misconduct by an employee, cannot excuse the failure to maintain an information system that permits a lawyer to periodically check the status of his or her cases. Under the State Bar Act and Rules of Professional Conduct clients have the right to expect that attorneys will reasonably supervise the progress of cases for which they accept responsibility. (Cf. rule 3-110(A) and (B); § 6068, subd. (m).) In addition, respondent failed to notify the client of the dismissal of their case for six months—also a clear violation of 6068, subdivision (m).

In the Boyette matter the client engaged respondent in 1986 to seek recovery for a back injury resulting from an allegedly defective garage door. This was one of three cases handled by respondent for this client, all dealing with soft tissue back injury. The other two cases were promptly settled. As the result of Boyette's reluctance to provide discovery, in spite of several trips by respondent's employees to her residence, the matter was dismissed as a terminating sanction for failure to comply with discovery orders. The hearing judge found Boyette was sometimes difficult to communicate with. The hearing judge further found that on a number of occasions following communications or contact between Boyette and members of respondent's staff she did not understand or did not remember papers that had been sent or hand delivered to her. The hearing judge also found that respondent had written Boyette a letter confirming a prior discussion with respondent's investigator that no appeal would be taken from the dismissal for failure to provide sanctions, in spite of Boyette's denial of receipt of that letter and denial of knowledge that the case had been dismissed.

Boyette did present a one-month phone record showing numerous calls to respondent's office. Other than this one record she was unable to identify, even by year, the period during which respondent's office failed to keep her advised of the status of her matter. Respondent and members of his staff testified to the difficulty they had in reaching Boyette, the calls they made to her, and the difficulty in communicating with her even after they were able to make contact.

We give great weight to the hearing judge's findings regarding the credibility of the witness. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a).) Having given that weight, we consider the evidence de novo, as we must. (Ibid.) Taking the record as a whole, we determine that there is insufficient evidence to find a violation of section 6068, subdivision (m) under a standard that requires clear and convincing evidence.

Respondent was charged with a violation of rule 3-700(D)(1), which required him to promptly turn over to the client at her request her papers and other material making up her file. Boyette's new counsel first asked for the file in November 1992. Following at least 10 requests the file was delivered in May 1993.

[3] Respondent claims that because of employee misconduct his stored files were in disarray and he was unable to locate the Boyette file. He further points out that he did not receive a substitution of

attorney until December 1992. To be grounds for discipline, a violation of the Rules of Professional Conduct must be wilful. Although attorneys cannot be held responsible for every detail of office operation, fiduciary violations resulting from serious and inexcusable lapses in office procedure may be deemed wilful for disciplinary purposes. (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 726, quoting *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795-796.) Respondent had a duty under rule 3-700(D)(1) to "promptly release to the client" all of client's papers and property. A delay of six months failed to meet that duty. Even without the substitution of attorney respondent was on notice that the file should be prepared for delivery by the November letter. As a result we reverse the hearing judge and find respondent culpable of violating rule 3-700(D)(1).

In all other respects we affirm the findings of the hearing judge and proceed to a consideration of the appropriate discipline. As a part of that consideration we look to any aggravating circumstances, as well as any mitigating factors that are revealed by the record.

The misconduct of respondent caused significant harm to both Garnett and Pham in that both of their cases were dismissed. Even though respondent is handling the appeal of the Pham matter, the client has been harmed by the dismissal. Standard 1.2(b)(iv) of the Standards for Attorney Sanctions for Professional Misconduct (standards), contained in Title IV of the Rules of Procedure of the State Bar of California, provides that significant harm to a client is an aggravating circumstance. Thus, respondent's misconduct is aggravated by the harm suffered by two of his clients.

[4a] There are significant mitigating factors demonstrated by the record. Respondent had a record in excess of 21 years of blemish- free practice before any record of misconduct. We attribute great significance to this factor. (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 765.) We especially note this long period of practice without discipline in relation to the nature of the disciplinary offenses here found. (Std. 1.2(e)(i).) That is, the misconduct here does not involve moral turpitude, and both the State Bar and respondent concede the appropriate standard for discipline is 2.4(b).

[4b] It must be noted that the record reveals that since the misconduct here found, respondent has closed three of his four offices, reduced his staff, and reduced his caseload from approximately 1600 cases to approximately 50. All of these changes were commenced prior to respondent being contacted by the State Bar. This factor is entitled to substantial weight under standard 1.2(e)(vii). In addition, respondent has acknowledged his responsibility for the misconduct and has shown admirable recognition and resolution of the flaws of his former office operation. (Std. 1.2(e)(vii).)

We look to other similar cases to aid us in determining the proper discipline. In In *the Matter of Kaplan* (1993) 2 Cal. State Bar Rptr. 509, respondent was found culpable in nine counts, including failing to communicate in five matters, failure to sign substitution of attorney forms or deliver files in seven matters, reckless or repeated failure to perform in three matters, failure to return a settlement draft in one matter and failure to pay court ordered sanctions in one matter. The mitigation was far less, and the aggravation greater in that the correction of office procedures was less, nor were they instituted prior to contact from the State Bar. Additionally, Kaplan's period of discipline-free practice was not nearly so lengthy. In that matter we recommended actual suspension for 90 days, and the Supreme Court adopted this recommendation. In *Colangelo* v. *State Bar* (1991) 53 Cal.3d 1255, the Supreme Court imposed no actual suspension in a matter involving several counts of failure to communicate, withdrawing from employment without taking reasonable steps to avoid prejudice to the rights of his clients in three counts, and failing to refund fees in three cases. (But see conc. and dis. opn. of Baxter, J. [favoring a 60-day actual suspension].)

In *In the Matter of Whitehead* (1991) 1 Cal. State Bar Rptr. 354, respondent was found culpable in three client matters, including commingling trust funds with personal funds, failure to supervise associates in a civil matter and failure to respond to correspondence from client's subsequent attorneys. There, following a finding of substantial mitigation,

we recommended 45 days actual suspension, and the Supreme Court adopted this recommendation.

Both the State Bar and respondent acknowledge that this matter is within standard 2.4(b), which provides in part that when an attorney fails to provide services in matters not demonstrating a pattern of misconduct, the discipline shall result in a reproval or suspension, depending on the extent of the misconduct and the extent of the harm to clients.

The State Bar argues that a 90-day actual suspension is appropriate, while respondent argues that the proper discipline is either a reproval or at the most 30 days actual suspension. Looking to the cases cited it appears that the misconduct in *In the Matter of Kaplan, supra*, 2 Cal. State Bar Rptr. 509 was more serious than that before us, while the present mitigation is greater. Likewise, in *Colangelo* v. *State Bar, supra*, 53 Cal.3d 785, the misconduct was more serious, with no actual suspension. The case that appears most analogous to that before us is *In the Matter of Whitehead, supra*, 1 Cal. State Bar Rptr. 354, although that case involved commingling and had significantly different mitigation than the case now before us.

[4c] Considering the record as a whole, respondent's many years of discipline-free practice, his recognition of misconduct, and his admirable reshaping of his office practices, it is our view that the actual suspension imposed by the hearing judge is excessive. We note that at no time was there any misrepresentation to any client and that respondent demonstrated full candor and acknowledgment of responsibility before the State Bar Court. However, because of the harm to clients, some period of actual suspension is appropriate. The primary purposes of discipline is protection of the public, the courts, and the legal profession as well as the maintenance of high professional standards. (*In re Morse* (1995) 11 Cal.4th 184, 205.) We conclude actual suspension of 60 days is appropriate.

II. RECOMMENDATION

We recommend that respondent be suspended from the practice of law for a period of one year, that execution of the order of suspension be stayed, and that he be placed on probation for a period of three years, on each of the conditions of probation recommended by the hearing judge, except that respondent be actually suspended from the practice of law in this state for the first 60 days of his probation and provided costs be awarded the State Bar pursuant to Business and Professions Code section 6086.10 and that those costs be payable in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997). We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order and provide the State Bar Probation Unit with satisfactory proof of his passage of that examination within said year.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Lawrence Crawford Bragg

A Member of the State Bar

No. 85-O-12550

Filed April 28, 1997, reconsideration denied June 19, 1997

SUMMARY

In a general count, the hearing judge concluded that respondent entered into a partnership involving the practice of law with a non-lawyer, shared legal fees with a non-lawyer, and engaged in moral turpitude. In a specific count, she concluded that he violated the prohibitions against intentionally, recklessly, or repeatedly failing to provide competent legal services and against withdrawing from employment without taking reasonable steps to protect the client's rights. In another count, she concluded that he failed to meet the requirements of an agreement in lieu of discipline. In a fourth count, he admitted, and she concluded, that he failed to support the law; to obey a court order which he should have obeyed; to comply with the prohibition against intentionally, recklessly, or repeatedly failing to provide competent legal services; and to use reasonable diligence in accomplishing the purpose for which he was employed. She recommended a two-year stayed suspension and two-year probation, conditioned on a one-year actual suspension and other requirements. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review. He disputed culpability conclusions and claimed that one year of actual suspension was too harsh. The State Bar supported the hearing judge's decision, yet argued for a three-year stayed suspension and three-year probation, conditioned on a one-year actual suspension.

The review department agreed with all but two of the hearing judge's culpability conclusions. It found insufficient evidence that respondent entered into a partnership involving the practice of law with a non-lawyer and that he withdrew from employment without taking reasonable steps to protect the client's rights. In aggravation, the review department found an uncharged violation of the prohibition against aiding a non-lawyer to engage in the practice of law. Stressing respondent's culpability of moral turpitude, the review department affirmed the hearing judge's disciplinary recommendation, except for changes to provisions about costs and about the professional responsibility examination.

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

COUNSEL FOR PARTIES

For State Bar: Teresa Schmid, Elena Bardellini

For Respondent: Lawrence C. Bragg, in pro. per.

HEADNOTES

[1 a-d] 252.20 Rule 1-310 (former 3-103)

Respondent did not enter into a partnership involving the practice of law with a non-lawyer where the evidence established that the non-lawyer shared in the firm's profits, but failed to show that the non-lawyer had an ownership interest in the firm's assets or the clients' files, had an obligation to pay any portion of the firm's liabilities, held himself out as respondent's partner during the term of the relationship with respondent, or had access to respondent's general account or trust account.

[2 a, b] 252.30 Rule 1-320(A) [former 3-102(A)]

Respondent shared fees with a non-lawyer where the non-lawyer received a percentage of the net fees on the cases he handled for respondent.

[3 a-e] 252.00 Rule 1-310 (former 3-103)

Respondent aided a non-lawyer in the practice of law where the non-lawyer and the non-lawyer's staff worked in offices bearing respondent's name, answered phones in respondent's name, and conducted correspondence and negotiations in respondent's name, with little or no input from respondent.

[4] 221.00 State Bar Act—Section 6106

Respondent engaged in acts involving moral turpitude where he both knew that he was abdicating his responsibilities as an attorney and acted purposefully in allowing a non-lawyer to engage in activities constituting the practice of law.

[5 a-c] 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Respondent violated the prohibition against intentionally, recklessly, or repeatedly failing to provide competent legal services where he filed and served a complaint, but did not make claim on the client's purported insurance, did not take any other action to prosecute her case, did not cause any independent investigation to be made, did not perform any discovery, did not cause service to made of the amended complaint in such a manner to prevent a motion for discretionary dismissal, and remained counsel of record for three years after concluding that her case lacked merit.

[6] 277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]

Respondent did not withdraw from employment without taking reasonable steps to avoid foreseeable prejudice to a client where his failure to act promptly for the client may have inspired a dismissal motion, but where his successor counsel had ample time to resist the motion.

Additional Analysis

Culpability

Found

213.11 Section 6068(a)
214.21 Section 6068(l)
220.01 Section 6103, clause 1
221.19 Section 6106—Other Factual Basis
252.31 Rule 1-320(A) [former 3-102(A)]
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Not Found

214.35 Section 6068(m)
252.25 Rule 1-310 (former 3-103)
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]

Aggravation

Found

561 Uncharged Violations
691 Other

Mitigation

Found

710.10 No Prior Record
735.10 Candor—Bar
740.10 Good Character
745.10 Remorse/Restitution
791 Other

Discipline

1013.08 Stayed Suspension—2 Years
1015.06 Actual Suspension—1 Year
1017.08 Probation—2 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

OBRIEN, P.J.:

Respondent Lawrence Crawford Bragg seeks review of a hearing judge's decision on a four-count charge against respondent in which the hearing judge found respondent culpable on each of the four counts. The hearing judge recommended a two-year stayed suspension and two-year probation, conditioned on one-year actual suspension along with certain other conditions.[1]

In a general count (count two), respondent was charged with entering into a partnership with a non-lawyer that involved the practice of law in violation of current rule 1-310, Rules of Professional Conduct,[2] sharing legal fees with a non-lawyer in violation of current rule 1-320, and engaging in an act or acts that involved moral turpitude in violation of Business and Professions Code section 6106.[3] The hearing judge found respondent culpable of each of the charges under this count, including a finding that respondent's conduct involved moral turpitude.

On the first count, involving client Renee Harmon (Harmon), respondent was charged with violation of section 6068, subdivision (m) (requiring an attorney "[t]to respond promptly to reasonable status inquiries of clients"), rule 3-110(A) (requiring that a lawyer "not intentionally, recklessly, or repeatedly fail to perform legal services with competence"), and rule 3-700(A)(2) (prohibiting an attorney from withdrawing from employment until reasonable steps are taken to see that harm will not result to the client). Respondent was found not culpable of violation of section 6068, subdivision(m) and culpable on the other two charges.

In count three, respondent was charged with and found culpable of violating section 6068, subdivision (l) (requiring an attorney to keep all agreements made in lieu of disciplinary prosecution). The agreement in lieu of discipline required respondent to take and pass the California Professional Responsibility Examination (CPRE) and to take a course in law office management, all within one year. Respondent failed to do either.

In count four respondent, as a part of his agreement in lieu of discipline, which was the subject of count three, admitted a violation of former rules 6-101(A)(2) and 6-101(2), and sections 6068, subdivision (a) and 6103, as a part of his stipulation leading to his agreement in lieu of discipline. The facts admitted in the stipulation are included in our review of the evidence, *post*.

We agree with the hearing judge that the misconduct was serious; however, we do not find that respondent entered into a partnership with Bruce Hickman, although we find respondent did have an agreement with him that amounted to sharing legal fees with a non-lawyer in violation of current rule 1-320. We find in aggravation that respondent violated current rule 1-300 in aiding a non-lawyer to engage in the practice of law. We further find that the misconduct involved moral turpitude in violation of section 6106.

As to count one, the Harmon matter, following analysis, we agree with the hearing judge that there was not clear and convincing evidence of violation of section 6068, subdivision (m). We determine that there is not clear and convincing evidence of culpability of violation of current rule 3-700(A)(2). We agree with the hearing judge that respondent is culpable of violating current rule 3-110(A).

The culpability under section 6068, current (l) (failing to comply with the terms of an agreement in lieu of discipline) (count three) is clear. The issue is

1. At page 1 of the decision, the hearing judge's decision recites "two (2) years probation including four (4) years actual suspension." We treat this as a clerical error.

2. Current rule shall refer to the Rules of Professional Conduct in effect since May 27, 1989; and former rule shall refer to the Rules of Professional Conduct in effect not earlier than January 1, 1975, and not later than May 26, 1989.

3. Unless otherwise indicated, section shall refer to the Business and Professions Code.

not mentioned in the briefs of respondent, and without further comment, we affirm the hearing judge's findings.

The respondent, in reaching the agreement in lieu of discipline, has admitted the violations charged in count four, and again we affirm the findings of the hearing judge without further comment.

After giving weight to our determination that respondent was culpable of moral turpitude under section 6106, we affirm the discipline recommended by the hearing judge that respondent be suspended from the practice of law for two years, that this suspension be stayed, and that respondent be placed on probation for two years, on the condition that he be actually suspended for the first one year of that probation, along with the other conditions recommended by the hearing judge.

I. REVIEW OF EVIDENCE

A. Charge of Entering a Partnership With Non-lawyer and Fee-Splitting

Initially, we look to the evidence pertaining to the charges that respondent entered into and maintained a partnership with a non-lawyer, Bruce Hickman, that involved the practice of law, and that he shared legal fees with Hickman (count two.) That charge further alleges that the misconduct involved moral turpitude in violation of section 6106.

The record is clear that respondent, admitted to practice in 1963, has, for many years, maintained a high-volume plaintiff's personal injury practice, operated primarily out of an office in Hacienda Heights. Respondent estimated that he had an inventory of about 500 cases in the early months of 1992. He advertised extensively in the yellow pages of various telephone directories covering areas of San Bernardino, Riverside, and San Gabriel Valley, as well as other areas of Southern California.

Prior to March 31, 1992, and in that year, respondent received a call from Hickman, whom he had neither met nor heard of at the time of the call. Hickman suggested that they meet and discuss ways in which respondent could improve the effectiveness of his advertising and his case management of "pre-litigation" matters. Pre-litigation matters were defined as those in which respondent had been retained, but no complaint had been filed. Hickman represented himself as having experience as an adjuster for various insurance carriers, and as an independent adjuster with experience in administering and negotiating settlements on personal injury matters.

Following an initial meeting, Hickman reviewed a portion of respondent's client files and prepared a report containing suggestions for improvement in management of the files, and outlining a program for more effective yellow page advertising, covering a wider area at no additional cost. Included in the report was a suggestion that respondent modify and expand his advertising and open new offices with the expectation of an increase in cases and that respondent engage Hickman to manage the pre-litigation department.

At the time of the initial meeting Hickman maintained staffed offices in Ontario, from which he performed investigations and other services for at least one other attorney.

Although no written agreement was reached between respondent and Hickman, we adopt the hearing judge's findings that an oral agreement was reached between the parties, and we adopt the findings of the hearing judge regarding the terms of that agreement.[4] It was agreed that the pre-litigation files

4. The credibility of Hickman was discounted by the hearing judge because of his obvious bias and prejudice against respondent, his repeated accusations of misconduct and criminal acts against respondent far beyond the scope of any question put to him as a witness, continuing in spite of the hearing judge's frequent remonstrations and other efforts to restrain and control the witness, and his obvious disdain for the authority of the hearing court. The hearing judge used Hickman's testimony only when corroborated by other reliable evidence. We agree, and follow suit.

To the extent respondent's testimony was not inconsistent with prior evidence given or created by respondent, the hearing judge found it to be generally reliable; other than that she found his testimony "unreliable." Again we agree, and follow suit.

would be moved to Hickman's Ontario office, and be under the management of Hickman. Hickman would be an independent contractor, and would employ his own personnel, some of whom would leave respondent's employ and join Hickman's staff. The litigation files would remain at the Hacienda Heights office and remain under the management of respondent. Compensation to Hickman was to be determined on a formula. Respondent was to pay all of his office expenses from gross attorney's fees earned on pre-litigation cases, which included the cost of advertising, rent, employee's compensation, and other office expenses. The balance was defined as net profit, to be divided between respondent and Hickman. Hickman was to get 25 percent of the net profit of those pre-litigation cases in respondent's office prior to the association with Hickman, and 50 percent of the net profit on those cases where the retainer was signed after Hickman joined the office.

Hickman's duties were agreed to include receiving and responding to new personal injury inquiries in response to telephone calls, meeting with clients either in the office or at the client's home or other place of convenience, obtaining client signatures on retainer agreements, and submitting those agreements to respondent's office for acceptance or rejection. He was to obtain statements, police reports, and medical reports; conduct field investigations; prepare demand letters on and negotiate settlements with insurance companies to the extent practicable; and administer the pre-litigation files.

This agreement was made in early April 1992, and the parties operated under it, as will be described, until January 12, 1993.

Hickman recommended and respondent agreed to a new plan of yellow page advertising plus other incidental advertising, all of which became effective incrementally during the term of the relationship between Hickman and respondent. New client calls were received by Hickman or a member of his staff. They would screen the calls for those claims that appeared viable, and set appointments with such potential clients. Hickman or a member of his staff would interview the client regarding the nature of the accident and the extent of injury. If the interviewer determined that the claim was viable, a form retainer agreement was presented to the client, and the member of Hickman's staff would open a file and undertake such investigation as may be indicated. While the agreement between Hickman and respondent called for the retainer agreement to be submitted to respondent for his approval and signature, the evidence demonstrated that, in fact, Hickman or his employees had a signature stamp in respondent's name and that they frequently stamped the retainer agreements with respondent's signature, without approval of respondent.

Respondent's name was placed on Hickman's offices in Ontario, and over the term of the agreement Hickman leased additional offices in various communities in Southern California. These leases were generally in Hickman's name, although they were held out as the offices of respondent, by signage and telephone answers. Respondent reimbursed Hickman for the rent on these offices as a charge before determining net profit. By virtue of the telephone system suggested by Hickman the area from which the call was made could be identified, and an appointment would be set by an employee of Hickman in an office in or near that area.

Respondent visited these offices infrequently, and some not at all. He visited Hickman's Ontario office approximately 10 times, the Huntington Beach office less than that, and other offices when required for a deposition or other litigated matter.

During the term of the agreement, pre-litigation cases settled at a rate of as much as 30 to 50 a month, with little supervision from respondent or his employed attorneys. In practice Hickman's employees evaluated the cases, set a demand value, and negotiated to resolution with the defendants or their insurance carriers. The negotiators would then do a disbursement sheet, including all medical liens and other charges to be paid, and present it to the client for approval. The disbursement sheet and the draft would then be forwarded to respondent's Hacienda Heights office for approval, and the check prepared there. Respondent did not charge clients for incidentals such as telephone, duplication, facsimile transmission, postage, or like items. In addition, in no event were the attorney's fees deducted from any client's recovery

to exceed the amount the client received, even if that meant no attorney's fees at all.

Respondent discussed cases with Hickman on almost a daily basis. However, there is clear and convincing evidence that in many cases the evaluation, negotiating, and settlement were conducted by Hickman or his negotiators, with no supervision by an attorney, with the exception that after acceptance by the client the draft was submitted to respondent or an employee attorney for approval of the disbursement sheet, showing the allocation of the settlement funds, and for the actual disbursement of those funds.

Other than the Harmon matter, discussed *post*, the record reveals no complaints by clients during the term of the arrangement with Hickman, nor any complaints by medical care providers or other lien claimants. There are no allegations of capping nor improper handling of trust funds.

The agreement between respondent and Hickman did not provide that Hickman was to have an ownership interest in the pre-litigation matters, nor was Hickman to share in losses, should they occur. There was no holding out to the public or others that a partnership had been created between Hickman and respondent, nor was there any change in the name as the result of the association with Hickman. There was no sharing of profits or income from cases other than the pre-litigation cases.

During the period of the relationship between respondent and Hickman, April 1992 to January 12, 1993, respondent paid to Hickman approximately $350,000, which included reimbursement for equipment and telephone advertising expenses Hickman had advanced, certain other expenses and salaries for negotiators and office personnel, and compensation to Hickman according to the agreed formula. In January 1993 a dispute arose between Hickman and respondent over a $61,000 check respondent delivered to Hickman to reimburse him for yellow page advertising. Early the morning following the dispute Hickman and one of his employees removed from the offices a substantial portion of the pre-litigation files, resulting in the arrest of Hickman.

B. The Harmon Matter

On July 24, 1990, Renee Harmon was involved in a single car accident while driving a Chrysler automobile rented from General Rent-A-Car. Following the rental, which was to be for an extended period, Harmon complained to General-Rent-A-Car that the steering was periodically malfunctioning. Following an inspection the vehicle was returned to Harmon with a statement that no malfunction could be found. Thereafter, with Harmon driving, the automobile crossed opposing traffic, jumped the curb, and came to rest. She sought treatment for neck and back pain the next day. Harmon filed an accident report with General Rent-A-Car, and although called, the police did not prepare an accident report.

In late July or early August 1990, Harmon retained respondent to handle the personal injury arising from the accident. She advised respondent that she had purchased all of the insurance available at the time of the rental of the Chrysler. On September 21, 1990, on Harmon's behalf, respondent filed a personal injury action against General Rent-A-Car, its parent company, and 20 Does. Respondent referred Harmon to physicians and advised her that they would file a lien to be paid at the time of her recovery. There was no discussion of responsibility for the medical charges in the event of no recovery.

Respondent's investigation of the claim included a discussion with representatives of General Rent-A-Car, who advised that they had checked over the Chrysler and found nothing wrong with it, but did not include an independent examination of the vehicle, nor did it include any discovery on that issue, or otherwise. Respondent testified that in September of 1990 he determined that Harmon's case had no merit and that he so advised her, but that he filed the action to protect her claim. Harmon did not recall such a statement.

In July 1991, and within one year of the date of the accident, respondent filed a first amended complaint naming Chrysler Corporation for the first time. Chrysler was not named as a Doe, but rather was named as the result of the filing of new complaint entitled "First Amended Complaint."

In March 1992 respondent made written demand on General Rent-A-Car for over $59,000. In May 1992, an identical demand was made on Chrysler. Both denied liability. No further action in the Harmon file is shown until August 1993, when Harmon wrote respondent complaining about the level of service. On September 20, 1993, the first amended complaint was served on Chrysler by certified mail, return receipt requested. On that same day Harmon signed a substitution of attorney substituting Michael Hemming as attorney for Harmon. That substitution was filed September 29, 1993.

In November 1993 Chrysler moved to quash service or to seek discretionary dismissal under Code of Civil Procedure sections 583.210 and 583.420. No opposition to that motion was filed on behalf of Harmon, nor was any appearance made at the hearing, and the court ultimately dismissed the complaint as to Chrysler.

Harmon's testimony regarding communications with respondent was vague, while respondent testified that he personally talked with Harmon on 15 occasions, and with her brothers on 5 other occasions. Also, she talked with Hickman's negotiators an undetermined number of times.

C. Agreement in Lieu of Discipline

In April 1990 respondent entered into an agreement in lieu of discipline requiring him to take and pass the CPRE and to complete a course in law office management, all within one year. In testimony, respondent has admitted his failure to comply with either of these provisions of the agreement.

D. The Charge Underlying the Agreement in Lieu of Discipline

In the agreement in lieu of discipline respondent stipulated to the facts and conclusions of law set forth below.

1. Facts

On March 4, 1980, respondent was hired by Wesley F. Jefferson and Mary J. Jefferson (the Jeffersons) to represent them in a foreclosure action concerning their real property and to file a lawsuit on their behalf arising therefrom against several defendants, including Goldenstate Company and Josephine DeFalco.

2.Respondent filed an action on behalf of the Jeffersons in Los Angeles Superior Court entitled *Wesley and Mary Jefferson* v. *Robert P. Davis, et al.*, case no. EAC 33683. He conducted discovery, including a mandatory settlement conference held on October 4, 1983.

3.Respondent located and served the two defendants who appeared to be most at fault, Goldenstate and DeFalco. On April 7, 1985, the statute of limitations tolled as to the remaining defendants for failure to prosecute within the five-year limitation, due to respondent's inadvertence. Respondent successfully obtained a default judgment as to Goldenstate and DeFalco, who had, in the meantime, disappeared without responding to the complaint.

4.Respondent also represented the Jeffersons as defendants in an unlawful detainer action known as *Lewis* v. *Jefferson, et al.*, Pomona Municipal Court case no. 37608.

5.On April 7, 1980, respondent appeared in the Pomona Municipal Court on behalf of his clients, who were not present. He negotiated a stipulation which would allow his clients to remain in possession of their residence until resolution of the superior court matter described above, on certain conditions. The latter included paying back rent of $475 per month. As the only alternative was immediate eviction, respondent believed his clients would be willing and able to enter such a stipulation.

6.On April 10, 1980, respondent executed a stipulation for judgment on behalf of the Jeffersons without their authorization, but believing they would agree to the terms if fully advised. He thereafter left a message at their home advising them of his action and asking them to contact him if they did not agree to the terms. The Jeffersons were out of town and did not receive or respond to the message.

7.The stipulated judgment was received and filed by the plaintiff's attorney. The Jeffersons were

unable to meet the terms of the stipulation and were evicted from their property. Respondent attempted to set aside the judgement, but was unsuccessful.

8.Respondent's conduct in the unlawful detainer action did not cause the Jeffersons to be evicted, but, in fact, resulted in some extension of time in what would otherwise have been a summary eviction proceeding.

9.The delay in respondent's handling of the superior court action, and his failure to maintain contact with his clients and to keep them fully advised of their position in the unlawful detainer action, were partially the result of insufficient office controls to assure attention to those client matters.

2.Conclusions of law

Respondent admitted that he wilfully violated former rules 6-101(A)(2) and 6-101(2) and sections 6068, subdivision (a) and 6103.

III. DISCUSSION

A. The Existence of a Partnership With Hickman

We first consider whether or not either the terms of the oral agreement between respondent and Hickman or their conduct in carrying out that agreement created a partnership consisting of the practice of law as proscribed by current rule 1-310. Absent authority to the contrary we interpret the use of the word "partnership" in that rule to mean partnership in the commonly understood definition as it exists in the civil law.

Under the Uniform Partnership Act, specifically section 15006 of the Corporations Code, "A partnership is an association of two or more persons to carry on as co-owners a business for a profit." Section 15007, subdivision (3) of that same code states that sharing of gross returns does not, of itself, establish a partnership; while subdivision (4) provides in effect that receipt of a share of profits in a business is prima facie evidence of partnership, except, inter alia, where the share of profits was received as wages of an employee. (See also *Brockman* v. *Lane* (1951) 103 Cal.App.2d 802, 805; 9 Witkin, Summary of Cal. Law (9th ed. (1989) Partnership, § 23, pp. 422, 423.)

[1a] The record is barren of evidence that Hickman had any ownership interest in any of the assets of respondent's law firm, including additions to equipment that were purchased as a result of the relationship. Respondent either paid for or reimbursed Hickman for additional computers, phone equipment, and other capital items. There is no evidence that Hickman had any ownership interest in these assets, either directly or as a partner. Further, the files were respondent's and the client's. In spite of Hickman's removal of the files at the termination of the relationship, it is clear that they were the files of respondent.

[1b] Hickman, although sharing in the profits from a portion of respondent's practice, had no obligation to pay any portion of the firm's liabilities, contingent or actual.

[1c] Hickman, in his testimony, repeatedly referred to himself as the partner of respondent, whether the question related to the relation of the parties nor not. However, there is no evidence that he ever referred to himself as a partner during the term of the relationship. Nor is there any evidence that the parties ever held themselves out as partners, either to clients or others. Respondent testified that the sole purpose of the shared net profits was to create a compensation plan that would fairly compensate Hickman, and create an incentive for productive work from Hickman and his staff. Hickman had no access to the general or trust accounts of respondent, nor did respondent share in the proceeds of any activity of Hickman, other than in relation to the pre-litigation cases.

The State Bar calls our attention to *Crawford* v. *State Bar* (1960) 54 Cal.2d 659. There, we note, the court found that the respondent and his father, a disbarred lawyer, adopted a firm name of Crawford & Crawford, held themselves out as partners, maintained a single general account into which were deposited the proceeds of the law practice and the disbarred father's "tax consulting" business, all of which was conducted out of a single office. There was no separate accounting of income and expenses,

and the court found that not only did they hold themselves out as partners, they considered themselves as partners.

In the matter before us none of the elements found by the court in *Crawford* is present. Hickman's testimony appears to be the first representation to or by anyone that a partnership existed. As we have indicated, Hickman's testimony in this regard is neither confirmed nor believable.

[1d] In the judgment of this court there is not clear and convincing evidence that respondent entered into a partnership with Hickman, and we reverse the finding of culpability in the charge of violating current rule 1-310.

B. The Sharing of Fees

[2a] We next look to the charge of violation of current rule 1-320(A) (prohibiting a lawyer from directly or indirectly sharing fees with a non-lawyer). Respondent freely acknowledges the terms of the compensation plan for Hickman, but argues that such a plan does not violate current rule 1-320(A), or any other rule of professional conduct. We disagree.

[2b] The pre-litigation cases, as defined by the parties, were delivered to Hickman for his supervision and administration. The control of these cases by respondent or his attorney staff, under the terms of the agreement or as carried out in practice as found by the hearing judge, was, at best, minimal. We agree. We need not decide whether the compensation plan for Hickman would have been proper had respondent or his attorney staff remained in control of the pre-litigation clients and maintained the files under their direct supervision, for, in fact, Hickman and his staff, with little or no control, were settling 30 to 50 cases a month; evaluating whether to accept clients in respondent's name, frequently without review by an attorney; setting values on clients' claims; negotiating with insurance companies and settling those claims, frequently without any attorney input; and, on occasion, even filing lawsuits to prevent the running of the statute of limitations without attorney control. The pre-litigation files were transferred to a separate facility at which there was no resident lawyer, only periodic visits by an attorney member of respondent's staff. Hickman's employees were receiving calls from over 40 different telephone lines and evaluating the claims with almost no attorney supervision. For this Hickman received a percentage of the net fees on the pre-litigation cases he handled.

In *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, this court was confronted with an almost identical agreement for the compensation of a non-attorney. There the agreement provided that half of all attorney fees collected would go to office upkeep and overhead, one-quarter would go to respondent lawyer, and one-quarter would go to the non-lawyer. (*Id.* at p. 416.) We held that respondent was culpable of dividing fees with a non-lawyer. There, the decision was based on former rule 3-102(A). There is no material difference between that former rule and current rule 1-320(A) for our purposes.

Respondent argues that there are marked differences between the instant matter and *Jones* in that in *Jones* there was a clear and deliberate effort to create a partnership, and that in this matter respondent maintained control of all of the pre-litigation cases, and that all disbursements were properly made from respondent's trust account under respondent's supervision.

As we have pointed out, we do not agree that, in fact, respondent maintained control over his pre-litigation cases, but rather affirm the hearing judge's finding that the control had been substantially abdicated to Hickman. In our previous section we have determined that there was no partnership. While that may bear on the degree of discipline, it has little bearing on the issue of culpability regarding sharing fees with a non-lawyer. Respondent did maintain control over the disbursement of clients' funds received in settlement, which is a significant factor, but that alone does not demonstrate sufficient control to avoid a showing of sharing fees with a non-lawyer in violation of the current rules.

As pointed out by the Supreme Court, the fundamental concern addressed by the prohibition against fee-splitting with a non-lawyer is the risk posed by the possibility of control by non-lawyers

more interested in personal profit than the client's welfare. (*In re Arnoff* (1978) 22 Cal.3d 740, 748, fn. 4; *Gassman* v. *State Bar* (1976) 18 Cal.3d 125, 132.)

The issue of fee-splitting was also presented in *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, along with issues of forming a partnership with a non-lawyer and capping. While we have not found a partnership, and there is no evidence of capping, *Nelson* remains instructive. In a situation in which Nelson exercised at least some control over the activities of the non-lawyer, this court found that he violated the prohibition against sharing fees with a non-lawyer.

We conclude that respondent is culpable of sharing fees with a non-attorney in violation of current rule 1-320(A).

C. The Issue of Moral Turpitude

The State Bar has charged respondent with commission of acts of moral turpitude under section 6106 regarding his relationship with Hickman. To properly evaluate this charge we must look to the acts shown by the record and consider not only culpability, but also any acts shown by the record that would constitute aggravation. **[3a]** Although not charged, the record is reviewed to determine if respondent is culpable of aiding a person or entity in the practice of law in violation of current rule 1-300(A). That rule provides, "A [lawyer] shall not aid any person or entity in the unauthorized practice of law."

[3b] As we have set forth, *ante*, the control of the pre-litigation cases by respondent or his attorney staff was minimal. The pre-litigation cases were delivered to Hickman for his supervision and administration at a location away from respondent's principal office. Hickman and his staff were accepting clients in the name of respondent and negotiating and settling cases with little or no attorney control. These settlements were at a rate of 30 to 50 cases a month; and bonuses were paid by Hickman to his employees for settlement of these cases, demonstrating a concern for profit by Hickman and his employees rather than a concern for the individual client. (Cf. *In re Arnoff*, *supra*, 22 Cal.3d. 740, 748, fn. 4.)

[3c] Respondent's name stamp was used by Hickman and his employees in sending out demand letters, correspondence with clients, and, on occasion, even complaints filed on behalf of clients. There was little or no contact between respondent and his attorney staff and the pre-litigation clients, as a general rule. The evaluation of the claim was done almost exclusively by Hickman, or his "negotiators," although there were regular conferences between Hickman and respondent. The majority of meetings with pre-litigation clients was done on premises without an attorney in regular attendance, although there was generally telephonic advice available when requested by a negotiator.

[3d] We conclude that in totality the agreement as carried out between respondent and Hickman created a situation where Hickman was, in fact, practicing law. In this respect, the conduct of Hickman was analogous to the conduct of the disbarred father, Howard, in *Crawford* v. *State Bar*, *supra*, 54 Cal.2d 659. There Howard gave advice on a mining claim, but a fee was charged by the firm. The court noted "Although Howard's services might lawfully have been performed by title companies, insurance companies, brokers, and other laymen, it does not follow that when they are rendered by an attorney, or in his office, they do not involve the practice of law. People call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel. Attorneys must conform to professional standards in whatever capacity they are acting in a particular matter. [Citations.]" (*Id.* at pp. 667-668)

[3e] In the matter before us the clients engaged the services of respondent. They expected and were entitled to have the services of an attorney in evaluating and settling their personal injury claims. Instead, they got the services of an adjuster and his negotiators, housed in offices bearing respondent's name, with phones answered in respondent's name and correspondence and negotiations conducted in respondent's name, with little or no input from respondent. We conclude that respondent aided Hickman in the practice of law in violation of current rule 1-300 (A). Since not charged, that violation will be considered in aggravation and considered in making a determination of whether respondent is culpable of moral turpitude under section 6106.

When the totality of respondent's conduct is considered in his relationship with Hickman and Hickman's employees, we are confronted with respondent moving a substantial portion of his practice away from his principal office, and with few remaining controls delivering it to the administration and supervision of a non-lawyer, Hickman.

There are no ethical concerns raised in connection with respondent's advertising, nor with the screening of potential client calls. The volume of respondent's practice does not present ethical questions, provided that each of the steps that involve the practice of law either are performed by a lawyer or are so immediately under a lawyer's supervision as to not run afoul of the underlying purpose of current rule 1-300(A) or sections 6125 and 6126.

Here, a lawyer with almost 30 years of practice, primarily in the personal injury field, entered into an agreement that we have found to constitute fee-splitting, as well as conduct that aided a non-lawyer in the practice of law. The scheme as carried into effect clearly created the illusion that the various new offices of respondent were, in fact, law offices staffed by lawyers to whom clients could come to resolve their personal injury problems. In fact, they were obtaining a lay negotiating service that, in many obvious respects, was practicing law. This operation continued in effect for some nine months, accelerating in volume on a monthly basis. In spite of this increase in volume there is no evidence of increased supervision by attorneys, and, in fact, as the volume increased, the supervision by attorneys on individual cases decreased, even as the number of Hickman's employees increased.

In *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. 411, the misconduct was found to involve moral turpitude where the respondent set up a venture with a non-lawyer. In that matter the respondent had only practiced law for two years, and the court noted that he ignored the "basic precepts of attorney professional responsibility . . . ." (*Id.* at p. 419.) In this matter, we have less egregious conduct by an experienced attorney who, we must assume, had a full command of the "basic precepts of attorney professional responsibility."

Even though respondent's misconduct was less egregious than Jones's misconduct, it was committed by an attorney, who, with the slightest bit of research, would have been made fully acquainted with the proscription on sharing fees, or aiding a non-lawyer in the practice of law. This plan continued for nine months.

Although respondent testified that the retainer agreements signed by the client were to be delivered to him for approval or rejection, the evidence is clear that in many, if not nearly all cases, Hickman or his negotiators were the ones who accepted the clients without further approval. Respondent knew that Hickman and the negotiators were settling cases about which he knew little or nothing.

During oral argument respondent called our attention to the Insurance Adjuster's Act, Insurance Code section 14000 et seq., arguing that the activities of Hickman and his employees would have been authorized under that act. We note that no evidence was introduced showing or suggesting that either Hickman or any of his employees were licensed under that act. Insurance Code section 14002 prohibits an insurance adjuster from engaging in the practice of law unless the adjuster is an active member of the State Bar of California, while Insurance Code section 15002 imposes a similar restriction on public insurance adjusters. We further note that a public insurance adjuster includes one who, for compensation, assists an insured in negotiating for or effecting a claim on behalf of an insured. (Ins. Code, § 15007.)

Respondent seeks to identify his duties in prelitigation cases as no more that those of an insurance adjuster. The analogy is not apt. Respondent is a lawyer, and clients contact his office because of and in reliance on that fact. When retained, respondent must competently evaluate the client's claim and represent the client appropriately. While insurance on the part of a prospective defendant may affect the value of the claim, it is not strictly a claim against that defendant's insurance carrier, but against that defendant, regardless of insurance. Also, in making such an assertion, respondent completely ignores the language of *Crawford* v. *State Bar*, *supra*, 54 Cal.2d. 659, 667-668, quoted *ante*. The argument places in doubt respondent's understanding of his fundamental duties as a lawyer in representing clients.

[4] Respondent knew that he was abdicating his responsibilities as an attorney and acted purposefully in allowing Hickman to engage in activities which constituted the practice of law. Accordingly, respondent's acts involved moral turpitude in violation of section 6106.

D. The Harmon Matters

1. Charge of violation of 6068, subdivision (m)

The hearing judge found a lack of clear and convincing evidence that respondent was culpable of violating section 6068, subdivision (m) (imposing a duty on attorneys to respond promptly to reasonable status inquires of clients). Our independent review of the record leads us to a like finding and we affirm the hearing judge's decision as that count.

2. Charge of violation of current rule 3-110(A)

Current rule 3-110(A) provides that an attorney shall not intentionally, or with reckless disregard or repeatedly fail to perform legal services competently.

[5a] As the record reveals and the hearing judge found, respondent failed to make claim against the medical coverage that Harmon represented that she had purchased, to properly investigate the condition of the Chrysler automobile following the incident, and to conduct discovery regarding Harmon's claim. On the other hand, respondent filed a timely action, caused it to be served on the car rental agency, and filed a timely amended complaint naming Chrysler Corporation, but made ineffective effort to have it served. In addition, respondent's office had made settlement demands on both the car rental agency and Chrysler Corporation.

[5b] While respondent did undertake some action on behalf of Harmon, he failed to make claim on her purported insurance, he took no action to prosecute Harmon's case other than file the complaint and the first amended complaint, he caused no independent investigation to be made, he performed no discovery, and he failed to cause service to made in such a manner to prevent a motion for discretionary dismissal.

[5c] Respondent argues that as early as September 1990 he concluded that Harmon's case was not meritorious. In spite of that he remained counsel of record and performed some services until September 1993. Following our de novo review we conclude that respondent is culpable of violating current rule 3-110(A).

3. Charge of violation of current rule 3-700(A)

[6] Current rule 3-700(A)(2) prohibits a member from withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to the client. Here respondent withdrew following service on Chrysler Corporation, and well before any motion for discretionary dismissal or to quash service was brought by Chrysler. Chrysler was served on September 20, 1993. On that same day Harmon signed a substitution of attorney replacing respondent with Hemming as attorney for Harmon. That substitution was filed nine days later. The Chrysler motion to dismiss or quash service was not made until November and was served on Hemming. The fact that respondent's successor counsel made no effort to resist the discretionary dismissal motion cannot be attributed to respondent. While respondent's failure to act more promptly may have inspired the motion for dismissal, we have dealt with such conduct in the prior section of this opinion. We determine that there is not clear and convincing evidence that his withdrawal, under circumstances giving successor counsel ample time to resist the motion for discretionary dismissal, resulted in a violation of current rule 3-700(A)(2), and we reverse the hearing judge's determination on that issue.

IV. DISCIPLINE

While we have reversed the findings of culpability in part of the Harmon matter and as to entering into a partnership agreement with Hickman, a non-lawyer, respondent remains culpable of sharing fees with a non-lawyer in several hundred cases, extending over a period of some nine months. In aggravation respondent has been found to have aided a non-lawyer to engage in the practice of law, again, covering several hundred cases and for a period of nine months.

In addition, these findings of culpability and aggravation are measured in a situation in which respondent has failed to comply with a prior agreement in lieu of discipline. We therefore add to the balance that violation by respondent of section 6068, subdivision (l) (requiring a lawyer to keep all agreements made in lieu of discipline).

Still further, we look to respondent's admission of violation of former rule 6-101(A)(2) (requiring an attorney not to intentionally, recklessly or repeatedly fail to perform competently), former rule 6-101(2) (requiring reasonable diligence to accomplish the purpose for an attorney was employed) and section 6068, subdivision (a) (requiring an attorney to support the federal and state laws and constitutions) and section 6103 (prohibiting disobedience to an order of court that attorney ought, in good faith, to obey). Each of the admissions to these charges followed respondent's stipulation of fact arising out of the 1985 disciplinary charge. We weigh these admissions of culpability along with the admitted facts in determining discipline.

We consider in recommending discipline, among other things, the fact that the conduct in sharing fees with a non-lawyer appears to go directly to the heart of the reason for current rule 1-320(A) as expressed by the Supreme Court in *In re Arnoff*, *supra*, 22 Cal.3d 740, 748, fn. 4. The conduct of Hickman and his negotiators clearly posed the risk of non-lawyers' elevating the personal profit motive above the interests of the clients. This risk was greatly exacerbated by respondent's deliberately creating a situation where Hickman and his negotiators were, in fact, practicing law. We also consider the volume of cases handled by Hickman and his employees, the dollar amount involved, and the length of time it continued.

In further aggravation, we note that respondent, so far as the record shows, has made no effort to take the professional responsibility examination, required by his agreement in lieu of discipline.

We consider in mitigation, as found by the hearing judge, that respondent presented evidence of good moral character and reputation in the community from a broad cross section of the community, including lawyers. Each of the witnesses had known respondent for many years, each knew of the nature of the charges against him, and each testified to his good moral character.

We also consider the evidence of community service by respondent. This shows that for many years he has participated in community activities and lent assistance and support to them. We further note, in mitigation, respondent's evidence of the revision in the management of his offices. This includes far greater participation by respondent in each case, whether in litigation or otherwise, and commendable evidence of management systems to control a high-volume law office.

The State Bar has recommended that respondent be suspended for a period of three years, stayed, and that he be placed on probation for three years on the condition, among others, that he be actually suspended for a period of one year. This is the actual suspension recommended by the hearing judge. The respondent, on the other hand, argues in connection with discipline only that one year of actual suspension is far too harsh.

In looking to the cases dealing with discipline for the type of culpability found here, we find no case identical, but several that are helpful. In *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, respondents set up a branch office in which non-lawyer independent contractors were responsible for signing up clients and were paid in cash based on the value of the client's case. In that case, there was also illegal solicitation by the non-lawyers, and respondents were found culpable of charging unconscionable fees. There, respondents were actually suspended for 18 months.

In *In the Matter of Jones*, *supra*, 2 Cal. State Bar Ct. Rptr. 411, this court found that respondent had entered into a partnership with a non-lawyer, divided fees with a non-lawyer, and aided a non-lawyer in the practice of law. There was harm to clients, and upon discovering that non-lawyers were using cappers to obtain clients in respondent's name, respondent took no decisive action. The actual suspension imposed was two years.

In *In re Arnoff*, *supra*, 22 Cal.3d 740, there was a fee-splitting agreement between Arnoff and

a non-lawyer. This was exacerbated by the layman paying kickbacks to doctors and others, although it was not clear that Arnoff knew of the kickbacks. Further, in that matter the layman maintained the books and records of the office, and disbursements were made without the control of Arnoff. There was strong evidence that fraudulent medical reports were used, and there was a question as to whether Arnoff knew of that fraud. In that matter Arnoff was actually suspended for a period of two years.

In *In the Matter of Nelson*, *supra*, 1 Cal. State Bar Ct. Rptr. 178, it was stipulated that respondent entered a partnership for the practice of law with a non-lawyer, divided fees with the non-lawyer, and used the non-lawyer as a capper. There was no evidence of harm to clients. In addition, cases were transferred to another lawyer who settled cases without client authority and misappropriated a portion of their settlement proceeds. There, the respondent showed mitigation in the form of decisive withdrawal from the misconduct and thorough cooperation with the State Bar. In addition, five years had elapsed between the misconduct and the hearing. In *Nelson* respondent received six months actual suspension.

In the matter before us we have no known harm to clients as the result of the relations between respondent and Hickman, although as pointed out in *Nelson*, "the potential for such harm was great . . . ." (*Id.* at p. 189.) Looking to 2.3 and 2.6 of the Standards for Attorney Sanctions for Professional Misconduct (Standards), we note that where moral turpitude is found we look to client harm and the magnitude of the act as it relates to the practice of law in determining the extent of discipline.

We find this case less egregious than the cited cases in that no capping was involved. While no partnership agreement has been found in the instant case, the circumstances of permitting Hickman and his employees to practice law with pre-litigation cases in an enormous volume create substantially the same risk to the public and the administration of justice. We find far less cooperation with the State Bar in this matter than in either *Nelson* or *Jones*. Further, in this matter we have elements that were not present in any of the cited cases.

Respondent had practiced law for approximately 29 years when he engaged in the misconduct described. Respondent has practiced for many years without discipline and is entitled to great weight in mitigation for that factor. However, we are left with an experienced attorney who engaged in serious misconduct, in great volume over an extended period of time.

We also consider serious, respondent's failure to comply with the terms of his agreement in lieu of discipline. We weigh respondent's admitted misconduct in the matters leading to the agreement in lieu of discipline.

Weighing all of the factors, we conclude that the actual suspension of one year requested by the State Bar and recommended by the hearing judge is appropriate, and we affirm that recommendation.

V. *RECOMMENDATION*

It is recommended that respondent be suspended from the practice of law in the State of California for a period of two years, that execution of this suspension be stayed, and that respondent be placed on probation for two years, on condition that during the first year of probation respondent be actually suspended from the practice of law in the State of California. In addition, we recommend that each of the remaining conditions of probation and other requirements recommended by the hearing judge be imposed, except that the recommendation for costs be amended to provide that costs be awarded to the State Bar pursuant to section 6086.10 and that those costs be payable in accordance with section 6140.7 (as amended effective January 1, 1997). As a further exception, it is recommended that respondent be required to take the Multistate Professional Responsibility Examination in lieu of the California Professional Responsibility Examination.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Kevin P. Kirwan,

Petitioner for Reinstatement.

No. 91-R-02993

Filed April 29, 1997; as modified June 11, 1997.

SUMMARY

After additional proceedings on remand, the hearing judge denied petitioner's petition for reinstatement because he concluded that petitioner did not meet his burden to prove his (1) rehabilitation and (2) present moral qualifications for reinstatement. (Hon. Carlos E. Velarde, Hearing Judge.)

Petitioner sought review contending that the hearing judge erred in expanding the issues to be addressed on remand, that the evidence was insufficient to support the hearing judge's adverse determinations with respect to petitioner's rehabilitation and moral qualifications, and that the hearing judge erred in denying petitioner's post-decision motion to re-open the record for additional evidence. The review department rejected each of petitioner's contentions and affirmed the hearing judge's decision denying the petition for reinstatement.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Kevin P. Kirwan in pro. per.

HEADNOTES

[1 a-c]	**120**	**Procedure—Conduct of Trial**
	139	**Procedure—Miscellaneous**
	159	**Evidence—Miscellaneous**
	167	**Abuse of Discretion**
	169	**Standard of Proof or Review—Miscellaneous**
	192	**Due Process/Procedural Rights**
	199	**General Issues—Miscellaneous**
	2509	**Reinstatement—Procedural Issues**
	2590	**Reinstatement—Miscellaneous**

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

In its opinion remanding a petition for reinstatement for further proceeding not inconsistent with the opinion, the review department held, on the record then before it, that the petitioner had demonstrated his moral reform from the acts which lead him to resign from the Bar with disciplinary charges pending. Accordingly, under law of the case, it would be improper for hearing department to reconsider petitioner's moral reform on remand in the absence of additional evidence. As to events that predated the petition, and were disclosed on the petition, it is clear that reopening would be impermissible. The same would be true of events about which the State Bar had a reasonable opportunity to investigate and present at a hearing. However, one of the underlying purpose of reinstatement proceedings is to insure that only persons of present good moral character are reinstated to the practice of law in this state. Accordingly, with the exceptions noted, the State Bar Court may consider any act or conduct that is relevant to a petitioner's moral character regardless of when or where the act or conduct occurred.

[2 a, b] **139 Procedure—Miscellaneous**
141 Evidence—Relevance
159 Evidence—Miscellaneous
169 Standard of Proof or Review—Miscellaneous
199 General Issues—Miscellaneous
2504 Reinstatement—Burden of Proof
2509 Reinstatement—Procedural Issues
2590 Reinstatement—Miscellaneous

A petitioner establishes that he possesses the requisite present moral qualifications for reinstatement by presenting clear and convincing evidence that he possesses good moral character and has been rehabilitated. Any act or conduct bearing on the petitioner's qualities of honest, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and nation, and respect for the rights of others and the judicial process is relevant in a reinstatement proceeding. Unlike a petitioner's rehabilitation from prior bad acts, a petitioner's present moral qualifications for reinstatement is not capable of being conclusively determined for all time and is subject to re-evaluation on the State Bar's motion at least until the effective date of the Supreme Court's reinstatement order.

[3 a, b] **101 Procedure—Jurisdiction**
119 Procedure—Other Pretrial Matters
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous
169 Standard of Proof or Review—Miscellaneous
2509 Reinstatement—Procedural Issues
2590 Reinstatement—Miscellaneous

Because jurisdiction vests in only one court at a time, once a review department opinion remanding the proceeding to hearing department for further proceedings becomes final, only the hearing department had jurisdiction to rule on State Bar's motion to expand the issues to be addressed at the trial on remand. Because the review department did not adjudicate the issue of petitioner's present moral fitness in its opinion remanding the proceeding to hearing department, the hearing judge's consideration of that issue on remand was not inconsistent with the review department's remanding opinion, and the hearing judge therefore did not error in admitting additional relevant evidence on the issue.

[4] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers

If an appellee wishes to address issues not raised by the appellant, the party should request its own review. Even though the review department is obligated to conduct de novo review, it seeks to discourage the obviously unfair practice of requesting review in a responsive brief of issues not raised by the appellant. In such a case the appellee has not shared in the cost of record preparation, and it reduces appellant's time to respond to such issues.

[5] **139 Procedure—Miscellaneous**
159 Evidence—Miscellaneous
161 Duty to Present Evidence
169 Standard of Proof or Review—Miscellaneous
2504 Reinstatement—Burden of Proof
2509 Reinstatement—Procedural Issues
2590 Reinstatement—Miscellaneous

Because the State Bar does not have the burden of proof in reinstatement proceedings, it need not rebut a petitioner's showing of rehabilitation, present moral fitness, or present learning and ability in the law with clear and convincing adverse evidence to prevail. Instead, the State Bar need only proffer sufficient adverse evidence to lower the persuasiveness of the petitioner's evidence so that he does not meet his burden to prove his case by clear and convincing evidence. Of course, the State Bar may elect not to present any adverse evidence if it concludes that petitioner's showing is insufficient to establish his case by clear and convincing evidence.

[6 a, b] **125 Procedure—Post-Trial Motions**
161 Duty to Present Evidence
167 Abuse of Discretion
2509 Reinstatement—Procedural Issues

Petitioner failed to establish that the hearing judge abused his discretion in denying petitioner's post-decision motion to reopen the record to present additional evidence because petitioner did not establish that the evidence he sought to proffer was newly discovered or that it could not have been presented at trial with the exercise of reasonable diligence.

Additional Analysis

Other
2551 Reinstatement Not Granted—Rehabilitation
2552 Reinstatement Not Granted—Fitness to Practice

OPINION

OBRIEN, P.J.:

After additional proceedings on remand, petitioner Kevin P. Kirwan seeks review of a hearing judge's decision denying his petition for reinstatement for a second time. The hearing judge's denial is based on his holdings that petitioner did not meet his burden to prove (1) his rehabilitation and (2) his present moral qualifications for reinstatement. We shall affirm the hearing judge's denial on the ground that petitioner failed to establish his present moral qualifications.

I. PROCEDURAL HISTORY

A. Petitioner's Admission and Resignation

Petitioner was admitted to the practice of law in this state in January 1964. He resigned with disciplinary charges pending 24 years later. The Supreme Court order accepting his resignation became effective in April 1988.

B. Original Trial

Petitioner filed his petition for reinstatement on May 13, 1991. On August 14, 1992, the parties filed a stipulation in which they agreed that petitioner possessed the requisite learning and ability in the law.[1]

Following hearings in August and October of 1992, the hearing judge originally denied the petition in his decision filed January 5, 1993. That denial was because the hearing judge concluded that petitioner did not prove his rehabilitation or his present moral qualifications for reinstatement. Petitioner appealed that decision.

C. First Appeal

In *In the Matter of Kirwan* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 692 (*Kirwan I*), we reversed the hearing judge's determination that petitioner had not established his rehabilitation. We held that petitioner demonstrated his moral reform from the acts which led him to resign from the bar with disciplinary charges pending (*Id.* at p. 699), but remanded the matter to the hearing department to re-address the issue of whether petitioner had recovered from alcoholism and depression in light of additional evidence we admitted on review (*Id.* at pp. 699, 701).

D. Trial on Remand

Shortly after the matter was remanded, the State Bar filed in the hearing department a motion to expand the scope of the issues to be considered on remand. In its motion the State Bar sought leave to proffer, at the trial on remand, evidence regarding petitioner's involvement in an unsuccessful project to open a card casino with Tim Carey in Oxnard, California during the Fall of 1992 and Spring of 1993. This involvement primarily occurred after the hearings in the first proceeding. The hearing judge granted the State Bar's motion over petitioner's objections.

Thereafter, the hearing judge found that petitioner was recovered from alcoholism and depression, but also found that petitioner improperly held himself out as entitled to practice law during his involvement in the casino project. In addition, he found that petitioner displayed a lack of candor in dealing with the mental health professionals who interviewed him regarding his alcoholism and depression and to the court on remand.

Moreover, the hearing judge concluded that petitioner's unauthorized practice of law and lack of candor undermined our holding in *Kirwan I* that petitioner had demonstrated his moral reform. The hearing judge further concluded that petitioner had not established his present moral qualifications for reinstatement and, thus, denied the petition. Petitioner again seeks our review.

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1. The hearing judge accepted this stipulation in his original decision, and no order has been filed relieving the parties from its binding effect. Accordingly, it remains binding on the parties. (Former Transitional Rules Proc. of State Bar (eff. Sept. 1, 1989, to Dec. 31, 1994), rule 401; Rules Proc. of State Bar, title II, State Bar Court Proceedings (eff. Jan. 1, 1995), rule 131.)

II. POINTS OF ERROR

We consolidate petitioner's contentions on review into the following three points of error and overrule each of them. Any argument not specifically addressed below, has been considered and also rejected.

A. Expanding the Issues on Remand

As a part of the first point of error, petitioner contends that the hearing judge erred in granting the State Bar's motion to expand the issues to be addressed at the trial on remand and, thereafter, permitting the State Bar to introduce evidence regarding his involvement in the failed casino project. Petitioner, as a further part of the first point of error, argues that the hearing judge did not have jurisdiction to hear the motion. According to petitioner, only the review department has jurisdiction to expand the issues on remand.

Petitioner argues that, even if the hearing judge had jurisdiction to hear the motion, he erred in granting it because our prior holding that petitioner had demonstrated his moral reform in *Kirwan I* is the law of the case, which is not susceptible to being "undermined" on remand. We first address this issue.

Petitioner does not cite any authority to support his contention. In our view, it lacks merit. **[1a]** Our order in *Kirwan I* stated that "we remand this matter to the hearing judge for further proceedings not inconsistent with this opinion." This is an appropriate method of providing directions as to proceedings on a retrial. Such a statement may be mere surplusage, meaning nothing more than the reviewing opinion is the law of the case. (*Puritan Leasing Co.* v. *Superior Court* (1977) 76 Cal. App.3d 140, 146-147; 9 Witkin Cal. Procedure (3d ed.) Appeal, § 639, p. 620; *Clutter* v. *Superior Court* (1934) 140 Cal. App. 135, 138.) We do, however, believe that the law of the case impacts our consideration. In *Kirwan I* we stated "Thus, on this record, we find that petitioner has demonstrated his moral reform from the acts which led him to resign from Bar membership." Absent an additional record, it would be improper to reconsider applicant's "moral reform". (2 Cal. State Bar Ct. Rptr. at p. 699.)

[1b] As to events that predated the petition, and were disclosed on the petition, it is clear that reopening would be impermissible. The same would be true of events about which the State Bar had a reasonable opportunity to investigate and present at a hearing. (Cf. *Hampton* v. *Superior Court* (1952) 38 Cal.2d 652, 655; *Hanna* v. *City of Los Angeles* (1989) 212 Cal.App.3d 363, 376.)

[1c] To determine whether a reopening of the question of moral rehabilitation is permissible under these circumstances, we need look to the nature and purposes of determining "moral character" in reinstatement proceedings before this court. It is the public policy of this state that only persons of present good moral character be admitted to the practice of law. (Bus. & Prof. Code, §§ 6060, subd. (b), 6062, subd. (b); Cal. Rules of Court, rule 951(f); rule 665(b) Rules Proc. of State Bar, title II, State Bar Court Proceedings.) One of the underlying purpose of reinstatement proceedings is to insure that only persons of present good moral character are reinstated to the practice of law in this state. Accordingly, with the exceptions noted, the State Bar Court may consider any act or conduct that is relevant to a petitioner's moral character regardless of when or where the act or conduct occurred. (Cf. *Pacheco* v. *State Bar* (1987) 43 Cal.3d 1041, 1057.)

[2a] A petitioner possesses the present moral qualifications for reinstatement when he presents clear and convincing evidence that he possesses good moral character and has been rehabilitated. The term "good moral character" has traditionally been defined in terms of the absence of proven acts that have been historically considered manifestations of moral turpitude. (See *Hallinan* v. *Committee of Bar Examiners* (1966) 65 Cal.2d 447, 452.) Nevertheless, at least in this state, it also includes "qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process." (Rules Regulating Admission to Practice Law in California, rule X, § 1; *Pacheco* v. *State Bar*, *supra*, 43 Cal.3d at p. 1046; but see *Hallinan* v. *Committee of Bar Examiners*, *supra*, 65 Cal.2d at pp. 452-553, fn. 5 [where the Court noted that the United States Supreme Court appears to treat `moral turpitude' as the relevant criterion in reviewing

a decision to refuse admission].) Thus, any act or conduct bearing on any of these qualities is relevant in a reinstatement proceeding.

[2b] Unlike a determination of one's rehabilitation from prior bad acts, a determination of one's *present* moral qualifications for reinstatement is not capable of being conclusively determined for all time. By definition, one's *present* moral qualifications is continuously in issue up to the date of its submission. Thus, a petitioner's *present* moral qualification is subject to re-evaluation on the motion of the State Bar *at least* until the effective date of the Supreme Court's order reinstating the petitioner to the practice of law. Moreover, the Supreme Court may even revoke its order reinstating a petitioner after finality and cancel the law license of the petitioner if the petitioner failed to disclose a material fact to the State Bar and the failure to disclose permitted him to be reinstated without adequate consideration of his moral character. (Cf. *Goldstein* v. *State Bar* (1988) 47 Cal.3d 937, 951 [Supreme Court revoked the law license of an attorney who willfully failed to disclose a material fact on his application to practice law]; see also *Simmons* v. *State Bar* (1969) 70 Cal.2d 361, 367 fn. 3.)[Matter referred back to the State Bar where a declaration was filed on behalf of petitioner two months after the petition filed in the Supreme Court]; *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 491-492.) [Respondent concealed his arrest and pending trial on 11 felony charges by not updating his application for admission. After admission he reported convictions. Order of admission cancelled.].)

[3a] Addressing the second part of petitioner's first point, it is axiomatic that jurisdiction vests in only one court at a time. Thus, once our decision remanding the matter to the hearing department became final, jurisdiction vested solely in the hearing department so that it was the only forum in which the State Bar could have filed its motion. Only the hearing department had jurisdiction to hear the State Bar's motion.

[3b] We did not direct the hearing judge to render judgement that petitioner had established his present moral qualifications in *Kirwan I*. Nor did we direct the hearing judge to render judgment in petitioner's favor if petitioner was found to be rehabilitated from alcoholism and depression on remand. Therefore, contrary to petitioner's arguments, the hearing judge's consideration of the issue on remand was not inconsistent with our opinion in *Kirwan I*. Because we did not conclusively adjudicate the issue of petitioner's present moral fitness in *Kirwan I*, the hearing judge was free to admit evidence relevant to that issue. (Evid. Code, § 351.)

Without question, petitioner's involvement in the failed casino project bears on his qualities of honesty, fairness, candor, trustworthiness, and respect for the rights of others. In addition, it bears on the issue of whether petitioner committed acts involving moral turpitude since the conclusion of the first trial on his petition. Therefore, the State Bar's evidence regarding petitioner's involvement was relevant to the issue of his present moral qualifications and no error has been shown.

B. Sufficiency of the Evidence

In the second point of error, petitioner contends that, even considering the State Bar's evidence regarding his involvement in the failed casino project, the record does not support the hearing judge's adverse determinations with respect to petitioner's showing of rehabilitation and present moral qualifications.

After independently reviewing the record, we adopt and incorporate herein by reference all of the hearing judge's findings of fact as recited in his decision on remand filed September 27, 1995, except as otherwise stated below.[2] **[4 - See fn. 2]**

2. [4] In its appellee's brief, the State Bar challenges the hearing judge's findings regarding petitioner's rehabilitation from alcoholism and depression. As we pointed out in *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 526, ft. 3, if an appellee wishes to address issues not raised by the appellant, the party should request its own review. (See also rules 301(b), and 301(c)(1), Rules Proc. of State Bar, title II, State Bar Court Proceedings.)

We acknowledge our obligation for de novo review (rule 305, Rules Proc. of State Bar, title II, State Bar Court Proceedings), but seek to discourage the obviously unfair practice of requesting review in a responsive brief of issues not raised by the appellant. In such a case the appellee has not shared in the cost of record preparation (see rule 301(c)(1), Rules Proc. of State Bar, title II, State Bar Court Proceedings), and it reduces appellant's time to respond to such issues (see rule 303(b), Rules Proc. of State Bar, title II, State Bar Court Proceedings).

The hearing judge's finding that petitioner displayed a lack of candor to the mental health professionals is based on the fact that petitioner did not discuss his involvement in the failed casino project with them. However, in light of the fact that petitioner saw the mental health professionals primarily for alcoholism and depression, we do not view his failure to discuss his involvement in the casino project as lacking candor. In our view, petitioner was not required to discuss every one of his business ventures with the mental health professionals.

The State Bar asserts that the evidence regarding petitioner's involvement with the casino project precludes petitioner from establishing that he possesses the present moral qualifications for readmissions by clear and convincing evidence. We agree. **[5]** Because the State Bar does not have the burden of proof in a reinstatement proceeding, it need not rebut a petitioner's showing of rehabilitation, present moral fitness, or present learning and ability in the law with clear and convincing adverse evidence to prevail. Instead, the State Bar need only proffer sufficient adverse evidence to lower the persuasiveness of the petitioner's evidence so that he does not meet his burden to prove his case by clear and convincing evidence. (Cf. *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933, 942-943.) Of course, the State Bar may elect not to present any adverse evidence if it concludes that petitioner's showing is insufficient to establish his case by clear and convincing evidence.

As we noted in *In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 553 (citing *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403), a petitioner for reinstatement "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." In light of petitioner's unauthorized practice of law and other questionable conduct during his involvement with the casino project, we conclude that he did not present the requisite proof to establish his present moral qualifications.

1. Unauthorized practice of law

Petitioner's own testimony establishes that he was an expert in the development of gaming casinos in California. Petitioner testified as follows: "I find myself in this following dilemma. I have a great deal of knowledge and expertise in a small, select, little field and that is *the laws of the State of California* as they govern card casinos and the construction, design, location, marketing, organization and development of that. . . . And I tried to market my expertise, such as it was, in order to make a living and to be a viable citizen of this community." (Emphasis added.)

In his capacity has an expert, he knew the political sensitivity of a proposal to initiate legal gaming in a new city or community. Both Mr. Plinsky, a former city councilman of the City of Oxnard, and Mr. Kinney, the then economic director of the City of Oxnard, testified to that fact. Kinney further testified that the city and he fully expected that the proponent of a gaming proposal would be represented by an attorney. As an expert, petitioner knew this. Petitioner made presentations on at least two occasions where he explained legal requirements of legalized gaming in California. His conduct was such that he could have reasonably inferred that he would be viewed as a lawyer for the proposing group. As Plinsky testified, petitioner had been identified as a lawyer by Carey, petitioner's associate, in presenting the project.

In fact, Kinney did reach the conclusion that petitioner was a lawyer, based on the presentation made by petitioner and his evident knowledge of the California gaming requirements. It is our conclusion that under these circumstances petitioner had an affirmative duty to advise a representative of the City of Oxnard that he was not a lawyer.

The testimony of Kinney establishes that petitioner impliedly held himself out as entitled to practice law during a major presentation of the casino project petitioner and Carey made to the City of Oxnard's economic development director, city manager, assistant city manager, and perhaps a city council member. Even though petitioner did not expressly tell the city officials that he was an attorney at that meeting in 1993, he did not tell them he was not an attorney or otherwise insure that they knew he was not entitled to practice law. More importantly, petitioner either

described his background or permitted it to be described "in terms of his legal experience and legal expertise with respect to all the issues pertaining to gaming." Kinney even concluded that petitioner was an attorney because of the emphasis placed on petitioner's legal skills at the meeting. "Both express and implied representations of ability to practice law are prohibited." (*In re Naney* (1990) 51 Cal.3d 186, 195; *In re Cadwell* (1975) 15 Cal.3d 762, 771.)

In addition, as Kinney testified, because of all the legal issues involving any gambling project, the city officials had an interest in having an attorney representing the developers of the casino project being present at petitioner's and Carey's presentation of their casino project to the city official. And, as Kinney testified, the city officials "looked to Mr. Kirwan to fill that role because that seemed to be what he was bringing to the [project]. Certainly there was no one else there that spoke to the legal issues as [petitioner] did."

Kinney's erroneous conclusion regarding petitioner's status as an attorney is not surprising in light of petitioner's admitted motivation for participating in the casino project as a consultant for a fee of $150 per hour, which was *contingent* on the successful completion of the casino project, a project petitioner describes as a $10 million project. Petitioner's contention that he did not intend to mislead the city officials into believing that he was an attorney is not plausible in light of his admission that he intentionally tried to market his legal expertise in the field of gaming and Kinney's testimony. Thus, following the determination of the hearing judge, we hold that the evidence supports a finding that petitioner intended to mislead the city officials into believing that he was an attorney. Yet, even if petitioner did not intend to mislead them, he must have known that he was doing so. (Cf. *In re Cadwell, supra*, 15 Cal.3d at p. 772.) People of good moral character do not practice deceit on others. (*Id.* at pp. 771-772)

Giving advice as to the law is the practice of law. (*Bluestein* v. *State Bar* (1974) 13 Cal.3d 162, 173-174.)

A lay person engages in the unauthorized practice of law in violation of Business and Professions Code section 6126 not only when he expressly represents to another that he is entitled to practice law, but also when he impliedly makes such a representation. (*In re Cadwell, supra*, 15 Cal.3d 762, 770-771, fn. 3.) The unauthorized practice of law can involve moral turpitude. (*Hightower* v. *State Bar* (1983) 34 Cal.3d 150, 157.)

As an expert, petitioner knew of the political sensitivity of the proposed gaming project in Oxnard. He further knew that if his past criminal activity in California gaming casinos was widely known in the Oxnard community any gaming project with which he was associated would not be politically acceptable. Kinney testified that because of the criminal activity of petitioner, and the felony conviction of Carey, the entire project was a waste of time. Under those circumstances the "qualities of honesty, fairness, [and] candor" required a disclosure of his past misdeeds to a representative of the City of Oxnard. (Rules Regulating Admission to Practice Law in California, rule X, § 1; *Pacheco* v. *State Bar, supra*, 43 Cal.3d at p. 1046.) Of course, since petitioner did not know of Carey's felony conviction he had no duty to disclose that.

2. Other questionable conduct

The State Bar asks that we consider petitioner's contributions to the political campaigns of candidates for city council and mayor of Oxnard, which contributions coincided with the gaming application discussed. In view of our conclusions in connection with the gaming application itself, we find no reason to address this issue.

However, we do note that notwithstanding petitioner's prior criminal activity in "fronting" ownership interests in a casino for individuals who could not legally own an interest in the casino, he again became involved with the Oxnard casino project with Carey, who is an individual who cannot legally own an interest in a casino because he was convicted of a felony charge of lewd and lascivious conduct with a minor. Petitioner denies knowing of Carey's conviction until after his participation in the project was terminated. He admits that he discussed the licensing requirements for ownership in and to manage a casino with Carey, but he never inquired as to Carey's qualification or conducted any in-

vestigation to insure that he was not dealing with someone who could not own or manage a casino.

In addition, petitioner never inquired as to how Carey intended to fund the project, nor did he know whom Carey was soliciting as investors in the project. According to petitioner, whoever the investors were or turned out to be, they would be carefully scrutinized by the California Attorney General and that if they were good enough for the Attorney General, they were good enough for him. Petitioner "didn't have anything involved in this project other than a per hour basis and all [he] cared about is that they had enough money to pay [him]." Such a position fails to conform to the morals of a fiduciary. Nor does it evidence that petitioner possesses such qualities as candor, respect for the law, or respect for the rights of others. Thus, it diminishes the persuasiveness of petitioner's claim of present good moral character.

C. Request to Present Additional Evidence

[6a] In the third point of error, petitioner contends that the hearing judge denied him a fair hearing by denying petitioner's post-decision motion to present additional evidence. The issue of whether petitioner held himself out as entitled to practice law was a subject of both the State Bar's direct questioning and petitioner's cross-examination of Kinney and Plisky. Accordingly, petitioner's contention that he did not realize the question of his unauthorized practice of law was in issue until after the hearing judge filed his decision on remand is not plausible. Petitioner was required to present all evidence he considers favorable during the trial on remand. (Cf. *Coviello* v. *State Bar* (1955) 45 Cal.2d 57, 65.) He may not neglect to do so and then demand that the evidence be reopened so that he may do so after obtaining an adverse determination. (*Ib.*) Accordingly, "we cannot say that the denial of petitioner's request was improper. (Citations.)." (*Baranowski* v. *State Bar* (1979) 24 Cal.3d 153, 166.) There was no showing that any of the proposed witnesses were unavailable at the hearing; in fact, petitioner and Carey had testified.

[6b] As the court indicated in *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 687, the moving party must establish good cause, showing why the unoffered evidence was not presented at the time of hearing. Code of Civil Procedure section 657(4) would require that the evidence be newly discovered and a showing that with reasonable diligence, the evidence could not have been presented at trial. We find no abuse of discretion by the hearing judge in denying petitioner's motion to reopen the proceedings.

III. CONCLUSION

The hearing judge's decision denying the petition is affirmed.

We concur:

MARCUS, J.*
STOVITZ, J.

* By designation of the Presiding Judge in accordance with the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, rule 305(d).

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Jan Stanley Mason

A Member of the State Bar

Nos. 93-O-11526, 93-O-16274

Filed May 20, 1997

SUMMARY

Respondent made a court appearance during a 75-day suspension ordered by the Supreme Court. The hearing judge concluded that respondent's improper practice of law violated his duty to support the law and involved moral turpitude. In deciding discipline, the judge relied on a Supreme Court order imposing discipline in another case, which order did not discuss the relevant facts or law. The judge used the order to take notice of the unpublished hearing decision in the other proceeding. The judge recommended a three-year stayed suspension and three-year probation, conditioned on a thirty-day actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Arguing for a six-month actual suspension, the State Bar requested review. Respondent supported the recommended discipline. The review department agreed with the hearing judge's culpability determinations, but not her reliance on the Supreme Court's order in another proceeding. Stressing respondent's moral turpitude, the review department recommended a three-year stayed suspension and three-year probation, conditioned on a ninety-day actual suspension.

COUNSEL FOR PARTIES

For State Bar: Victoria R. Molloy, Charles Weinstein

For Respondent: Jan Stanley Mason, in pro. per.

HEADNOTES

[1] 720.50 Mitigation—Lack of Harm—Declined to Find

Respondent failed to establish lack of harm as a mitigating circumstance where he harmed the object of his misconduct, a superior court, by appearing in the court and by signing and serving a trial brief while he was suspended from the practice of law.

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] 730.50 Mitigation—Candor—Victim—Declined to Find

Respondent failed to establish spontaneous candor as a mitigating circumstance where he admitted to a superior court that he had appeared before the court while on actual suspension, but where the admission might well have resulted from his fear that the opposing counsel would disclose the unlawful appearance.

[3 a-d] 135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
146 Evidence—Judicial Notice
159 Evidence—Miscellaneous
167 Abuse of Discretion
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act

A hearing judge erroneously relied on an unpublished hearing department decision and a Supreme Court order in another case. The unpublished decision of the hearing department in another proceeding, involving another respondent, may not be relied on either as precedent or as evidence. While the hearing department could take judicial notice of the Supreme Court order, that order provided no information that would make it relevant as either evidence or precedent in the matter before the court. It merely recited the discipline ordered, without discussion of the relevant facts or law and therefore should not have been relied on in this proceeding.

Additional Analysis

Culpability
Found
213.11 Section 6068(a)
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
231.01 Section 6126
Aggravation
Found
511 Prior Record
521 Multiple Acts
Mitigation
Found
765.10 Pro Bono Work
Discipline
1013.09 Stayed Suspension—3 Years
1015.03 Actual Suspension—3 Months
1017.09 Probation—3 Years

OPINION

OBRIEN, P.J.:

The State Bar seeks review of the discipline imposed on respondent Jan Stanley Mason. The hearing judge recommended that respondent be suspended from practice for three years, that suspension be stayed, and that he be placed on probation for three years on a number of conditions, including a condition that he be actually suspended for thirty days. Respondent now seeks to support the recommended discipline, while the State Bar argues for six months actual suspension.

The matter was tried in two counts, the first of which was tried on a charge of violation of Business and Professions Code sections 6068, subdivision (a) (duty to support the laws); 6125 (requirement for membership in the State Bar to practice law); 6126 (misdemeanor to hold oneself out improperly as authorized to practice law); and 6106 (moral turpitude, a cause for disbarment or suspension).[1] In that count, it was stipulated that respondent made a court appearance during a 75-day suspension ordered by the Supreme Court. The hearing judge found respondent culpable of violation of section 6068, subdivision (a), in that he practiced law while suspended, in violation of sections 6125 and 6126. It was further found that respondent was culpable of moral turpitude, in violation of section 6106, in practicing law while suspended.

In count two, following the dismissal of certain counts by the State Bar, respondent was charged with violation of the Rules of Professional Conduct, rule 4-100(B)(3) (requiring a lawyer to account for all funds of a client).[2] Following a hearing, the trial judge found respondent not culpable of that charge. The State Bar sought review of that count, but later withdrew its request. We have independently reviewed the record and find no reason to disturb that finding.

Following our review, we shall determine that respondent's violation of the Supreme Court's order suspending him from the practice of law for 75 days was willful and constituted moral turpitude, and we shall recommend that respondent be actually suspended for 90 days.

II. EVIDENCE AND FINDINGS

By a Supreme Court order, effective January 29, 1993, respondent was suspended from the practice of law for 75 days, which covered the period to April 13, 1993. Respondent stipulated that he appeared in the Orange County Superior Court on February 5, 1993, as counsel for the petitioner in a domestic relations matter. He further stipulated that he requested a continuance of the matter and that he did not inform either the court or opposing counsel that he was suspended from the practice of law.

The evidence showed that he signed and filed a declaration dated February 5, 1993, stating the matter was not ready for trial, because, among other things, discovery disputes existed, child custody was in issue, and the parties had not yet met and conferred. The record also shows that respondent signed and served his trial brief in that matter on February 2 or 3, 1993.

At no time in February 1993 or before, did respondent disclose to the court or opposing counsel that he was, or was about to be, suspended. At the time of the appearance on February 5 respondent indicated that he needed a continuance of 90 to 120 days, and he made no objection when the court continued the matter to May 7, 1993.

Respondent was notified by letter dated January 3, 1993, from his counsel, Kenneth Kocourek, that the Supreme Court order of suspension became effective 30 days from December 30, 1992. Respondent testified that he talked with his counsel and was informed that there would be no trouble obtaining an extension of the effective date of the Supreme Court order. Kocourek has no specific recollection of that conversation. Kocourek wrote to respondent on January 21, 1993, advising respondent that he would

1. Section shall refer to Business and Professions Code, unless otherwise indicated.

2. Rule shall refer to Rules of Professional Conduct, except where otherwise noted.

not represent him in seeking an extension of the effective date of suspension, and including a copy of the State Bar Court's requirements for a motion for such extension. Respondent testified that he sent a facsimile transmission and a hard copy of some of the information required by the State Bar Court for considering an extension to Kocourek on January 27 or 28, one or two days before the effective date of respondent's suspension. Respondent did not produce a copy of that document, nor does Kocourek have a copy of it, or remember receiving it.

Following January 27 or 28, Kocourek had no further communication from respondent until about two weeks after respondent's February 5 court appearance. Respondent testified that he assumed that he had obtained an extension of 30 or 45 days of the effective date of the Supreme Court order of suspension.

As the State Bar points out, such a belief is not credible in light of the fact that respondent, purportedly on the assumption of an extension of 30 to 45 days, agreed to a continuance to May 7, 1993. That continuance would have placed the continued trial date in the midst of respondent's suspension, considering his purported extension, but after the termination of the suspension, absent an extension.

The hearing judge determined that respondent's court appearance six days after the commencement of his suspension was "in reckless disregard of whether he was actually suspended or the suspension was stayed. He did not care whether he complied with the Supreme Court's suspension order." The hearing judge reached this conclusion in spite of respondent's testimony that he thought his attorney had obtained an extension of the effective date of the suspension. We agree with the hearing judge's determination, but conclude that such a finding commands a determination of willful misconduct. That is, he knew of the order of suspension and appeared in court during that suspension. Either respondent was willful in his appearance on February 5; or if he believed he had obtained an extension of the commencement of his suspension, he willfully failed to advise the superior court that he would be suspended on the continued date of May 7. Thus, respondent is culpable of violating section 6106. (Cf. *In re Cadwell* (1975) 15 Cal.3d 762, 771; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91.)

In September 1993, when appearing for trial in the Orange County Domestic Relations matter, respondent advised the court that he had appeared on February 5, while under suspension.

III. AGGRAVATION AND MITIGATION

In aggravation respondent has one prior record of discipline. (Std. 1.2(b)(i), Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards).) In that matter, respondent stipulated to three counts of misconduct, involving commingling, failing to promptly pay out client funds, failing to promptly provide an accounting, and failing to cooperate with the State Bar in an investigation.

We agree with the hearing judge that the failure to disclose to the trial judge on February 5, 1993, that he was suspended, is not aggravation because it is the fact of that appearance that led to a finding of culpability. We do, however, note that respondent not only made an appearance on February 5, but also signed and served a trial brief on February 2 or 3 without disclosing to opposing counsel or the court that he was suspended. (Std. 1.2(b)(ii).)

[1] The hearing judge found the lack of harm to the client to be a mitigating circumstance. We disagree. It is true that there was no demonstrated harm to a client in the court appearance, or the signing and serving the trial brief. Yet under standard 1.2(e)(iii), lack of harm to the client or person who is the object of the misconduct is a mitigating factor. The object of respondent's misconduct was the Orange County Superior Court, whose proper administration of justice he harmed. We cannot agree with the hearing judge that the court appearance was an isolated instance of misconduct. The court appearance and the serving and filing of the trial brief while suspended constituted multiple acts of wrongdoing.

[2a] The hearing judge gave mitigation for the fact that respondent "displayed candor and recognition of his wrongdoing in an attempt to atone for the consequences of his misconduct," in relation to his

disclosure in September to the superior court that he had been suspended at the time of his February court appearance. We disagree that this mitigating factor was shown by clear and convincing evidence.

[2b] Respondent testified that at the time of the September admission he did not know that the fact of the prior suspension was known by either opposing counsel or the court. However, he did testify that at an earlier settlement conference with the court, during which sanctions against respondent were discussed, following a conference between the court and opposing counsel only, the court appeared upset, and denied respondent's motion for relief from sanctions. Respondent also testified that during a court appearance prior to the date he told the court of his suspension, opposing counsel had made reference to reporting respondent to the State Bar. With this record we can not conclude that there is clear and convincing evidence that the September disclosure of the prior suspension was motivated by voluntary, spontaneous candor under standard 1.2(e)(v). On the evidence, the September admission might equally well have been the result of the fear of opposing counsel making a harmful disclosure to the superior court.

We agree with the hearing judge that the evidence of respondent's pro bono work is a mitigating factor. He has worked as a fee arbitrator with the Los Angeles County Bar Association since the 1970's. He volunteered at a center to assist those affected a recent Los Angeles area earthquake, and for two years he has volunteered to consult by telephone with abused or disturbed women referred by the House of Ruth. For these factors, respondent is entitled to mitigation. (Cf. *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 529.)

IV. DISCIPLINE

[3a] Following the submission of this matter in the hearing department, the hearing judge, over objection from the State Bar, reopened the matter to take judicial notice of the Supreme Court's order in *In re Michael Torrey Wayland*, S044802, filed April 13, 1995. (State Bar case no. 93-O-17404). That case included a Supreme Court order based on a State Bar Court hearing department recommendation, which is unpublished. That hearing department recommendation, in turn, is based on a stipulation of the parties as to the facts and recommended discipline. The issue is whether it is proper for a hearing judge to take judicial notice of such a Supreme Court order for the purpose of measuring discipline.

[3b] As a matter of first impression, we determine that the hearing judge's reliance on *In re Michael Torrey Wayland* was in error.

[3c] If the other elements for taking judicial notice are present, the State Bar Court and its hearing department are, of course, permitted to take judicial notice of Supreme Court orders. (Evid. Code, § 452(d).) Rule 977(a) of the California Rules of Court makes clear that an unpublished opinion shall not be relied on by a court or a party in any other action or proceeding, with certain exceptions not here pertinent. Only published Supreme Court or review department opinions have precedential value. (See rule 310(b), Rules of Proc. of State Bar, title II, State Bar Court Proceedings.)

[3d] The unpublished decision of the hearing department in another proceeding, involving another respondent, may not be relied on in this proceeding either as precedent or as evidence. While the hearing department could take judicial notice of the Supreme Court order, that order provides no information that would make it relevant as either evidence or precedent in the matter before the court. It merely recites the discipline ordered, without discussion of the relevant facts or law and therefore should not have been relied on in this proceeding.

In view of the fact that the record is before us, and that we must review the matter de novo (*id.*, rule 305(d); *In re Morse* (1995) 11 Cal.4th 184, 207), that error is harmless, and we review the record without considering the matter of *In re Michael Torrey Wayland*.

The State Bar urges that the 30 days actual suspension ordered by the hearing judge is inadequate to meet the needs of attorney discipline. Respondent, after arguing for no actual suspension in the hearing department, now seeks to sustain the ruling of the hearing judge.

In determining discipline we look to the standards and authorities for such help as they may provide. The principal purpose of State Bar disciplinary proceeding is to protect the public, preserve public confidence in the legal profession, and maintain the highest possible standards for attorneys; not to punish the culpable attorney. (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111; cf. std. 1.3.)

The standards are guidelines, and the court may deviate from those guidelines to fashion the appropriate discipline, considering the facts and circumstances of the matter before it. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) The standards need not be followed in a mechanical manner. (*Gary* v. *State Bar* (1988) 44 Cal.3d 820, 828.)

Standard 1.7(a) provides that where an attorney has prior discipline, "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 unjust."

The discipline in the prior proceeding is certainly not remote in time. The Supreme Court order was effective January 29, 1992, and respondent violated it seven days later. In considering the circumstances of the misconduct, we cannot conclude that the imposition of greater discipline in this matter than was given in the prior matter would be unjust. As we have concluded, respondent willfully violated the provisions of a Supreme Court order by appearing in court, and by signing and serving a trial brief while suspended. Respondent did not advise either the court or opposing counsel of his suspension until long after the conclusion of that suspension.

We next search for case authority to assist in determining discipline. We note that in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619, this court stated that "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 . . . ."

Farnham v. *State Bar* (1976) 17 Cal.3d 605 involved the unauthorized practice of law, as well as the abandonment of two clients. Farnham was given six months actual suspension. That case appears more serious than the matter before us.

In *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, a lawyer was suspended for 30 days for accepting employment from a client and appearing in bankruptcy court while suspended. Trousil had prior misconduct, but was entitled to far more mitigation than is respondent in the case before us. Trousil suffered from an undiagnosed psychological impairment, followed by an extended period of compliance with the terms of probation.

In *In the Matter of Wyrick, supra,* 2 Cal. State Bar Ct. Rptr. 83, a respondent with prior discipline was found to have deliberately failed to disclose his suspension on two applications for employment as an attorney. One of those applications was for employment as a judicial arbitrator, and one was made while on interim suspension. Respondent also served as a judicial arbitrator while on interim suspension in violation of rule 1604(b) of the California Rules of Court. The attorney was given an actual suspension of six months. On balance, that case seems somewhat more serious than that before us.

We shall recommend that respondent be actually suspended for a period of 90 days as a condition of probation. We otherwise follow the recommendations for discipline made by the hearing judge, except we modify the order for costs as required by section 6086.10.

V. RECOMMENDATION

It is recommended that respondent be suspended from the practice of law for three years, that suspension be stayed, and that respondent be placed on probation for three years, on condition that during the first ninety days of probation respondent be actually suspended from the practice of law in California. We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts in subdivisions (a) and (c) of rule 955 within 30 days and 40

days, respectively, after the effective date of the Supreme Court's order made in this matter. In addition, it is recommended that each of the remaining conditions recommended by the hearing judge be imposed, except that the recommendation for costs be amended to provide that costs be awarded to the State Bar pursuant to section 6068.10 and that those costs be payable in accordance with section 6140.7 (as amended effective January 1, 1997).

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Mason Harry Rose V

A Member of the State Bar

No. 94-O-12235

Filed May 22, 1997

SUMMARY

Respondent failed to comply with certain conditions of his three-year disciplinary probation, and had an extensive prior disciplinary record. The hearing judge recommended that respondent be disbarred. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, arguing, among other things, that he was not culpable because he substantially complied with his probation conditions, and that disbarment was not warranted in any event because the conditions he violated are relatively minor, and that there were more mitigating circumstances than found by the hearing judge. The State Bar argued in reply that the hearing judge's decision should be adopted in its entirety.

The review department concluded that the hearing judge's decision, including the disbarment recommendation, was supported by the record. This was respondent's fourth disciplinary matter and, like the others, involved serious misconduct. Respondent had ample opportunity to conform his conduct to the ethical requirements of the profession, but has repeatedly failed or refused to do so. Probation and suspension have proven inadequate to prevent continued misconduct.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: James W. Weinberg

HEADNOTES

[1 a, b] 179 **Discipline Conditions—Miscellaneous**
1713 **Probation Cases—Standard of Proof**
1719 **Probation Cases—Miscellaneous**

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.

The review department rejected the argument that respondent was not culpable of violating probation conditions because he was actually suspended from the practice of law during the entire time that the probation conditions were in effect as a result of other disciplinary orders and therefore his probation was de facto revoked. The Supreme Court placed respondent on probation and the order was not revoked or modified. If respondent believed that subsequent events impacted the order, or if he was unclear of the requirements of the order, he could have raised the issue with the State Bar Court and the Supreme Court, which he did not do.

[2 a-e] 162.90 Quantum of Proof—Miscellaneous
1713 Probation Cases—Standard of Proof
1719 Probation Cases—Miscellaneous

The review department rejected the argument that substantial compliance with a probation condition was a defense to culpability. Disciplinary probation serves the critical function of protecting the public and rehabilitating the attorney. The importance of these goals makes distinctions between substantial and insubstantial or technical violations of probation inappropriate. However, for purposes of discipline, not every probation violation should be treated the same. Belated compliance with a probation condition may be considered as a mitigating factor in determining discipline.

[3 a, b] 135.82 Procedure—Revised Rules of Procedure—Probation
214.10 State Bar Act—Section 6068(k)
220.00 State Bar Act—Section 6103, clause 1
1711 Probation Cases—Special Procedural Issues
1719 Probation Cases—Miscellaneous

The State Bar can prosecute a probation violation by way of a motion to revoke probation, or by way of an original disciplinary proceeding based on a violation of the Business and Professions Code section 6068, subdivision (k). It was not error to charge a violation of Business and Professions Code section 6103 in this original disciplinary proceeding. The gravamen of this case was respondent's failure to comply with the conditions of his probation. Regardless of the statute charged, the proceeding was based on a violation of section 6068, subdivision (k).

[4 a, b] 173 Discipline—Ethics Exam/Ethics School
174 Discipline—Office Management/Trust Account Auditing
214.30 State Bar Act—Section 6068(m)
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
1714 Probation Cases—Degree of Discipline

The greatest amount of discipline is warranted for violations of probation which show a breach of a condition of probation significantly related to the misconduct for which probation was given, especially in circumstances raising a serious concern about the need for public protection. Where the misconduct which gave rise to the probation involved failure to perform and communicate, the law office management plan, ethics school, and law office management course conditions of probation directly addressed the misconduct and were therefore significantly related to the underlying misconduct.

[5 a, b] 162.20 Proof—Respondent's Burden
715.50 Mitigation—Good Faith—Declined to Find

In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held and reasonable. Respondent's beliefs regarding his interpretation of the Supreme Court order were honestly held but were unreasonable and, therefore, were not a mitigating circumstance.

[6] 745.59 Mitigation—Remorse/Restitution—Declined to Find
1719 Probation Cases—Miscellaneous

Tardy compliance with conditions of probation after being notified by the probation unit of the failure to comply is not a mitigating circumstance as it is not a "spontaneous" recognition of wrongdoing.

[7 a-e] 511 Aggravation—Prior Record—Found
1810 Probation Cases—Discipline Imposed—Disbarment

Respondent's extensive record of prior discipline demonstrated that probation and suspension have proven inadequate in the past to protect against future misconduct, and the record in the current proceeding did not give assurance that such a sanction would ensure that future misconduct would not occur. Accordingly, the review department concluded that disbarment was appropriate to protect the public, courts, and legal profession.

[8 a-d] 135.87 Procedure—Revised Rules of Procedure—Division VIII—Reinstatement
179 Discipline Conditions—Miscellaneous
1715 Probation Cases—Inactive Enrollment
1810 Probation Cases—Discipline Imposed—Disbarment

Respondent was not given credit for the period of time he was ineligible to practice law against the time period he must wait before he may petition for reinstatement. The ban on respondent's practice for which he sought credit resulted from other disciplinary proceedings, not from the present case and, therefore, was not a related interim ban on his practice.

Additional Analysis

Aggravation
Found
521 Multiple Acts
Mitigation
Found
735.10 Candor—Bar
740.10 Good Character
Declined to Find
720.50 Lack of Harm
Discipline
Probation Conditions
1715 Probation Cases—Inactive Enrollment
Other
175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge that respondent Mason Harry Rose V be disbarred from the practice of law. The recommendation is based on respondent's misconduct which involved his failure to comply with certain conditions of his three-year disciplinary probation, and on his extensive prior disciplinary record.

Respondent requested review, arguing, among other things, that he is not culpable because he substantially complied with his probation conditions, and that disbarment is not warranted in any event because the conditions he violated are "relatively minor," and that there are more mitigating circumstances than found by the hearing judge. The State Bar represented by the Office of the Chief Trial Counsel (OCTC) argues in reply that we should adopt the hearing judge's decision in its entirety.

We have independently reviewed the record and conclude that the hearing judge's decision, including the disbarment recommendation, is supported by the record. This is respondent's fourth disciplinary matter and, like the others, involves serious misconduct. By his own admission, respondent has not practiced law since November 1989. Most of the time since then he has been actually suspended for disciplinary reasons. Respondent has been either committing misconduct or actually suspended as a result of that misconduct for approximately 18 of the 26 years since he was admitted to practice.

Respondent has had ample opportunity to conform his conduct to the ethical requirements of the profession, but has repeatedly failed or refused to do so. Probation and suspension have proven inadequate to prevent continued misconduct. Given respondent's past and present misconduct and the record as a whole, we conclude that disbarment is warranted to protect the public, courts, and profession from the substantial risk of future misconduct.

FACTS AND FINDINGS

Respondent was admitted to the practice of law in California in 1971. By Supreme Court order filed May 13, 1992, and effective June 12, 1992, in case number S025490 (85-O-13737) (hereafter *Rose II*), respondent was suspended for three years, execution of which was stayed, and he was placed on three years' probation, on conditions, including actual suspension for one year and until respondent demonstrated his rehabilitation and fitness to practice pursuant to standard 1.4(c)(ii). (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards).) The conditions of probation included the requirement that respondent attend and satisfactorily complete the State Bar Ethics School, develop an approved law office management plan, and complete an approved law office management course. These three conditions were to be completed within one year of the effective date of the Supreme Court's order.

The Supreme Court's order was served on respondent. In addition, the probation unit advised respondent of the three conditions of probation and of the required completion date of June 12, 1993. Respondent wilfully failed to timely comply with any of the above three conditions of probation. After being notified by the probation unit that he had failed to timely comply, respondent attended Ethics School and presented his law office management plan in April 1994, and he completed the law office management course in May 1994.

The notice to show cause in this matter charged three separate counts, each alleging a failure to comply with a separate probation condition in violation of section 6103 of the Business and Professions Code.[1] The hearing judge concluded that respondent wilfully violated section 6103 in each of the three counts.

1. All further references to sections are to the Business and Professions Code unless otherwise noted. As relevant here, section 6103 provides that a wilful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which the attorney ought in good faith to do or forbear, constitutes cause for disbarment or suspension.

In aggravation, the hearing judge found that respondent had a record of prior discipline.[2] (Std. 1.2(b)(i).) He was first disciplined in *Rose* v. *State Bar* (1989) 49 Cal.3d 646 (hereafter *Rose I*). Respondent was suspended for five years, execution of which was stayed, and placed on five years probation on conditions including actual suspension for two years. The Supreme Court ordered respondent to comply with rule 955 of the California Rules of Court (rule 955). Respondent was found culpable of numerous acts of misconduct, including willful failure to communicate with clients, willful failure to provide services, willful failure to promptly and properly discharge obligations with regard to client funds and records, improper client solicitation, and improper business dealings with a client. The misconduct spanned a time period of some seven years from 1978 through 1985. The hearing panel decision was filed in November 1986, the former review department's decision was filed in August 1987, and the Supreme Court's opinion was filed in October 1989. The Supreme Court noted that, but for the extensive mitigation, respondent would have been disbarred. (*Rose* v. *State Bar*, *supra*, 49 Cal.3d at p. 666.)

Respondent was next disciplined pursuant to the Supreme Court's order in *Rose II*.[3] He did not file an answer to the notice to show cause and his default was entered. His motion for relief from the default was denied. He was found culpable of three instances of failure to communicate, three related instances of failure to perform legal services, and one instance of failure to cooperate with a State Bar disciplinary investigation. Most of the misconduct occurred during approximately 1988 and 1989, although some of it occurred between 1984 through 1986. The trial of this matter occurred in October 1991, the hearing judge's decision was filed in December 1991, and the Supreme Court's order was filed in May 1992. The probation in *Rose II* was concurrent to the probation in *Rose I*, but the actual suspension was consecutive to the actual suspension in *Rose I*. As indicated above, respondent's failure to comply with the terms and conditions of his disciplinary probation in *Rose II* gave rise to the instant proceedings.

Respondent's next discipline resulted from his failure to comply with the probation conditions imposed by the Supreme Court in *Rose I* and his failure to comply with rule 955 requirement imposed in *Rose II*. These two matters were consolidated in the hearing department (and resulted in a disbarment recommendation), but were the subject of separate review department recommendations (*In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 208-210), and separate Supreme Court orders. By Supreme Court order filed May 16, 1995, and effective June 18, 1995, in case number S004192 (92-P-13660), respondent's probation in *Rose I* was revoked, the stay of execution of the suspension was lifted, and respondent was suspended for five years, execution of which was stayed, and placed on five years' probation on conditions including actual suspension for two years (hereafter *Rose III*). Respondent was found culpable of failing to file timely three quarterly reports and two trust account audits that were all due between January and July 1992.

By Supreme Court order filed June 28, 1995, and effective July 28, 1995, in case number S046229 (92-N-16099), respondent was suspended from the practice of law for two years, execution of which was stayed, and placed on two years' probation on conditions, including nine months' actual suspension (hereafter *Rose IV*).[4] He was found culpable of failing to file timely the affidavit required by rule 955(c), which was due in July 1992. Respondent filed the affidavit 15 days late. The trial of *Rose III* and *Rose IV* occurred in late 1992 and early 1993, and the hearing judge's decision was filed in June 1993. The

2. We have added factual detail regarding respondent's prior discipline based on the records of these prior matters that were introduced into evidence at trial, which are uncontroverted by either party.

3. Respondent was actually suspended between December 4, 1989, and December 4, 1991, as a result of *Rose I*. He was again actually suspended between January 1, 1992, and March 13, 1992, for failing to take and pass the professional responsibility examination as ordered in *Rose I*. Then, on June 12, 1992, he was actually suspended as the result of *Rose II*, and he has remained actually suspended since then.

4. As noted, *Rose III* and *Rose IV* were consolidated. Our separate reference to them is for clarity and has not influenced our disposition of this matter.

review department opinion was filed in December 1994, and reconsideration was denied in March 1995. (*In the Matter of Rose, supra,* 3 Cal. State Bar Ct. Rptr. 192.)

The only other aggravating circumstances found by the hearing judge was that the misconduct involved multiple acts of wrongdoing occurring over a significant time period. (Std. 1.2(b)(ii).) Although concluding that the misconduct was repeated, the hearing judge did not find that it constituted a pattern of misconduct, citing *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1149-1150.

In mitigation, the hearing judge gave some weight to respondent's "candid admissions of misconduct" made during the disciplinary proceeding. (Std. 1.2(e)(v).) Although recognizing that attorneys are required to participate in disciplinary hearings under section 6068, subdivision (i), the hearing judge found that respondent's cooperation was particularly commendable and aided in the resolution of many material factual issues.

Respondent's extensive community service in establishing and enforcing the rights of the physically challenged both in the United States and abroad was given substantial mitigating weight by the hearing judge as reflecting favorably upon respondent's good character. (Std. 1.2(e).) The hearing judge gave moderate weight in mitigation to respondent's tardy compliance with the three probation conditions. (Std. 1.2(e)(vii).) The hearing judge did not find respondent's asserted good faith beliefs regarding his interpretation of the requirements of the probation conditions as a mitigating factor because, even though honestly held, the beliefs were not reasonable.

DISCUSSION

Before addressing respondent's contentions, we note that although respondent argues on review that additional mitigating circumstances are present and that we should accord the mitigation more weight than did the hearing judge, he does not otherwise contest the hearing judge's findings of fact, including the aggravating and mitigating circumstances. OCTC also does not contest the hearing judge's factual findings. We have independently reviewed the record and conclude that the findings are supported by clear and convincing evidence, and we adopt them with the modifications noted above.

A. Culpability

[1a] Turning to the merits of the arguments, respondent asserts that he is not culpable of the probation violations on two grounds. First, he argues that he is not culpable because he was actually suspended from the practice of law during the entire time that the probation conditions were in effect as a result of other disciplinary orders and therefore his probation in *Rose II* was "de facto revoked." Respondent also argues that it would have been an "idle act" to perform the conditions of probation ordered in *Rose II* while the "threat of probation revocation and/ or disbarment loomed over his head" from *Rose III*, and "the law" does not require the performance of idle acts.

[1b] Respondent does not cite any authority in support of these arguments and our research reveals none. The Supreme Court placed respondent on probation in *Rose II* and the order was not revoked or modified, "de facto" or otherwise. Respondent was obligated to comply with the *Rose II* order under sections 6103 and 6068, subdivision (k). His performance would not have been an idle act. If respondent believed that subsequent events impacted the order, or if he was unclear of the requirements of the order, he could have raised the issue with the State Bar Court and the Supreme Court. He did not do so.[5]

[2a] Second, respondent argues that he is not culpable because he "substantially" complied with

5. We also note that in *Rose III*, respondent argued that he only had to comply with the probation conditions there at issue *during* the period of his actual suspension. (*In the Matter of Rose, supra,* 3 Cal. State Bar Ct. Rptr. at p. 202.) It is disingenuous at best to now argue that he *did not* have to comply with the probation conditions during the period of his actual suspension.

the conditions. Although not articulated, we presume that respondent is arguing that his untimely compliance was "substantial" compliance.

[2b] As acknowledged by respondent, we have previously held that substantial compliance with a probation condition is not a defense to culpability. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 150, citing *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536-537.) Respondent requests that we "reexamine" this holding, asserting that the present case does not involve the failure to make restitution, as did *Broderick* and *Potack*. Respondent also argues that he was charged with wilfully violating a court order under section 6103, which is akin to a contempt charge, and that substantial compliance is a defense to a contempt charge under federal law.

[2c] The relevant probation condition at issue in *Potack* involved restitution. (*In the Matter of Potack, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 536-537.) Contrary to respondent's assertion, the relevant probation condition at issue in *Broderick* involved the requirement that the attorney obtain psychological therapy. (*In the Matter of Broderick, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 149-150.) In both cases, we held that substantial compliance was not a defense to culpability.

[2d] Disciplinary probation serves the critical function of protecting the public and rehabilitating the attorney. (*In the Matter of Potack, supra,* 1 Cal. State Bar Ct. Rptr. at p. 540.) The importance of these goals makes distinctions between substantial and insubstantial or technical violations of probation inappropriate. It is the importance of the goals, not just the particular probation condition at issue, that makes such distinctions inappropriate. We reiterate that for the purpose of determining culpability, "it is misguided" to distinguish between substantial and other forms of compliance.[6] (*Id.* at p. 537.)

[2e] We stress, however, that the issue here is culpability. We agree that for purposes of discipline, not every probation violation should be treated the same. (See *Id.* at p. 540.) Furthermore, belated compliance with a probation condition may be considered as a mitigating factor in determining discipline. (See *In the Matter of Broderick, supra,* 3 Cal. State Bar Ct. Rptr. at p. 150.)

We also note that whether respondent was charged under section 6103 or another statute, the gravamen of this proceeding like any other probation revocation proceeding is the same; respondent's failure to comply with the terms and conditions of probation. The analogy to contempt proceedings is inapt.

We find no merit to the above arguments and adopt the hearing judge's conclusion that respondent is culpable of wilfully failing to comply with the probation conditions at issue here in violation of section 6103. Before turning to the degree of discipline, we address one other issue respondent raises.

[3a] He argues that he was charged under the wrong statute. Respondent asserts that under rule 560, Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, OCTC can prosecute a probation violation only by way of a motion to revoke probation or by way of an original disciplinary proceeding charging a violation of section 6068, subdivision (k). Since he was charged with violating section 6103, respondent contends that this matter should be converted to a motion proceeding. We decline to interpret rule 560 so narrowly.[7]

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6. Even if substantial compliance were a defense to culpability, we would question whether respondent has substantially complied with the probation conditions under the definition for that term that he proffers. Quoting from *Stasher* v. *Harger-Haldeman* (1962) 58 Cal.2d 23, 29, respondent asserts that substantial compliance means "*actual* compliance in respect to the substance essential to every reasonable objective of the statute." (Emphasis in original.) The substance essential to the objective of disciplinary probation is the rehabilitation of the attorney and the protection of the public. If anything, respondent's failure to comply timely with the probation conditions at issue here indicates that the essential objectives of his probation have not been met.

7. Rule 610 of the former Transitional Rules of Procedure of the State Bar, was in effect at the time that the notice of disciplinary charges was filed in this matter. Nevertheless, the relevant provisions of the current rule 560 are identical to the former rule.

[3b] The rule provides for either or both an original disciplinary proceeding "based" on a violation of section 6068, subdivision (k) (rule 560(a)), or a motion to revoke probation (rule 560(b)). The rule does not provide that an original disciplinary proceeding must charge a violation of section 6068, subdivision (k), only that it be based on a violation of that statute. Section 6068, subdivision (k), provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation. As noted above, the gravamen of this case is respondent's failure to comply with the conditions of his probation. Regardless of the statute charged, this proceeding is *based* on a violation of section 6068, subdivision (k), for purposes of rule 560. Furthermore, a violation of section 6103 may appropriately be found based on a violation of probation. (*In the Matter of Broderick, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 147-148.)[8]

B. Discipline

Turning to the issue of discipline, we disagree with respondent's contention that his probation violations were "relatively minor." **[4a]** As we have held, the greatest amount of discipline is warranted for violations of probation which show a breach of a condition of probation significantly related to the misconduct for which probation was given, especially in circumstances raising a serious concern about the need for public protection. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.)

[4b] The misconduct in *Rose II* involved three instances of failure to communicate, three instances of failure to perform, and one instance of failure to cooperate with a State Bar disciplinary investigation. The probation condition requiring respondent to submit a law office management plan specifically required that the plan include procedures for periodic status reports, for documenting telephone calls received and placed, for file maintenance and meeting deadlines, for procedures to withdraw as attorney, and for the supervision of support staff. This condition, as well as the ethics school and law office management course conditions, directly addressed respondent's failure to perform and communicate with his clients, and were therefore significantly related to the underlying misconduct. Consequently, the violations were not minor.

Respondent next contends that his cooperation in the disciplinary proceeding was "extraordinary" and was a mitigating factor. As noted, the hearing judge gave some weight to respondent's "candid admissions." We agree with the weight accorded this factor by the hearing judge. Respondent had a legal and ethical duty to cooperate in the disciplinary proceeding under section 6068, subdivision (i). Nevertheless, we have considered similar cooperation as a mitigating circumstance (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 730), and find no reason on the record before us to modify the hearing judge's conclusion.

[5a] Next, respondent argues that the hearing judge "incorrectly" refused to consider his good faith as a mitigating factor. The hearing judge found that respondent's beliefs regarding his interpretation of the Supreme Court order were honestly held but were unreasonable and, therefore, were not a mitigating circumstance. We agree with the hearing judge. In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held and reasonable. (*Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 331 [attorney's credible good faith belief not a mitigating circumstance because the belief was not reasonable]; std. 1.2(e).)

[5b] The Supreme Court's order was clear and unambiguous. It required respondent to perform the specified conditions within the specified time. Soon after the order was filed, the probation department advised respondent by letter of the specific conditions of probation at issue here and of the exact due date for compliance, and provided him with a copy of the order in *Rose II* and of the probation conditions.

8. We find no merit to any due process argument with regard to the charges in this case. Respondent was appropriately notified of the conduct and statute at issue. Such notice was adequate. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928-929.)

During the one year period of time in which the conditions were to be completed, respondent submitted several quarterly probation reports in which he swore under penalty of perjury that he had discussed the terms and conditions of his probation with his probation monitor. Thus, respondent was provided with information regarding compliance with the order and if that information was contrary to his beliefs, he had every opportunity to discuss the issue with his probation monitor. In addition, respondent could have raised with the State Bar Court and the Supreme Court any issues he believed existed regarding the impact of subsequent orders or events on the order in *Rose II*. Under these circumstances, any beliefs respondent held regarding this issue were clearly not reasonable.

We decline to find lack of harm to clients as a mitigating circumstance in this case. Respondent's citation to *In the Matter of Rose, supra*, 3 Cal. State Bar Ct. Rptr. 192, 205, is not on point. The lack of harm there was with respect to the rule 955 matter, not the probation revocation matter.

[6] The hearing judge gave "moderate weight" to respondent's tardy compliance with the probation conditions. Respondent argues that this circumstance should be given more weight. We conclude that this factor deserves little weight. Respondent admits that he did not comply with the three conditions until after he was notified of his failure by the probation unit. That notification informed him that a notice to show cause would be filed as a result of his failure to comply. Tardy compliance under these circumstances is not a mitigating circumstance as it is not a "spontaneous" recognition of wrongdoing. (*Id.* at p. 204; std. 1.2(e)(vii).)

In summary, we conclude that respondent is culpable of serious misconduct. In aggravation, he has an extensive record of prior discipline and his misconduct involved multiple acts. In mitigation, we give some weight to respondent's cooperation and significant weight to respondent's community service.

The parties do not cite any comparable case law in support of their respective positions regarding the appropriate discipline. The hearing judge found that disbarment was warranted based on respondent's demonstrated unwillingness or inability to conform his conduct to the ethical norms of the profession. Coupled with respondent's "uncertain" understanding of his present misconduct and the other circumstances surrounding the case, the hearing judge concluded that only disbarment would give the public, courts, and profession the degree of protection they deserve.

Our research has also not revealed any comparable cases. Nevertheless, we note that standard 1.7(b) provides for disbarment where the attorney has a record of two prior impositions of discipline, unless the most compelling mitigating circumstances clearly predominate. We recognize that the standards are only guidelines. (*Gary* v. *State Bar* (1988) 44 Cal.3d 820, 828.) However, we do not find on the record before us a compelling reason to depart from standard 1.7(b). (Cf. *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 291.)

[7a] Respondent was admitted to the practice of law in this state in 1971. Most of the time since 1978 he has either been committing misconduct, actually suspended, or involved in the disciplinary process. The notice to show cause in *Rose I* was filed in June 1986. He committed some of the misconduct in *Rose II* after that and committed most of the misconduct in *Rose II* after the hearing and review department decisions had been filed in *Rose I*. The Supreme Court opinion in *Rose I* was filed in October 1989, and the Supreme Court's order in *Rose II* was filed in May 1992. Respondent committed the misconduct in *Rose III* and *Rose IV* between approximately January and July 1992. The hearing department decision in *Rose III* and *Rose IV* was filed in June 1993. The probation conditions here at issue, which were due to be completed by June 1993, were not completed until April and May 1994. Respondent has been given ample opportunity to reform his conduct and has failed or refused to do so. "Each of [the prior] disciplinary orders provided him an opportunity to reform his conduct to the ethical strictures of the profession. His culpability [here] sadly indicates either his unwillingness or inability to do so." (*Arden* v. *State Bar* (1987) 43 Cal.3d 713, 728.)

[7b] We also agree with the hearing judge that respondent's understanding of his misconduct is

"uncertain." The hearing judge in *Rose III* and *Rose IV* wrote extensively in firmly rejecting respondent's unilateral interpretation of the disciplinary orders there at issue. Despite what should have been ample warning, respondent did not question his asserted beliefs regarding the order at issue here and did not comply with the order until notified by the probation unit.

[7c] These factors cause grave concern that respondent does not understand his ethical obligations, which in turn causes grave concern that respondent will commit future misconduct. Our observations in *Rose III* and *Rose IV* apply here as well; "respondent's unilateral and ill-conceived interpretation of the Court's disciplinary order in *Rose I*, coupled with his claim at trial, again based on his unilateral and ill-conceived interpretation of a Supreme Court order, that he did not have to comply with rule 955 because he had not practiced law, are circumstances which raise additional concern about the need to protect the public. Respondent's demonstrated tendency toward interpreting important and significant court orders in such a way as to fit his needs may negatively impact his future clients." (*In the Matter of Rose, supra*, 3 Cal. State Bar Ct. Rptr. at p. 206.)

[7d] As noted by the Supreme Court, "the principal purpose of disciplinary proceedings and the imposition of sanctions is to protect the public by ensuring to the extent possible that misconduct by an attorney will not recur." (*Sternlieb* v. *State Bar, supra*, 52 Cal.3d at p. 331.) We recognize that respondent's extensive community service on behalf of the physically challenged is a significant mitigating circumstance. Nevertheless, the net effect of this circumstance in balance with the record does not demonstrate that a sanction short of disbarment will fulfill the purposes of disciplinary sanctions. (Std. 1.6(b)(ii).)

[7e] In short, probation and suspension have proven inadequate in the past to protect against future misconduct, and the record before us does not give assurance that such a sanction will ensure that future misconduct will not occur. Accordingly, we conclude that disbarment is appropriate to protect the public, courts, and legal profession.

C. Rule 955 and Costs

We agree with the hearing judge that compliance with rule 955 is not warranted in view of respondent's continuous suspension since he was last ordered to comply with the rule. As did the hearing judge, we recommend that the State Bar be awarded costs, but we modify the hearing judge's recommendation as the result of recent statutory amendments.

D. Inactive Enrollment

We note that section 6007, subdivision (c)(4) was amended effective January 1, 1997. Currently, it provides that an attorney shall be enrolled inactive "upon the filing of a recommendation of disbarment after hearing or default." Rule 305, Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, was also modified effective January 1, 1997, in conformity with the statutory change. The rule now provides that where the review department recommends disbarment, it shall order the attorney be enrolled inactive under section 6007, subdivision (c)(4).

At oral argument, we asked the parties to brief the issue of whether respondent should be inactively enrolled under this statute if we recommended disbarment. Both agree that such inactive enrollment is appropriate. Although respondent is currently suspended for other reasons, we shall order his inactive enrollment under this statute as an independent ground for his ineligibility to practice law.

[8a] We also asked the parties at oral argument to brief the issue of whether respondent should be given credit for the period of time he has been ineligible to practice law against the time period he must wait before he may petition for reinstatement. (See rule 662, Rules Proc. of State Bar, title II, State Bar Court Proceedings.) Respondent argues that he should be given the credit for the period of time he has been ineligible to practice since April 27, 1996. OCTC argues that respondent should not be given any credit.

[8b] The Supreme Court in *In re Lamb* (1989) 49 Cal.3d 239, 249, found that such a credit was

warranted "[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. . . ." Lamb's "related interim ban on practice" occurred because she stipulated to inactive enrollment under section 6007, subdivision (c), following the hearing officer's disbarment recommendation.

[8c] Similarly, in *In the Matter of Heiner* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559, 566-570, and in *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 178, we recommended that the attorneys be given credit for the period of time that they were ineligible to practice law. As in *Lamb*, the "related interim ban on practice" in these two cases occurred because the attorneys were enrolled inactive under section 6007, subdivision (c), in the proceedings then under consideration.

[8d] The ban on respondent's practice for which he seeks credit resulted from other disciplinary proceedings, not from the present case and, therefore, was not a "related interim ban" on his practice. Accordingly, we conclude that respondent should be given credit only for the period of time he is inactively enrolled under section 6007, subdivision (c)(4), in this present proceeding.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent be disbarred from the practice of law in this state. We also recommend that the time period for filing a petition for reinstatement be measured from the effective date of our order of inactive enrollment in this case. We further recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code, and that those costs be payable in accordance with Business and Professions Code section 6140.7 (as amended eff. January 1, 1997).

ORDER

It is hereby ordered that Mason Henry Rose V be enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective upon personal service of this order on him or effective three days after service by mail, whichever is earlier.

We concur:

OBRIEN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Arthur Theodore Hindin,

A Member of the State Bar.

No. 88-O-12721

Filed May 28, 1997, as corrected July 23, 1997

SUMMARY

During a ten-year period, respondent committed a panoply of protracted failure to communicate with clients, incompetent practice, and failure to supervise subordinate staff affecting more than 20 different clients. The hearing judge recommended a two-year stayed suspension and four-year probation conditioned on one-year actual suspension. (Hon. Elliot R. Smith, Hearing Judge Pro Tempore.)

Both parties requested review. Respondent contended that there was less misconduct, less aggravation, and more mitigation than found by the hearing judge and that, therefore, the hearing judge's discipline recommendation was excessive. The State Bar contended that respondent's misconduct constituted habitual disregard of client matters and moral turpitude and that disbarment was the appropriate discipline.

The review department found that although none of respondent's individual acts of misconduct involved moral turpitude, his habitual disregard for the interests of his clients and failure to communicate with them did. The review department concluded that respondent's protracted misconduct over the lengthy period warranted disbarment.

COUNSEL FOR PARTIES

For State Bar: Allen L. Blumenthal, Teresa J. Schmid

For Respondent: Arthur Lewis Margolis

HEADNOTES

[1] **117 Procedure—Dismissal**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
167 Abuse of Discretion

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.

A hearing judge's determination to dismiss specified charges in the furtherance of justice with prejudice over the State Bar's objection that the dismissals should be without prejudice is reviewed under an abuse of discretion standard.

[2] **117 Procedure—Dismissal**
139 Procedure—Miscellaneous
167 Abuse of Discretion

Even though equitable estoppel does not control a hearing judge's determination whether to dismiss specified charges in the furtherance of justice with or without prejudice, the considerations in making such a determination are not dissimilar. Thus, in determining that the dismissals should be with prejudice in the present case, the hearing judge properly considered the positions of the parties and its effect on each side.

[3] **117 Procedure—Dismissal**
139 Procedure—Miscellaneous
192 Due Process/Procedural Rights
193 Constitutional Issues

The fact that respondent may be placed in "indefinite limbo" if specified charges are dismissed in the furtherance of justice without prejudice is not sufficient cause to require that the charges be dismissed with prejudice. His remedy in any subsequent proceeding would be a due process argument for relief caused by unreasonable delay based upon a sufficient showing of specific prejudice resulting therefrom.

[4] **117 Procedure—Dismissal**
139 Procedure—Miscellaneous
193 Constitutional Issues
199 General Issues—Miscellaneous

Generally, it is in the public interest to dispose of disciplinary charges on the merits. However, the public interest and the interests of justice would not be served by permitting the State Bar to maintain specified charges for possible later prosecution by dismissing the charges without prejudice when respondent relied on the charges to his detriment in preparation for and during trial and in doing so exposed his defense case.

[5 a, b] **214.30 State Bar Act—Section 6068(m)**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.00 Rule 3-500 (no former rule)
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]

Attorney's failure to communicate with a client may also constitute incompetent legal practice or abandonment of the client when facts demonstrate that attorney's failure to communicate resulted in the effective cessation of work on client's cause of action, foreclosed client from choices regarding her cause of action, or indicated a withdrawal from employment.

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

An attorney is not responsible for every event that takes place in the attorney's office, but the attorney does have a duty to reasonably supervise his office staff. And, once alerted to them, an attorney's gross neglect in not adequately addressing problems in law office is disciplinable as a failure to competently perform legal services in violation of Rules of Professional Conduct.

[7] 214.30 State Bar Act—Section 6068(m)
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
275.00 Rule 3-500 (no former rule)

An attorney's failure to adequately communicate with a client may evidence the attorney's lack of time to perform legal services competently in violation of Rules of Professional Conduct.

[8] 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Former Rule of Professional Conduct 6-101(B)(2)'s express proscription of repeatedly accepting employment or continuing representation in legal matters by attorneys who do not have sufficient time and resources to provide competent legal representation is now encompassed within Rule of Professional Conduct 3-110's proscription of attorneys intentionally, recklessly, or repeatedly failing to perform legal services competently.

[9 a, b] 213.90 State Bar Act—Section 6068(i)

Once respondent met with State Bar deputy trial counsel in response to initial State Bar investigative letters and indicated a willingness to cooperate through his counsel in any matter raised by the State Bar, respondent should be accorded the benefit of the doubt in assuming that continued cooperation with deputy trial counsel constituted contemporaneous cooperation with State Bar regarding additional investigative letters subsequently sent to respondent. Thus, respondent was not culpable of failing to cooperate in the State Bar's investigation.

[10 a-c] 221.00 State Bar Act—Section 6106
531 Aggravation—Pattern—Found

A pattern of misconduct may be found even though the acts and omissions encompass a wide range of improper behavior. Respondent's numerous acts of neglect extended over a long period of time, 10 years, indicating a continuous course of professional misconduct. It continued even after respondent attempted to address his case management problems by hiring a management consultant and after the State Bar contacted him about client complaints. Even though none of this neglect entailed dishonesty or false statement, the review department concluded that respondent habitually disregarded his client's interests and failed to communicate with them and, therefore, committed acts of moral turpitude.

[11 a, b] 221.00 State Bar Act—Section 6106
531 Aggravation—Pattern—Found
831.20 Standards—Moral Turpitude—Disbarment
1091 Substantive Issues re Discipline—Proportionality

Even though none of respondent's individual acts of misconduct involved dishonesty, concealment, or mishandling of client funds and even though respondent had no prior record of discipline over a lengthy practice, respondent's disbarment was warranted as consistent with past case law and the standards for attorney discipline for respondent's panoply of protracted failure to communicate with clients, incompetent practice, and failure to supervise subordinate staff affecting many different clients over a 10-year period.

Additional Analysis

Culpability

Found

213.91 Section 6068(i)
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.11 Rule 3-700(A)(1) [former 2-111(A)(1)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]

Not Found

213.95 Section 6068(i)
214.35 Section 6068(m)
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Aggravation

Found

521 Multiple Acts
582.10 Harm to Client
591 Indifference

Declined to Find

545 Bad Faith, Dishonesty

Mitigation

Found

710.10 No Prior Record

Declined to Find

720.50 Lack of Harm
730.50 Candor—Victim
740.53 Good Character
745.51 Remorse/Restitution
765.59 Pro Bono Work

Standards

802.62 Appropriate Sanction

Discipline

1010 Disbarment

Other

2315.20 Section 6007—Inactive Enrollment After Disbarment—Not Imposed
2315.90 Section 6007—Inactive Enrollment After Disbarment—Not Imposed

OPINION

STOVITZ, J.:

This proceeding concerns serious misconduct by respondent Arthur Theodore (Tod) Hindin during a ten-year period. After a 25-day trial, litigating 53 counts alleging over 150 separate violations, the hearing judge concluded that respondent had committed professional misconduct in 22 counts constituting over 30 violations. In a 195-page opinion, the hearing judge recommended that respondent be placed on a two-year stayed suspension and placed on probation for four years with conditions including a one-year actual suspension. Both parties have sought our review. After reviewing the extensive record in this matter, we conclude that additional findings of culpability are necessary, as well as a reevaluation of the appropriate, recommended discipline. Given the goals of protecting the public, preserving confidence in the legal profession, and maintaining high professional standards for attorneys, we conclude that respondent's disbarment is warranted and consistent with past case law and in accordance with the standards for attorney discipline.

PROCEDURAL HISTORY

In September 1991, the State Bar's Office of Chief Trial (State Bar) filed a 31-count notice to show cause against respondent. A first amended notice to show cause was filed on January 12, 1993, adding 16 additional counts. A second notice to show cause was filed in May 1993 containing six counts. These two matters were consolidated for hearing. Six counts were dismissed pretrial on motion of the State Bar and three counts were dismissed during trial. The hearing judge held 25 days of hearing beginning in January 1994 and filed his decision on July 29, 1994. After respondent's request for reconsideration and a hearing de novo was denied by order filed October 13, 1994, both the State Bar and respondent sought review.

FACTUAL FINDINGS

The hearing judge summarized the factual findings and conclusion of law at pages 3-145 of the decision. There is little or no dispute by the parties over those factual findings. This opinion will summarize the thirty client matters and the three omnibus counts (counts 30, 31, and 53) which were the subject of the findings, before discussing the issues raised by the parties on review. We adopt the following factual statement as our findings, reserving as noted, the legal conclusions until later in the opinion.

Background

Respondent was admitted to practice in California in December 1967 and has maintained his own professional corporation since 1980. Respondent's practice includes major personal injury cases, business litigation, and bad faith insurance litigation. He maintained a professional office as well as an office in his home where he would work on cases. During the period in question, respondent handled all trials personally and his case load varied from between 50-100 active cases at any one time. Respondent was the only principal of this law practice. There were no others who were partners or co-principals.

Respondent was in trial from three to nine months in a given year. Pretrial matters were often handled by one to three associates employed by respondent as well as by several non-attorney employees responsible for office matters. Respondent considered himself personally responsible for returning most client telephone calls, advising clients of significant developments in their cases, and reviewing all files before they were returned to clients for any reason. All associates were instructed to take direction and seek help from respondent, usually on an "as needed" basis. Respondent held weekly Saturday office meetings to assign all calendared matters, but had no regular practice of reviewing all client files or requesting periodic status reports from his associates. Although there was usually another experienced attorney in the office, besides respondent, there were periods of time significant to the events covered in this proceeding, where respondent was the only attorney practicing in the law office.

Count 2: Dr. Kofsky

Dr. Stephen Kofsky retained respondent in April 1982 to represent him in a personal injury matter arising from a boating accident in May 1981.

Although there were a number of defendants charged in the original complaint, respondent considered Boat City to be the primary defendant and it was the only entity served with the complaint.

Between September 1983 and October 1986, Kofsky called respondent's office periodically to speak to respondent concerning his case. The total number of calls during this period was 40. Respondent never returned any of these calls, and Dr. Kofsky received only two letters from respondent's office during this time; a set of interrogatories, which Kofsky answered in August 1983, and a letter requesting additional documents in July 1985.

Boat City filed for bankruptcy in 1985, and by January 1986, had converted from a Chapter 11 (reorganization) to a Chapter 7 (liquidation) proceeding. Respondent did not attend an arbitration conference in his case in April 1986 because of the bankruptcy stay. The matter was removed from the civil active list as a result of his failure to appear.

Kofsky wrote to respondent on October 30, 1986, and requested his file. Respondent met with Kofsky in early December 1986. He advised Kofsky during that meeting that Boat City had filed for bankruptcy, that the bankruptcy had been converted to a liquidation proceeding, and that it would be very difficult to collect anything from Boat City in his personal injury action. Respondent promised that he would monitor the bankruptcy case and inform Kofsky of any further developments and would let him know if Boat City had any assets remaining from which they could seek compensation for his injuries.

Periodically from January 1987 until December 1990, Dr. Kofsky would phone respondent's office requesting a status report. His calls were never returned. Boat City was discharged in bankruptcy in 1989, and Kofsky's claims became worthless.

The hearing judge concluded that respondent failed to communicate significant events to Kofsky or return his telephone calls, contrary to Business and Professions Code section 6068, subdivision (m),[1] but did not violate former rule 2-111(A)(2),[2] finding that respondent's failure to communicate, did not constitute an abandonment or a failure to perform services.[3]

Count 4: Arline Young

Respondent was retained by Arline Young on March 6, 1982, to pursue a personal injury matter after she suffered a skiing accident. After retaining his services, Ms. Young made approximately ten phone calls to respondent's office over a six-week period. None of those calls were returned. Respondent later explained to her that he had been in trial during that period.

A complaint was filed on Ms. Young's behalf in February 1983, and the case proceeded to a settlement conference in January 1988. Recognizing difficulties in the case, respondent and Young discussed a possible settlement of the case for $15,000. That settlement was passed on to defense counsel, who refused to discuss settlement. While in discovery, the defense sought further answers to its third set of interrogatories and set the motion for hearing on June 24, 1988. The hearing was advanced upon defense motion to May 1988. Respondent was occupied in another trial, so that an associate in his firm prepared the papers and opposition to the motion and attended the hearing, at which time the defense motion to compel discovery was granted. The associate was thereafter terminated and another associate, Arthur Hampton, was assigned to handle the matter. Hampton misunderstood the status of the case and filed a written opposition to the motion to compel which he thought was to be heard in June. He did not prepare further answers to interrogatories.

1. Unless otherwise indicated, all references to section(s) are to the sections of the Business and Professions Code.

2. Unless otherwise indicated, all references to rules are to the Rules of Professional Conduct effective May 27, 1989, until September 13, 1992. References to former rules are to the Rules of Professional Conduct in effect from January 1, 1975, until May 26, 1989.

3. The hearing judge noted that, at trial, the State Bar expressly waived any charges against respondent for violating former rules 2-111 and 6-101 for not pursuing the other possible defendants in Dr. Kofsky's personal injury case.

The order compelling discovery was not complied with, but the defense moved to dismiss the case, and the motion was granted on September 23, 1988. Respondent was advised of the dismissal of the matter upon his return from vacation in late September and met with Young to advise her of the outcome of the case.

In October 1988, Young requested return of her file and her skis, evidence in the case. Associate Hampton advised her that he needed respondent's permission to return them. Young's new counsel, Mr. Kopald, wrote to respondent in early 1989 and requested the file and evidence, but they were not returned. Young filed a malpractice suit against respondent and, through an order to compel discovery, was able to retrieve the files and skis by the summer of 1990.

The hearing judge concluded that respondent had failed in his duty to communicate with his client during the six-week period in 1982, contrary to section 6068, subdivision (m), violated rule 3-700(D)(1) by not promptly returning her case files and skis and concluded that Ms. Young had not been misled about the status of her case. The hearing judge also found that respondent had not violated rule 6-101(A)(2) as a result of the dismissal of Ms. Young's action, concluding that there was insufficient evidence of a reckless disregard for his client's interest and was instead only mere negligence.

Count 5: Geneva Austin

Geneva Jean Austin was injured from a fall at a department store on February 22, 1983. Respondent was associated in her case in 1983 by Austin's former counsel and filed the complaint on her behalf on February 16, 1984. Prior to filing the complaint, respondent interviewed Austin, reviewed medical records, and had pictures taken of the accident scene. He did not correctly calendar the two-year date within which the complaint was required to be served. The complaint was served in February 1987. On March 16, 1987, defense moved for dismissal for failure to prosecute. The motion was granted on June 17, 1987. Respondent has since settled a malpractice action against him brought by Ms. Austin.

The hearing judge concluded that, without evidence of any lapse other than the initial negligence in failing to calendar the matter, there was not clear and convincing proof of a violation of former rules 2-111(A)(2) or 6-101(A)(2).

Count 9: Melville Roberts

Melville Roberts retained respondent in late 1983 to represent him in a personal injury action as a result of his automobile accident on December 26, 1982. Respondent filed suit on Roberts's behalf on December 22, 1983. The complaint was served in June 1985. From 1983 through 1987, Roberts regularly wrote and telephoned respondent seeking information on the status of his case. During this time, Roberts did get some information from other members of respondent's office staff, and when they met at various social functions, respondent would update Roberts about the status of the case.

An at-issue memo was filed on the case on or about March 1988. In August 1988, the defendant filed a motion to dismiss for failure to prosecute. After a hearing at which all parties appeared, the court granted the motion to dismiss by order filed October 27, 1988. Respondent met with Roberts's thereafter and determined to appeal. The notice of appeal was filed December 2, 1988. After securing a number of extensions, Roberts's opening brief was to be filed by January 30, 1990.

The appellate brief was assigned to Thomas Szakall, an associate hired by respondent in late December 1989. After assuring Roberts that he would timely file the brief, Szakall did not file it. The appeal was dismissed on February 5, 1990. Although he called respondent's office in February or March 1990, Roberts was not advised of the dismissal of the appeal until later in the spring of 1990. Roberts sought the return of his file soon thereafter, but it was not delivered to his new attorney until July 1990.

The hearing judge found that the only culpable failure to communicate with Roberts was respondent's failure to advise him of the dismissal of the appeal in a timely fashion. The judge also concluded that there was no culpability for either abandoning the client

under former rules 2-111(A)(2) or rule 3-700(A)(2) or that his failure to prosecute did not rise to a level of a reckless disregard of his client's interest, contrary to rule 3-110(A). The hearing judge found that the failure to file the appellate brief could be cause for a violation of rule 3-110(A), but not by respondent. The hearing judge concluded that respondent's duty to supervise is not as broad given the experience level of Mr. Szakall and the lack of any evidence of a previous record of errors in meeting deadlines.

Count 10: Susan Varon

Mr. and Mrs. Varon and their daughter, Dora, were injured in a car accident in July 1979. A complaint was filed on their behalf in January 1980, and respondent was associated in the case on September 16, 1983.

The five-year deadline to try the matter was January 10, 1985. There were numerous stipulations to extend the five-year limit and to continue the trial date, some for the convenience of the parties and others for the convenience of counsel. The last stipulation extended the date to December 30, 1987. Shortly before the date, respondent wrote to defense counsel requesting an additional extension of the five-year limit. To his surprise, defense counsel refused to agree to another extension. Because the extension was due to expire in a few days, respondent did not have the 30 days necessary to notice the case for trial and he was precluded from proceeding to trial. The defense filed a motion to dismiss based on the five-year statute, and the motion was granted on March 28, 1988.

The hearing judge concluded that respondent was negligent by not seeking a written stipulation to extend the five-year limit in November, at least 30 days prior to the expiration of the last stipulated continuance, so that he could have noticed the trial if necessary. However, he found that respondent's negligence did not rise to the level of a reckless disregard for the interest of his client contrary former rule 6-101(A)(2). He also concluded that the stipulated continuances did not reflect an abandonment of a case, despite the ultimate dismissal.

Count 11: Anatoly Kagan

Ludmilla Kagan and her son, Anatoly, retained respondent in March 1984 to file a wrongful death and medical malpractice action against a hospital. The complaint was filed on November 2, 1984. An at-issue memorandum was filed by respondent with the court in March 1988. In late March 1988, the defense filed a motion to dismiss for failure to prosecute. One of respondent's employees calendared the hearing date for the motion, but not the date to file a response. Respondent learned of the matter prior to the hearing date, but after the deadline for filing an opposition to the motion.

Respondent had his associate attend the hearing on May 13, 1988, and request that the court delay hearing argument on the motion until later that day so that respondent could appear and argue for additional time. When the court recalled the matter, respondent's associate had left the courthouse, and respondent was not present. The motion to dismiss was granted. Respondent's subsequent motion to vacate the dismissal ordered was denied.

The hearing judge found that respondent's failure to supervise the employee who calendared matters, and respondent's failure to attend the hearing on the motion were negligent, but did not rise to the level of a reckless disregard of his client's interest sufficient to find a violation of former rule 6-101(A)(2).

Count 12: Donald Sponza

Respondent was retained by Donald Sponza on a pro bono basis seeking a total disability finding from his former job at the Los Angeles Unified School District (LAUSD).

Sponza's intent was to return to work with the LAUSD if possible. Respondent advised him that the disability case could be used as leverage to obtain his job back with LAUSD, but if he was successful in obtaining total disability, this would preclude him from being rehired by LAUSD. Respondent attended one disability hearing with Sponza in 1985, and attempted to negotiate a settlement with the LAUSD at that time, but was not successful. Between 1985 through 1989,

Sponza sent many letters and made dozens of telephone calls to respondent's office, many of which were status reports from Sponza, advising respondent's office of his job-seeking efforts, or providing additional information concerning his past employment with LAUSD. By 1988, Sponza had not found employment, and decided to settle his disability case for whatever he could obtain. Respondent's associate, James Doherty, negotiated a $10,000 settlement for Sponza in the early summer of 1989.

The hearing judge concluded that there was insufficient evidence that respondent had violated section 6068, subdivision (m), finding that Sponza was informed of significant developments in his case, did receive replies to many of his inquiries, and what omissions there were in respondent's office system did not rise to the level of misconduct.

Count 13: Kerry South

Respondent was retained by Kerry South to file a legal malpractice action against attorney Richard Murkey. The complaint was filed on December 31, 1984; a default trial was held in January 1989; and judgment was entered for South in the amount of $950,000 in compensatory damages and $50,000 in exemplary damages. Around the time of South's trial, Murkey was under criminal indictment and attorney disciplinary proceedings were underway. Soon after judgment was entered against Murkey, respondent learned that Murkey had been disbarred and was in prison.

Respondent recorded the abstract of the judgment, advised South by telephone of his actions, and counseled him that further actions to recover from Murkey were not worth the money.

The State Bar charged that respondent did not communicate with South after January 1990, a year after the conclusion of the malpractice judgment. The hearing judge rejected the State Bar's argument that respondent should have memorialized his conversation to South instead of telephoning him, since respondent allegedly knew of South's past problems with narcotics. The hearing judge found that failure to write such a letter could not be deemed to be a violation of section 6068, subdivision (m).

Counts 14, 15 and 16: Vrono matters

Respondent was retained by Arnold and Sandra Vrono on or about June 17, 1985, to pursue claims arising from a cruise they had taken on Royal Viking Lines. During the cruise Mr. Vrono had become seriously ill and was treated by a Dr. Shapiro. As a result of his illness, the Vronos had to fly home early.

The case presented difficulties because the defendants all had different domiciles. The booking agency was a partnership based in New York or Massachusetts, its owners were not California residents; Royal Viking Lines had contacts in California but its ship was registered in Norway; and Dr. Shapiro was a resident of Michigan. Three cases were eventually filed on behalf on the Vronos: a California state court case, which was never served and was later dismissed for lack of service; a federal court case; and a Michigan state court case. The federal case was filed in the Central District of California on April 29, 1986, and after a defense motion, all defendants, except for Royal Viking Lines, were dismissed.

Mr. Vrono's deposition was taken on March 10, 1987, attended by respondent's associate Craig Castle. Mrs. Vrono's deposition was scheduled for April 10, 1987. However, Castle did not notice the deposition until the day before. He telephoned the attorney for Royal Viking Lines, seeking a continuance because both he and respondent had other court hearings. The defense counsel refused to agree to the postponement. After respondent and Mrs. Vrono did not appear at the deposition on the morning of April 10, Royal Viking Lines's attorney made an application ex-parte for an order compelling Mrs. Vrono to appear. A federal magistrate ordered her to appear at 1:00 p.m. that day. Respondent testified that he did not learn of the 1:00 p.m. deadline until late that afternoon, when he could not comply with the order. Thereafter Royal Viking Line's attorney moved to have respondent held in contempt. The hearing was held on April 24. Castle appeared, having filed papers in opposition, and the magistrate found that Royal Viking Lines should be dismissed as the defendant as a sanction for respondent's conduct. The federal judge adopted the recommendation and, on June 17, 1987, the case was dismissed.

The Vronos agreed to also file a state court action against Dr. Shapiro in Michigan state court. Consistent with that, Castle contacted a Michigan law firm, which agreed to and prepared the complaint on behalf of the Vronos and filed it in Michigan state court on April 29, 1987. Respondent was not the attorney-of-record in the Michigan matter, but did agree to forward information to the Vronos to assist the Michigan law firm.

The Michigan case was apparently dismissed for failure to answer interrogatories. Respondent acknowledged that the interrogatories had been sent to him for forwarding to the Vronos, and Ms. Vrono testified that they had completed them and returned them to respondent's office. Respondent maintained that he was told by Castle that the answers had been forwarded to the firm in Michigan.

The hearing judge concluded that the dismissals of the two state court actions were not the result of attorney misconduct by respondent. The California case was dismissed as a part of a litigation strategy, and the Michigan case was dismissed through no fault of respondent. As to the federal case, the hearing judge concluded that respondent did not abandon the case nor was there sufficient evidence that his failure to prepare for Ms. Vrono's deposition indicated a reckless disregard of his client's interests. Nor did respondent intentionally disobey the court's order to produce her since he did not receive notice of the court's order in time to comply with it. Thus, he did not violate section 6103.

Count 18: Michael Amaro

Respondent was retained by Michael Amaro and four members of his family, to try a personal injury accident case filed on January 28, 1986. Respondent associated as counsel in the case on October 27, 1987.

Difficulties arose as to serving the defendant in the matter, a resident of British Columbia, Canada. After considerable efforts, in February 1988, attorney Peter Dubrawski indicated that he was authorized to accept service of process on behalf of the defendant. Respondent did not serve the summons of complaint at that time having until January 1989, to serve the summons and complaint. On August 31, 1988, respondent receive a substitution of attorney signed by Amaro and his new attorney, Robert Sklar. The substitution of attorney was signed on respondent's behalf by associate Arthur Hampton on September 14, 1988, and returned to Sklar. The file was forwarded to Sklar shortly thereafter.

In March 1989, respondent received a notice of the trial court's intent to dismiss the Amaro case if no motion was filed with the court by April 24, 1989. Respondent was listed on the certificate of mailing, but Sklar was not. Respondent did not forward the document to Sklar immediately. In mid-April 1989, he received a defense motion to dismiss for failure to serve the summons and complaint within three years. This was dated April 13, 1989, and gave a hearing date of June 29, 1989. On April 20, 1989, respondent's associate hand-delivered copies of the two motions to dismiss to Mr. Sklar's office, with the cover letter stating that his attention to the court's motion was imperative. No one appeared in court on April 24, and the case was dismissed that day.

The hearing judge was troubled by respondent's delay from early March to April 20 in passing along the trial court's notice to Mr. Sklar, but found that there was sufficient notice for Mr. Sklar to appear at the court hearing on April 24, 1989. Therefore, he found that the delay did not rise to the level of reckless conduct, and thus did not find a violation of former rule 6-101(A)(2), nor of section 6068, subdivision (m).

Count 19: Natalie Toth

Respondent was retained by Natalie Toth in August 1985 regarding a bad faith action against State Farm Insurance arising from settlement of a automobile accident in which Toth was injured. Respondent filed suit on March 11, 1986. In 1988 the case law concerning bad faith actions changed and punitive damages could no longer be recovered in this type of third party case. Compensatory damages could still be pursued however.

Between 1985 and 1989, Ms. Toth called respondent's office more than 10 times, faxed him at least once, and left messages requesting that

respondent return her phone calls. None of these calls were returned. Her father also contacted respondent on her behalf because he was her insurance adjuster. Respondent acknowledged that he often spoke to Ms. Toth's father rather than contacting her directly. In June 1989, Ms. Toth retained new counsel, and that counsel, Louise Lewis, wrote to respondent on June 27, 1989 submitting a signed substitution of attorney and requesting that he forward Ms. Toth's file. One of respondent's associates signed the substitution of attorney on July 13 and returned it with a letter stating that the file would be forwarded to Lewis shortly. Between July 12 and September 11, Lewis called respondent's office and wrote at least one letter respondent requesting the file. It was forwarded on September 12, 1989.

The case was settled soon thereafter for $14,000. Lewis then spent the first two weeks of October attempting to secure respondent's signature on the settlement draft. Respondent finally signed the draft on October 20, 1989.

The hearing judge concluded that respondent violated section 6068, subdivision (m) by not promptly responding to Ms. Toth's status inquiries between 1985 and 1989, and that he improperly delayed returning her file contrary to rule 3-700(D)(1). The delay in signing the settlement draft did not, in his view, violate rule 4-100(B)(4).

Count 21: George Welch

Respondent was retained by George Welch in February 1987 for matters arising out of Mr. Welch's collision with a train on June 10, 1986. Respondent filed a personal injury action on Mr. Welch's behalf on June 4, 1987, and also represented Mr. Welch in connection with a citation he received in connection with the accident. Between June 1987 and the spring of 1989, respondent worked on the matter, including engaging in discovery. Mr. Welch became dissatisfied with the speed at which the case was proceeding. Respondent advised him that he did not think the case had much merit, and the two agreed that respondent would no longer represent Welch. Respondent sent an executed substitution of attorney to Welch on May 17, 1989, indicating that Welch would be representing himself. Respondent advised Welch in the cover letter that he believed the case had no merit, and suggested that Welch find counsel as soon as possible.

On September 1, 1989, Welch was sent notice from the trial court that his case would be dismissed on the court's motion unless it received written opposition within 15 days. Welch did not file anything and his case was dismissed on October 18, 1989.

The hearing judge found that respondent's duty to Welch did not include advising him of the possibility of receiving a trial court omnibus motion to dismiss for lack of prosecution, given the posture of the case at which respondent withdrew. Respondent fulfilled his duties by advising Welch to seek other counsel as soon as possible, and he did not violate former rule 2-111(A)(2).

Count 22: Leonard Goldman

Respondent was retained by Leonard Goldman in February 1987 to represent him in a wrongful termination matter against Sperry/Unisys. In preparation for filing suit, respondent reviewed documents, met with Mr. Goldman, and researched the law. Respondent delayed filing the complaint because the viability of wrongful termination cases such as Mr. Goldman's was in question due to the pending case of *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654. Respondent explained to Mr. Goldman that going forward with the lawsuit prior to a final decision in the *Foley* case carried more risk than waiting for the Supreme Court's decision. The *Foley* case was decided by the Supreme Court on December 29, 1988, and did adversely affect Goldman's right to sue under tort law.

Mr. Goldman died in November 1989 and a complaint was filed with the State Bar against respondent in April 1990.

The hearing judge concluded that none of the charges in this count had been established. Respondent's failure to explain his strategy to Mr. Goldman in writing, rather than in meetings, did not constitute a lack of communication under section 6068, subdivision (m), nor was there evidence that his strategy to delay filing suit for Goldman was in fact an abandonment of his case.

Count 23: Arthur Gordon

Respondent was retained by Arthur Gordon in July 1987 to represent him in a fraud and bad faith action against an insurance company arising from his purchase of retirement insurance. Respondent had several meetings with Gordon. At the time there were several cases pending in the Supreme Court which could have affected Gordon's bad faith claims against the insurance company. On August 18, 1988, one of those cases, *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, was decided, and it severely restricted bad faith actions against insurers. However, the court provided a window for common law actions for litigants such as Gordon. Accordingly, respondent did file suit on September 16, 1988, but did not inform Gordon. Shortly thereafter, the Supreme Court decided two additional cases which respondent construed as effectively eliminating punitive damages in Gordon's case.

Attorney Ronald Slates wrote to respondent on December 5, 1988, on Gordon's behalf. Slates indicated that Gordon wanted his files returned to him or to be advised when he could pick up the files. Slates did not include a substitution of attorney form; nor did he indicated that respondent's employment had been terminated. Respondent telephoned Slates soon after receiving these correspondence and discussed the case with him. Slates again wrote to respondent on January 24, 1989, indicating that Gordon wanted Slates to review the file and give him a second opinion. He asked that the file be sent to him and, at the bottom of the letter, Gordon signed it with the line, "I approve and ask that my files be released."

Slates again requested the file by letter dated February 9, 1989. Slates received the file in late March 1989 and sent a substitution of attorney form for respondent on April 14, 1989, which was executed and returned on April 19, 1989.

The hearing judge found that there was insufficient evidence that respondent had committed any of the misconduct charged. His failure to advise Gordon of the filing of the complaint or the outcomes of decisions affecting the bad faith cause of action did not rise to the level of a failure to communicate given the circumstances of the law at the time. He also found that respondent had not neglected the case contrary to former rule 6-101(A)(2); on the contrary, respondent filed the complaint, monitored the Supreme Court cases affecting his cause of action and otherwise worked on the matter. The judge concluded that prior to the submission of the substitution of attorney, respondent did not have the duty to promptly return the file to Gordon or forward it to Slates.

Count 24 and 25: Dr. Minaya

Respondent was retained in June 1988 to defend Dr. Jose Minaya in a federal court suit charging him with improperly receiving $106,000 in disability benefits while in prison. Respondent filed a complaint in Los Angeles Superior Court in August 1988 charging an insurer with bad faith and claiming additional benefits under the disability policy and filed a first amended complaint the following month. The state case was never served. In October 1988, respondent filed and served an answer as well as a counter- claim in federal district court.

In December 1988 respondent learned information which compromised Minaya's defense and causes of action. Respondent advised Minaya to try to settle the matter. Minaya, seeking a second opinion, requested and received a copy of his file from respondent. Respondent was contacted in early February 1989 by attorney Steven Gentry, advising respondent that Minaya had hired him to litigate both cases and enclosing a substitution of attorney. After no answer, Gentry then phoned respondent's office several times and faxed him an additional letter on February 10, 1989. Respondent did not answer any of these contacts.

On March 7, 1989, Gentry filed a Motion for substitution of attorney in the federal case, and asked for sanctions against respondent. Respondent did not file an answer or response to the motion; nor did he appear at the hearing on the motion on April 10, believing that the insurer's counsel opposed any substitution of attorney. At the hearing on April 10, the federal judge issued an order to show cause (OSC) regarding sanctions against respondent for his failure to appear at the hearing or file a response.

As part of the OSC, the court set a hearing date for May 5 and stated in its order that respondent was to file a written response to the OSC no later than April 24, 1989. Respondent did not file a response as ordered, claiming that he was confused as to whether he was required to file an answer at all. He also was concerned that he would waive his 5th Amendment rights by filing a response.

Respondent did appear at the May 5 hearing, where he was ordered to pay $692 to plaintiff, $252 to plaintiff's counsel, $500 for failing to comply with the court order regarding a written response, and $1156 to Gentry's firm for his costs incurred with the proceeding. Respondent did not report any of these court ordered amounts to the State Bar.

The hearing judge found that respondent had failed to adequately communicate with attorney Gentry concerning the status of the case at the time Gentry was substituting into the case and that respondent failed to forward the file promptly as required by former rule 2-111(A)(2). As to the OSC proceeding in federal court, the hearing judge concluded that the OSC was sufficiently clear to find that respondent's failure to provide a response to the court violated section 6068, subdivision (a) and section 6103 as a violation of the court order. However, the judge concluded that the language concerning the $1156 to be paid to Gentry was sufficiently ambiguous not to clearly and convincingly show that it was a judicial sanction required to be reported by section 6068, subdivision (o)(3).

Count 26: Eugene Shales

Eugene Shales met with respondent on December 7, 1988, concerning a potential bad faith claim against Humana Corporation for its failure to pay bills incurred for Shales's treatment by physical therapists. After reviewing the documents, respondent indicated to Shales that he did not think a bad faith claim could be proven and that he did not want to represent Shales. Respondent agreed to review additional documents in Shales's possession, but cautioned that he would look at the documents when he had a chance and would send Shales a fee agreement only if he changed his mind about representing him.

Shales did send additional documents to respondent. He reviewed them, but did not change his mind about representing Shales. He did not send the documents back to Shales or otherwise contact him.

The hearing judge found that Shales was not credible in his claim that respondent had agreed to take his case, had not done the work, and had not returned his file. The judge concluded that respondent's testimony was credible. There was no proof that an attorney-client relationship had been established or that respondent was in possession of an original file, which he was obligated to return to Shales. Therefore, he concluded that none of the charges under this count had been established.

Count 27: Alexander Kruger

Alexander Kreger retained respondent's services in August 1989 to defend a suit filed against his company, North American Credit Association.[4] Kreger signed the retainer agreement with the respondent and the blank substitution of attorney form. He left with respondent a thick file of documents, which he reviewed in part with respondent during their meeting. Respondent indicated that he wanted to amend the answer on file in the case and intended to file a cross-complaint. He asked Kreger to remind his office manager that these matters had to be attended to and advised Kreger that it would take him some time to review the file and that, after he had done so, he would make an appointment to meet with Kreger.

A week or so after this meeting, Kreger sent copies of depositions held in the case to respondent's office. He then began a series of telephone calls and faxes to respondent's office, repeatedly requesting an appointment to meet with respondent to discuss the case. By late October, Kreger sent an angry fax

4. The decision indicates that Kreger was being sued personally for unpaid debts. From his testimony, it appears that it was his company that was the subject of litigation, not Kreger, personally.

to respondent indicating that he wished to terminate his services. In response, respondent had an appointment set up with Kreger even though he had not yet reviewed Kreger's documents. Mr. and Mrs. Kreger drove in from Palm Desert and spent four hours waiting to meet with respondent. At 9:30 p.m., respondent emerged from his office, apologized to the Kregers, indicated that he was unable to meet with them that night because of the fatigue from being in trial all day, and requested that Kreger make another appointment.

After several weeks, Kreger fired respondent, asked him to waive any claim to fees, and requested return of his files. It was agreed that Kreger would pick up his file at respondent's office on December 11.

There was considerable dispute at the hearing as to whether Kreger received his file on December 11. Kreger contended that he did not receive any documents at that time and that he was forced to wait several hours at respondent's office. Respondent contended that he did receive the file, albeit somewhat delayed.

In January 1990, Kreger complained to the State Bar and copied the letter to respondent. Respondent could not locate the deposition transcripts which Mr. Kreger had provided, but did copy all the files he had in his possession and forward them to Kreger by overnight mail, with an enclosed release and substitution of attorney.

The hearing judge did not find any violations of professional conduct rules or statutes. The hearing judge found that Kreger had been advised that there would be delays before his file would be reviewed and before respondent took any action in the case and that these delays did not constitute either incompetent practice or failure to communicate with Mr. Kreger. He also concluded that there was no clear and convincing evidence that Mr. Kreger did not receive his case file.

Count 28: The Oretega Matter

Sol and Rubin Oretega retained respondent to handle their personal injury cases arising from an automobile accident and to pursue a bad faith claim against the insurance company, State Farm. After arbitrating the personal injury actions, respondent filed the bad faith actions against State Farm and the case was set to go to trial on March 19, 1990. The week prior to trial, respondent was in Hawaii on vacation, so he sent his associate, James Doherty to attend the pre-trial status conference on Friday, March 16. The trial judge found that Doherty was unprepared to discuss the pre-trial issues to be disposed of at the conference, sanctioned respondent $4,000 per day, and ordered him to appear in court the following Monday. When respondent appeared for trial on March 19, the court reduced the sanctions from $4,000 per day to $1,359 per day. Respondent conceded that he did not report the $1,359 sanctions to the State Bar pursuant to section 6068, subdivision (o)(3).

The remaining charge was whether respondent had violated sections 6068, subdivision (a) and 6103 by failing to appear at the hearing or by sending an associate that was not prepared to dispose of the issues presented at the conference. The hearing judge determined that the person in violation was Mr. Doherty, not respondent.

Count 32: Ethel Barney

Respondent was hired by Mrs. Ethel Barney in 1976 to pursue an action against Aetna Insurance (Aetna) and her former attorneys, Buck & Smith, on grounds of bad faith and conspiracy between Aetna and her former law firm to compromise her rights in the settlement of an insurance case from the early 1970's. Mrs. Barney died in 1980, and her husband substituted in as a plaintiff, as the representative of her estate, in 1981.

After numerous trial delays, the case went to trial with the issues of liability and punitive damages being bifurcated. The judgment on liability issues was awarded to Barney, and the issue of punitive damages was settled with the law firm. Aetna moved to dismiss the remaining liability counts against them on the basis of the settlement with the law firm, and respondent succeeded in his appeal to the Court of Appeals in keeping the claim of punitive damages against Aetna alive. The Court of Appeals filed its remittitur on January 12, 1987 and remanded the case for trial on punitive damages and related issues against Aetna. Respondent concedes that he

miscalendared the three-year cut off date from the remittitur on his office calendar. Aetna filed a motion to dismiss on January 19, 1990, based on the three-year statute; the motion was granted on February 7, 1990; and the case was dismissed.

Since the lawsuit remained an asset of the estate of Mrs. Barney, respondent was contacted periodically by Philip Gepner, the attorney Mr. Barney retained in the estate matter. Mr. Gepner contacted respondent repeatedly between January 1988 and December 1989, inquiring about the status of the case and asking for an accounting. Respondent did speak to Mr. Gepner in early December 1989, requesting Mr. Barney's birthday in order to advance the trial date if Mr. Barney were 70 years of age or older. By letter dated December 11, 1989, Gepner advised respondent that Mr. Barney would be 70 years old on February 3, 1990. Gepner wrote to respondent three times in 1990 (February 13, November 5, and December 3) and telephoned respondent almost twice a month. Gepner was never advised that the case had been dismissed in February 1990. Gepner learned of the dismissal when he contacted the attorney for Aetna in mid-1992. Gepner went to the probate court and secured a citation issued on respondent for him to appear or send someone to explain the proceedings in the underlying bad faith case to the probate court in February 1993.

The hearing judge concluded that respondent violated section 6068, subdivision (m) by failing to respond to Mr. Gepner's inquiries, failing to inform Gepner and Mr. Barney of the dismissal of the case, and failing to communicate with Barney from 1987 onward. He concluded that respondent's failure to calendar the date correctly was simple negligence, which did not rise the level of reckless or intentional misconduct.

Count 36: Robert Brodowy

On July 18, 1987, respondent became attorney of record in a bad faith action brought by Robert Brodowy against Interinsurance Exchange arising from claims from an automobile accident. The complaint had been filed on September 10, 1985.

Due to a mix-up in respondent's office, neither respondent nor his associate, James Doherty, attended a trial setting conference on June 12, 1990. As a result, the case was taken off calendar. Realizing that the five-year statute was due to expire in September 1990, respondent filed a new at-issue memo and an ex parte application to advance the trial date. The application was denied and, in order to toll the statute, respondent filed an election of judicial arbitration on June 22, 1990. By electing arbitration, the five-year limitation on prosecuting an action was tolled, but Brodowy would be prohibited from requesting a trial de novo if he were awarded the maximum amount in the arbitration ($50,000). Brodowy was not informed that the case was going to arbitration until after the election was filed with the court; nor was he advised that, if he had won the maximum amount, he would not have the right to trial de novo. Brodowy maintained at the hearing that he was told by respondent that the insurance company had elected to arbitration and that he had no choice but to proceed in this fashion.

The insurance company offered to settle the case for $50,000 in September 1990. Respondent advised Brodowy to take the offer, since the changes in the law in bad faith cases had considerably lessened the value of his cause of action. Respondent's associate wrote to Brodowy on September 10, 1990, suggesting that he reconsider the offer, but did not advise Brodowy of the relationship between the arbitration, the $50,000 offer, and the impact they could have on his right to a trial de novo. Brodowy rejected the offer by letter of September 24, 1990.

The judicial arbitration was held on November 16, 1990. At the hearing Browdowy advised the judge that he did not want to be in arbitration and had been advised that it had been the insurance company's election to proceed in this manner. The defense stipulated to the entry for plaintiff of the $50,000 maximum judgment, and the judge issued an arbitration award for that amount. That judge also made a reference to Brodowy's apparent lack of consent to the arbitration, interpreted it as a motion to vacate the election, and referred the case back to the Superior Court.

Brodowy secured new counsel, Linda Rice, prior to a status conference in superior court on December 11, 1990. Rice advised Brodowy that he had the choice of either accepting the award or receiving nothing.

The settlement draft was sent to Respondent in mid-December 1990, but a dispute arose as to how to divide the settlement. Respondent claimed a 50% share of the draft pursuant to his fee agreement, which also provided that any additional legal fees would be paid from Brodowy's share of the settlement. Eventually, Brodowy's first counsel, Mr. Guluveza, agreed to waive his fees, and Brodowy received his $25,000 share on May 9, 1991. A malpractice action was settled for $25,000.

The hearing judge concluded that respondent's failure to consult with Brodowy before filing the election to arbitrate violated section 6068, subdivision (m), as a significant development which Brodowy should have been informed of prior to filing with the court. Other events in the case, including respondent's failure to advise Brodowy of his failure to appear in court on June 12, 1990, and his attempt to ameliorate the effect of that mistake by filing of an ex parte application to advance the trial date also were significant and should have been communicated to Brodowy, according to the hearing judge. The State Bar conceded that it had not shown by clear and convincing evidence that respondent's actions in the dispute over the fees constituted a violation of rule 4-100(B)(4).

Count 38: Michele Carter

Respondent became attorney of record in the personal injury action of Michele Carter in 1985. That case went to judicial arbitration, and Carter was awarded $42,000. On September 16, 1988, an associate in respondent's office filed a bad faith action on Ms. Carter's behalf against an insurer. The defense filed a successful demurrer to this complaint and to two subsequent amended complaints filed by respondent. The demurrer to the second amended complaint was sustained on June 1, 1989. The defense did not serve notice of that ruling until July 27, 1989. Respondent assigned a new associate to his office, Wanda Grasse, to handle the matter.[5]

Grasse believed that the time to file the complaint ran from the June 1 hearing, rather than from the service date and therefore took no action because she believed it was too late. On September 6, 1989, the defense filed a motion to dismiss. Under respondent's direction, Grasse filed an opposition, a declaration as to her error, and a request for relief from default. The court denied her request and dismissed the case on October 24, 1989.

Respondent assigned the appeal to Thomas Szakall. The appeal was filed on December 29, 1989; however, a designation of record was not filed. The omission was noted by the court clerk and a notice was sent to respondent's office, providing 15 days to file the designation. The designation was not filed, and the appeal was dismissed on April 23, 1990.

Carter began monthly telephone calls to respondent's office seeking a status report on her case beginning in late 1989, and twice a month through 1991. In 1992 she called two or three times a month and also wrote to Respondent. She never received a response or was contacted by anyone in respondent's office. Carter was never advised by respondent of the October 24, 1989, dismissal by the trial court or the April 1990 dismissal of the appeal.

The hearing judge concluded that Respondent violated section 6068, subdivision (m) by failing to respond to any of Carter's status inquiries and by failing to inform her of the dismissal of the case in the trial court and the dismissal of the appeal. He did not find that respondent was culpable of the two dismissals caused by his associates' inaction, finding that it was their responsibility and not respondent's.

Count 40: The Sivert Matter

Tilly and David Sivert owned a trucking business. In the mid-1980's an employee was injured and at that point Ms. Sivert discovered that her worker's

5. Respondent's exhibit BBBBBB indicates that Wanda Grasse was employed in Respondent's office between July and November 1988. However, payroll records indicate that she was employed by respondent between July 19, 1989, and November 8, 1989. (Exhibit IIII).

compensation carrier, Golden Eagle Insurance, had not renewed her policy and that there was no insurance coverage for the employee's injury.

The Siverts hired attorney Jeffrey Trudgeon, who filed suit before the Worker's Compensation Appeals Board for a declaration of coverage and payment of the employee's injuries if coverage were found. Thereafter, they also hired another attorney in early 1987 to file a bad faith action against Golden Eagle Insurance, in which respondent substituted in as counsel in August 1987. Respondent believe that the bad faith case had been filed prematurely because coverage issue had not been established in the Worker's Compensation Appeal Board case. Consistent with that strategy, respondent advised the Siverts that he would not serve the complaints or proceed with the bad faith case unless the coverage issue was decided in their favor. Therefore, respondent did not file the substitution of attorney form, but did appear as an attorney in the worker's compensation case to take a deposition in connection with the facts necessary to develop his bad faith case if coverage were found. Respondent communicated primarily with Jeffrey Trudgeon rather than the Siverts.

The worker's compensation case was decided against the Siverts. Respondent advised Trudgeon that as a result there would be no basis to pursue the bad faith case and assumed that Trudgeon would communicate this to the Siverts. The bad faith case was dismissed by order of March 6, 1990, for failure to bring the case to trial and serve the complaint within three years.

After the completion of the worker's compensation case, Tilly Sivert attempted to contact respondent concerning the bad faith matter. She called respondent's office periodically in late 1990 and 1991, making one to three calls a week. None of those calls were returned. She did not learn that the bad faith case had been dismissed until she had filed a complaint with the State Bar in June 1991.

The hearing judge found that respondent violated section 6068, subdivision (m) by not responding to Ms. Sivert's calls or informing the Siverts of the dismissal of the bad faith case. He also found that there was not clear and convincing evidence that he had either abandoned or performed incompetently in the bad faith matter, given that the worker's compensation decision precluded the subsequent bad faith action. He found that there was no evidence presented to contradict respondent's assertion that there were no remaining claims after the dismissal of the worker's compensation case.

Count 42: Santos Morales

Santos and Grazziella Morales were injured in an automobile accident in April 1985. Respondent, who employed Grazziella Morales as a baby sitter and housekeeper, agreed to represent the Morales and in September 1985 filed a complaint against Laurie Clemons, the driver of the out-of-control vehicle, and drivers Hatch and Gould, who were also hit by Clemons. Respondent named the latter defendants as a precautionary measure.

Respondent allowed dismissals in the case against Gould in August 1988 and against Hatch in November 1990, since neither appeared to have any liability for the accident. In 1988, respondent learned that Clemons's insurance carrier had gone into conservatorship and that Clemons herself had no assets, employment, or residence in California. There was no evidence presented as to what happened to the case after November 1990. Mrs. Morales left respondent's employ around that time for reasons unrelated to the lawsuit.

The hearing judge granted respondent's motion to strike the testimony of Mr. Morales because it was questionable whether Mr. Morales understood enough English to be accurate in answering the questions asked in his testimony. The State Bar did not follow up on the judge's proposal that Mr. Morales testify again with the aid of a Spanish interpreter.

The hearing judge concluded that none of the charges in this count were sustained by clear and convincing evidence and that Mr. Morales's problems with English did not undermine respondent's assertion of adequate communication under section 6068, subdivision (m).

Count 46: The Finnigans

On August 30, 1985, respondent was employed by Tim and Brian Finnigan, Mark Zack, and Deena Dorado to pursue a breach of contract action against State Farm Insurance arising from the loss of Tim Finnigan's home in a fire on September 3, 1984.

In 1989, just prior to the trial date, the parties stipulated to binding arbitration. The arbitration commenced in July 1991 for three days, continued for two trial dates in December 1992, and concluded on January 26, 1993. The arbitrator requested at the close of testimony that the parties submit briefs. Respondent had an initial deadline of May 5, 1993, to submit his brief, but was given an extension to file until June 3, 1993 because of other trial commitments.

Respondent felt he could not delegate the brief to an associate due to the complexity of the case. However, he still did not file the brief by June 3. In his award, the arbitrator dismissed the claims of Zack and Dorado, found there was no basis for a bad faith award, and declared a mistrial as to all other issues in the case. He retained jurisdiction to hear any motions, including any motion for dismissal of the proceeding for lack of prosecution or due diligence or otherwise. The defense filed a motion to dismiss. Respondent filed an opposition, and the arbitrator issued an order dismissing the proceedings for failure to prosecute on November 24, 1993.

The hearing judge concluded that there was sufficient communication with the Finnigans, finding Tim Finnigan's testimony to the contrary was not credible. As to whether respondent's failure to file the brief with the arbitrator constituted either an abandonment of the matter or a failure to competently perform legal services, the hearing judge conceded that it was a close case, but concluded that respondent's negligence did not constitute misconduct. The hearing judge resolved all reasonable doubts regarding culpability in favor of respondent and found no culpability in this count.

Count 48: Michael Kronick

In September 1985, respondent was retained by Ruth Kronick to represent her six-year-old son Michael who had been injured in an accident at a shopping mall. Michael had already suffered some physical limitations but his injuries were not related to his limitations. At the time Mrs. Kronick retained respondent, he advised her that liability was clear, but that it would take five years to go to trial. He requested that she photograph the area of the accident, obtain names of witnesses, and gather other information about the accident and her son's injuries. The statute of limitations under these circumstances would not run until one year after Michael turned 18. Respondent did not himself interview any witnesses, conduct any further investigation, monitor Michael's medical condition, or otherwise do any additional work on the case after he was retained.

The Kronicks saw respondent at a social function in early 1990 and asked about the status of the case. Respondent asked them to make an appointment. Mrs. Kronick, thereafter, called respondent's office, left a message, and received no response. Thereafter, Dr. Kronick began a series of phone calls to respondent's office, calling and leaving messages several times a month. Finally, Dr. Kronick wrote to respondent on October 28, 1991, asking respondent to return the pictures and file in the matter and indicating that he no longer wished respondent to represent Michael on the case. Respondent did not return the file as requested. As of the date of hearing, respondent had still not returned any of the materials provided by the Kronicks.

The hearing judge concluded that respondent's failure to take any action in the case constituted a violation of former rule 6101(A)(2) and rule 3-110(A). Further, his failure to respond to any of the messages left by the Kronicks violated section 6068, subdivision (m).

Count 49: Monte Martin

Respondent was retained by Monte Martin on May 8, 1986, to pursue a bad faith cause of action against Utica National Insurance Group in connection with an automobile accident. Respondent testified that he delayed filing a complaint in the case because he was aware that other bad faith cases had been dismissed where the underlying case had been settled rather than proceeding to judgment. After

reading the Supreme Court's decision in *Moradi-Shalal v. Fireman's Fund Ins. Companies, supra,* 46 Cal.3d 287, and reviewing additional facts Martin provided at respondent's request, respondent decided that Martin no longer had a cause of action. However, respondent never communicated this assessment to Martin.

Between 1986 and 1991, Martin called respondent's office once or twice a year for status report from either respondent or respondent's staff. In response to his inquiries, he was told "We're proceeding." Martin interpreted this statement to mean that the case had actually been filed in Court.

In March 1991, Martin moved from California to Georgia and forwarded his new address to respondent. Soon thereafter, he called respondent's office for a status report, but received no response. He made 15 additional calls over the next month, but none of them were returned. He also sent a certified letter to respondent in June 1991, which was sent to respondent's former address. Martin continued calling respondent several more times in late 1991 and early 1992. He was advised in April 1992 by the switchboard operator that his calls would no longer be forwarded to respondent's office. Martin travelled to California in June 1992, found his way to respondent's office, and requested his file. Martin was advised by a secretary that she was not authorized to give him his file, but would advise respondent of his visit and request. None of Martin's calls on subsequent days were permitted through to respondent's office. As of the date of the hearing, respondent had not returned Martin's file.

The hearing judge concluded that there was not sufficient evidence to find that respondent has misrepresented to Martin that a complaint had been filed in his case. He did find that respondent failed to adequately communicate with Martin by not returning his calls or advising him that his case was no longer viable and that respondent failed to promptly forward the case file upon Martin's request. The hearing judge also found that respondent did not competently perform services because he did not advise Martin of the viability of his case after the Supreme Court decisions in the bad faith case area.

Count 50 - Dee Mattox

Respondent was retained in 1983 or 1984 by Dee Mattox to handle a bad faith cause of action against Allstate Insurance Company arising from a dispute after two of her houses were destroyed by fire. Originally, the bad faith action had been filed in 1979 by attorney Paul Shoop, who interviewed respondent with Mattox before she hired him to substitute into the case.

After respondent took over the case, there were additional pre-trial motions, including one for partial summary judgment in 1988. As a result of that motion, all claims for punitive damages were dismissed, gutting much of Mattox's cause of action. Respondent did not advise Mattox of this development until late 1988 or early 1989 when he met with her and attorney Shoop. Respondent represented at that meeting that he would appeal the decision and that the cause of action would be reinstated.

The case went to trial before a private judge on November 6, 1989. After a few days, a mistrial was declared, and the parties agreed that the trial would resume on August 17, 1990. In August 1990, the judge realized he could not proceed with the matter, took the trial off calendar, and signed an order indicating that a mistrial had been declared in November 1989. Respondent had not calendared the three-year cut-off date when the mistrial was declared in November, and his staff, upon receiving the August 1990 order, miscalendared the three-year date based on the date of the order. Respondent did not realize the mistake in calendaring until the summer of 1992. The case was dismissed in September 1992. He did not advise either Mattox or Shoop that the case could not be tried and was worthless.

Both Mattox and Shoop phoned respondent's office repeatedly between November 1989 and the end of 1991. Shoop also sent respondent three letters in 1991, one of which even reminded respondent to set the matter for trial. Finally, Mattox signed a substitution of attorney in the summer of 1993 in favor of another attorney, but it was too late to proceed since the matter was dismissed in September 1992.

The hearing judge concluded that respondent violated section 6068, subdivision (m) by not communicating with Mattox or her authorized agent, including failing to advise them of the dismissal of the case. The judge also concluded that, after November 1989, respondent repeatedly failed to competently perform legal services by not calendaring the three-year cut-off date at the time of the November 1989 mistrial and not reviewing the file in over two years despite contacts from both Shoop and Mattox.

Count 51 - Linda Smith

Respondent was hired on May 3, 1986, to pursue a wrongful death action on behalf of Linda and David Smith, resulting from the death of their daughter. Respondent assigned responsibility for all pre-trial matters to associates employed in his office, and the case was prepared for trial through the spring of 1989. At that point, an associate, Bruce Greenfield, failed to file a memorandum to set trial with the court. Respondent did not learn of this until March 1990 when the defense filed a motion to dismiss for failure to prosecute. On April 24, 1990, the court heard arguments on the motion and granted the motion. The dismissal was entered May 17, 1990. Immediately after the hearing, respondent directed that a memorandum to set trial and a motion for reconsideration be filed; and on May 4, 1990, they were. However, no one from respondent's office appeared at the hearing on the reconsideration motion on May 24, 1990, and the motion was denied.

A notice of appeal and a notice designating record were filed on June 15, 1990. The opening brief from respondent was due in early June 1991. The associate assigned responsibility for the brief, requested an extension of time, but the extension was denied, and she did not file the brief. As a consequence, the appeal was dismissed on July 11, 1991. Respondent did not advise the Smiths of the dismissal of the appeal.

Smith made repeated attempts to contact respondent's office between November 1989 through July 1991. None of her phone calls or letters were answered, and she only learned of the dismissal after she hired another attorney to look into the case.

The hearing judge concluded that respondent violated section 6068, subdivision (m) by not responding to Smith's telephone calls and correspondence and by not advising her of the dismissal of her case at the trial level, the filing of the appeal, or the dismissal of the appeal. He also found that respondent failed in his duty to supervise the associates assigned to work on the case and, thus, violated former rule 6-101(A)(2) and rule 3-110(A). The hearing judge concluded that respondent did not review the Smith file when Greenfield left the office in July 1989, confirm that someone would appear at the motion for reconsideration hearing, nor monitor the work of a brand new attorney assigned to write the brief in the Smith appeal.

Count 52: Eric David

On March 15, 1983, respondent was hired by Eric David to pursue a medical malpractice claim against Dr. Paul Getzoff. Respondent filed the complaint in the matter on February 13, 1984. Most of the pretrial work was performed by associates employed in respondent's office. A newly admitted attorney, John Hall, was hired in December 1987 and assigned in January 1988 to prepare responses to interrogatories. Those responses were submitted on January 11, 1988, and in turn, the defense filed on February 26, 1988, a motion to dismiss for refusal to comply with court ordered discovery. Under respondent's direction, Hall prepared a supplemental response, but not an opposition to the motion. Hall attended the April 18, 1988, hearing on the motion, at which time the court dismissed the case. The order of dismissal was entered May 4, 1988. Hall then prepared a motion for reconsideration which was heard on June 17, 1988. Hall had been discharged by respondent by that date so that another associate appeared at the hearing. The motion was denied. Another associate prepared a notice of appeal and a notice of designating record and filed them with the court on July 1, 1988. The brief was due in the latter part of November 1988, and respondent took responsibility for preparing and filing the brief. In doing so, he came to the conclusion that the appeal of the dismissal was "not meritorious" and stopped work. The brief was not filed, and the appeal was dismissed on February 7, 1989. Respondent did not advise David of the dismissal of the appeal until August 1991,

despite repeated contacts David made with Respondent's office seeking to learn the status of his case.

David retained counsel at the end of 1991 to pursue a legal malpractice action against respondent. Attorney Stephen Phillipi wrote two letters to respondent and made two phone calls in March 1992 requesting the file. The legal malpractice action was filed April 15, 1992, and Phillipi requested in discovery in June 1992, documents which included the file in the David case. Respondent did not produce the file, and Phillipi was forced to file a motion to compel on September 28, 1992. The file was produced in November 1992.

The hearing judge found respondent did not advise David of the 1989 dismissal in violation of section 6068, subdivision (m); violated rule 3-700(D)(1) by not promptly turning over the file to David or David's new attorney; and violated former rule 6-101(A)(2) by not adequately supervising his associate. The hearing judge also concluded that, by stopping work on the brief without notice and without taking steps to avoid prejudice to his client, respondent violated former rule 2-111(A)(2) and rule 3-700(A)(2).

Count 30: Taking Cases Without Sufficient Time and Resources

The facts of counts 1-29 and counts 31-52 were incorporated by reference as the factual background for the charge in this count. The respondent was charged and found to have violated former rule 6-101(B)(2) and rule 3-110(A) in not performing in his legal responsibilities competently by knowingly accepting and continuing representation in legal matters for which he did not have sufficient time, resources, and ability to perform the cases with competence. The incidents which supported the finding of lack of diligence and time included respondent's failures to respond to client inquiries (counts 2, 4, 19, 32, 38, 40, 48, 49, 50, and 51), failures to advise clients of significant developments in their cases (counts 9, 38, 50, 51, and 52), failures to return client files upon request promptly (counts 4, 24, 19, 48, and 49), failures to supervise his staff adequately (counts 11, 34, 50, 51, and 52) and failure to file the brief in the Finnigan case (count 46) because of lack of time to perform that responsibility.

Count 31 - Failure to Cooperate (Counts 9, 11, 18, 20, 22, 27)

The hearing judge found that respondent began to get letters from the State Bar seeking information concerning matters covered in the consolidated cases beginning in early 1989. Respondent did reply to letters concerning approximately 20 matters from early 1989 to mid 1990. Because he had not received a response from the State Bar to his letters, in mid-1990, respondent stopped providing responses to the investigative letters. In counts 9, 11, 18, 22, and 27, the hearing judge concluded that respondent did not answer the investigative letters for at least eight months prior to meeting with State Bar deputy trial counsel on June 25, 1991. The hearing judge concluded that, in these five cases, the prolonged delays clearly constituted a violation of section 6068, subdivision (i). In Count 20, the hearing judge did not find culpability because the underlying misconduct in that count was dismissed.

Failure to Cooperate (Counts 33, 35, 37, 39, 41, 43, 45, and 47)

These eight counts concern investigative letters sent to respondent within the six months preceding his June 25, 1991, meeting with deputy trial counsel. Respondent did not respond to any of the investigative letters. Where the delay exceeded six weeks, the hearing judge concluded that that was unreasonable and respondent was obligated to respond to the letters and was culpable of violating section 6068, subdivision (i) under those facts. Therefore, he found culpability for not cooperating with the State Bar's investigation in counts 35, 43, 45, and 47. The hearing judge determined that if the letters were sent to respondent within the six weeks immediately preceding the June 25 meeting, respondent was reasonable in waiting until the meeting to address those complaints, if asked, and that would be adequate cooperation with the State Bar in its investigation. Therefore, in counts 33, 37, 39, and 41, he did not find culpability because of the proximity of the meeting to the requests for information and because in one case, the request for information was sent after the meeting on June 25.

Count 53 - Failure to Cooperate (Counts 48-52)

The hearing judge did not find any culpability for respondent's failure to cooperate with the State Bar in investigating these five client matters. The hearing judge found that since the June 25, 1991, meeting with the deputy trial counsel, respondent had been cooperating with the State Bar and had communicated his willingness to cooperate in other matters under investigation. Therefore, the judge found that respondent's failure to answer any of the investigative letters sent in these five matters, which were sent after the June meeting, did not constitute a failure to cooperate with the investigation.

ISSUES ON REVIEW

Dismissals with Prejudice

[1] A preliminary issue raised by the State Bar is whether the hearing judge erred in dismissing counts with prejudice over the objection of the State Bar. We review this portion of the judge's determination under a standard of abuse of discretion. (Cf. *In the Matter of Respondent R* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 227, 230.)

The State Bar's two dismissal motions were made at different points in the hearing. As part of its pretrial statement in this matter filed on September 13, 1993, the State Bar moved to dismiss in the interests of justice counts 1, 3, 6, 7, 8, and 17. Trial was set at that time for October 5, 1993. The motion was heard at a pretrial conference held in this matter on September 17, 1993 and Respondent did not object, and no other facts, explanations or argument were presented to the hearing judge. The hearing judge issued an order on September 20, 1993, granting the motion.

After the commencement of trial, the State Bar moved to dismiss three additional counts, counts 20, 29, and 44. The respondent objected only as to whether the counts should be dismissed without prejudice, and argued that the pretrial dismissals and those dismissed during trial should, under the circumstances, be granted with prejudice. The hearing judge granted the dismissals at trial, but reserved the issue of whether all the dismissals should be with prejudice, directing respondent to file a written motion. Respondent filed his motion, and the State Bar filed its response.

The hearing judge ruled on July 28, 1993, that the furtherance of justice required that all nine counts should be dismissed with prejudice. The three counts addressed after the commencement of the trial and the introduction of evidence were considered by the judge to be an adjudication on the merits, citing for reference to rule 411 of the Former Transitional Rules of Procedure of the State Bar (effective September 1, 1989, to December 31, 1994). The motion to dismiss the six remaining counts was under rule 410 of the former Transitional Rules of Procedure which, in the hearing judge's view, left it within the court's discretion to decide which charges should be dismissed with prejudice and which dismissed without.[6] The hearing judge considered the proximity of the motion to the then anticipated trial date, three weeks later, the trial preparations by respondent in anticipation of defending those charges, as reflected in his pretrial statement filed September 10, 1993, and concluded that principles of estoppel should be applied to prevent unfairness to respondent and from permitting the State Bar an unjust advantage after disclosure of respondent's defenses to the State Bar.

The State Bar makes three arguments in seeking to overturn the dismissal orders. First, it argues that the two rules must be read together and that the *only* explicit authority the hearing judge has to dismiss charges with prejudice is under former rule 411 of the former Transitional Rules of Procedure, after the weighing of evidence in the case. However, it acknowledges that rule 410 does not differentiate between dismissals being with or without prejudice. The distinction we discern in the two rules is the obvious one: rule 410 of the former Transitional

6. The present rules set forth some grounds for dismissals and defines some instances in which the dismissal is purportedly required to be without prejudice. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rules 261, 262.)

Rules of Procedure applies to those motions brought by the State Bar and former rule 411, as well as rule 554.1 of the former Transitional Rules of Procedure, applies to motions to dismiss brought primarily by the respondent. Since all these motions were the work of the State Bar and because they were all made and granted before the hearing weighted the culpability evidence under the dismissed charges, we disagree with the hearing judge that former rule 411 applies to those three charges considered for dismissal during the trial. Former rule 410 expressly encompasses motions filed by the State Bar pretrial as well as those sought after the commencement of the trial, but before the evidence of culpability is weighted. We agree with the hearing judge that the rule leaves to the discretion of the hearing judge the determination as to whether the dismissal shall be with or without prejudice.

The State Bar, in its second argument, notes that the present rule of procedure regarding motions to dismiss by the State Bar in furtherance of justice purports to provide that all such motions "shall be without prejudice unless the motion seeking dismissal shows good cause why the proceeding should be dismissed with prejudice." (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 262 (e).) In its view, the present rule is a clearer articulation of the former rule, where the State Bar seeks to dismiss charges in the interests of justice and does not provide any evidence for the Court to weigh. The State Bar does not cite to any authority, theory of statutory construction, or rule comments in the present rules to support them in this interpretation of the former rule. The "source" notation to present rule 262 indicates that it is a new rule, with a reference to contrary dictum in the three prior rules (rules 410, 411, and 554.1 of the former Transitional Rules of Procedure). We do not disagree that the prior practice may be reflected in the present rule. However, the interpretation of the former rule is not guided by the subsequent redrafting, particularly where the language of the former rule is silent, not ambiguous.

The third argument combines two ideas of equity: it was unfair to the State Bar for the hearing judge to convert its motions to dismissals with prejudice over its objections and not to give it the opportunity of withdrawing its motions to dismiss thereafter; and that principles of estoppel should not be applied under these circumstances to prohibit prospectively the filing of another action against respondent based on the dismissed charges. The facts do not support the State Bar's first equitable argument. The hearing judge was obligated to clarify his dismissal of the first six charges to indicate whether they were with or without prejudice. Once respondent raised the issue early at trial concerning *all* the dismissal orders and the hearing judge reserved that issue, the State Bar had notice that the charges might be dismissed with prejudice. At that point it had the opportunity to withdraw the motions, since they were voluntary under rule 410 of the former Transitional Rules of Procedure. By not withdrawing the motions, the State Bar took the risk of having the charges dismissed with prejudice or, upon the judge's reflection, having the motions denied altogether.

[2] We agree with the State Bar that equitable estoppel, which is a defense in a civil action, is not applicable under these facts. However, the considerations in determining whether the dismissal made in furtherance of the interests of justice should be with prejudice are not dissimilar. The hearing judge properly focused on the positions of the parties at the time of the proffer of the motions and the effect on each side. On one side, respondent, in the extent of his trial preparations, relied to his detriment on the representation by the State Bar that it was going to pursue all nine charges and, as a result, disclosed his case in large measure to them. That is reflected in his pretrial statement presenting witnesses and documents submitted for a trial then scheduled for three weeks hence.[7] **[3 - See fn. 7]**

[4] The State Bar admits that it presented no evidence in support of its motion. Generally, how-

7. **[3]** Respondent also argues that he is placed in "indefinite limbo" if the State Bar is permitted to revisit these charges in the future. We do not find that reason alone to constitute cause; his remedy in any subsequent proceeding would be a due process argument for relief caused by unreasonable delay based upon a sufficient showing of specific prejudice resulting therefrom. (See, e.g., *Harris v. State Bar* (1990) 51 Cal.3d 1082, 1089.)

ever, it is in the public interest to dispose of disciplinary charges on the merits. (Cf. *In the Matter of Morone* (Rev. Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214-215 [default matters].) The State Bar does not plead that the evidence underlying these charges is unavailable or insufficient, or it would have submitted its motion on those grounds. It had been investigating the earliest of these charges since January 1989, and was presumably ready to try them up until September 1993. In contrast with respondent, the State Bar was in control of the issues to be addressed at the disciplinary hearing and was in an even better position after the filing of the respondent's pretrial statement, to assess the probable success or failure of the charges in the Notice. We conclude in the absence of additional evidence, that the public interest and the interests of justice would not be served by permitting the State Bar to maintain these actions for possible later prosecution when respondent has relied to his detriment in preparation for and during trial and in doing so exposed his defense case.

Failure to Communicate and Duplicative Charges

[5a] The State Bar argues that a respondent's failure to communicate adequately with his client may also constitute incompetent legal practice, under former rule 6-101 (A)(2) and rule 3-110, or abandonment of the client, under former rule 2-111 (A)(2) and rule 3-700(A)(2). We agree. Prior to the enactment of section 6068, subdivision (m), adequate communications with a client was recognized both as a common law duty owed to a client, under section 6068, subdivision (a) (*Layton v. State Bar* (1990) 50 Cal.3d 889, 903-904), and as part of the competent performance required of attorneys under former rule 6-101. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782-783.) After the enactment of section 6068, subdivision (m), where the essential issue concerned the adequacy of communication between attorney and client of significant events and client inquiries, a charge of incompetent legal performance was given no additional weight in discipline because it addressed the same misconduct. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155.) Duplicative charges are to be avoided. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 57.)

[5b] However, the Court has recognized that inadequate communication can be an element in violations of other attorney duties. So, in *Baker v. State Bar* (1989) 49 Cal.3d 804, 816-817, fn. 5, the Court noted that an attorney may effectively abandon a client under rule 3-700 or former rule 2-111 even absent the formation of an intent to withdraw when he or she ceased coming into the office *and* could not be contacted by his or her clients. The Court also stated that gross negligence in failing to communicate with clients may be construed as abandonment. (*Calvert v. State Bar*, *supra*, 54 Cal.3d at p. 783; *Walker v. State Bar* (1989) 49 Cal.3d 1107, 1117.) In *Kapelus*, the Court found that an attorney's failure to *advise* the client of an adverse decision or ascertain if the client wished to appeal the decision effectively foreclosed the client's opportunity to proceed with his claim and constituted an improper withdrawal from employment under former rule 2-111(A)(2). (*Kapelus v. State Bar* (1987) 44 Cal.3d 179, 187.) In *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1124, 1126, the attorney did not tell the client of his misgivings concerning the merits of the case or urge him to seek other advice, misconduct which was found to be constitute a failure to communicate and incompetent legal representation contrary to former rule 6-101(A)(2). (See also *Bernstein v. State Bar* (1990) 50 Cal.3d 221, 232.) Based on this case law, we would agree with the State Bar that where the facts demonstrate that the attorney's failure to communicate with the client resulted in the effective cessation of work on the cause of action, foreclosed the client from choices regarding her cause of action, or indicated a withdrawal from employment, the attorney has engaged in more serious misconduct than merely a failure to communicate.

In the *Martin* case (count 49), the hearing judge did find a lack of diligence arising from respondent's failure to communicate to Martin his decision not to file a lawsuit on Martin's behalf, contrary to section 6068, subdivision (m) and rule 3-110. Under the same reasoning, in the *Sivert* case (count 40), we concur with the hearing judge that respondent was obligated to contact the Siverts after he learned of the outcome of their workers compensation case to advise them that, in his view, their bad faith action was no longer viable. His failure to communicate his assessment or return their phone calls deprived them

of the opportunity to obtain alternative counsel or otherwise pursue that action. We modify the decision to find respondent's inaction constituted incompetent representation, contrary to rule 3-110.

Respondent's failure to communicate his abandonment of the appeal in the *David* case (count 52) was found by the hearing judge to violate 6068, subdivision (m), as well as an abandonment of the client under rule 3-700(A)(2). In the *Barney* case (count 32), respondent not only failed to communicate with his client and his designee regarding the dismissals, but upon discovering his calendaring error, he abandoned the client as well. We find respondent's abandonment of the Barney cause of action violated rule 3-700(A)(2).

In the *Kofsky* case (count 2), the hearing judge focused on the dearth of options available to Mr. Kofsky after the chapter VII discharge in bankruptcy of the manufacturer of the boat which injured him. We agree that there was little respondent could have done at that point. It is a closer question whether the failure of respondent to advise Kofsky promptly of the conversion of the bankruptcy filing from chapter XI to chapter VII prevented Kofsky from seeking more experienced bankruptcy advice during a time when his claims against the bankrupt had a chance of being satisfied prejudiced his client. The defendant was not discharged from bankruptcy until more than three years after the conversion of the case to chapter VII. The eleven-month delay in advising Kofsky of the conversion of the bankruptcy case violated his duty under section 6068, subdivision (m) but does not constitute clear and convincing evidence of incompetent representation under rule 3-110.

We reject the State Bar's arguments regarding the *Shales* case (count 26), given the hearing judge's finding that respondent did not have an attorney-client relationship with Mr. Shales after his initial consultation. Hence, respondent had no obligation to communicate his views concerning additional copied materials sent to him by Shales, since they agreed that he would do so *only* if respondent changed his mind about representing Shales. Not returning the copies to Shales may not have been the best practice, but it alone does not rise to the level of disciplinable misconduct.

In sum, we concur with the State Bar that in the *Barney* and *Sivert* cases, respondent not only failed to communicate with the clients, but also abandoned the client in one instance (*Barney*) and failed to perform competently in the other (*Sivert*). The State Bar has not demonstrated clear and convincing evidence of incompetence or abandonment in the *Shales* or *Kofsky* cases.

Supervision of associates and other employees

Both parties seek review of the hearing judge's rulings regarding the issue of respondent's culpability for errors by support staff and misconduct by associate attorneys. The hearing judge found that respondent had adequate notice of this charge as a violation of respondent's duties under former rule 6-101 and rule 3-110. The issue of adequate supervision of staff arose in counts 4, 9, 11, 38, 50, 51, and 53, and as evidence in support of the charge that respondent did not have sufficient time and resources to provide competent legal services (count 30).

The State Bar argues that, in counts 4, 9, 11, and 38, respondent should be held responsible for the misconduct of one associate who failed to file appellate papers in two cases (counts 9 and 38), another who left the courtroom prior to the court calling and hearing respondent's motion for relief from default (count 11), and another who misunderstood the file and prepared an opposition to a discovery motion, rather than complying with the court order to provide discovery (count 4). Each of these missteps resulted in the dismissal of the case and the loss of the client's cause of action. Respondent counters that he did not have adequate notice of the charge of inadequate supervision, that an inappropriate standard of strict liability was applied, that supervision which is merely negligent does not rise to the level of a disciplinable offense, and that the record does not support a finding that respondent was grossly negligent in the supervision of his staff.

[6a] As we have stated in the past, "an attorney cannot be held responsible for every event which takes place in a lawyer's office although the attorney does have a duty to reasonably supervise his staff. [Citation.]" (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 627.) We

consider whether the attorney has taken appropriate steps to guide his employees and, in the case of a showing of the misuse of a trust account, whether the office procedures in place were adequate. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26; *In the Matter of Koehler, supra*, 1 Cal. State Bar Ct. Rptr. at p. 627.) The Supreme Court has found an attorney responsible for the misconduct of even a very experienced associate where the clients reasonably expected the principal attorney to perform the services for which he was retained and where the attorney was aware of problems affecting the associate's performance. (*Bernstein v. State Bar, supra*, 50 Cal.3d at p. 231.) The duty of reasonable attorney supervision encompasses reviewing a client file after the associate departs as well. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 368.)

[6b] We have found in past cases that a single instance of negligence resulting from staff error did not amount to a disciplinable offense. (See *In the Matter of Fonte* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 752, 757 (failure to answer interrogatories due to calendaring error not misconduct); *In the Matter of Ward, supra*, 2 Cal. State Bar Ct. Rptr. at p. 57 (single miscalendaring of five-year statute not misconduct). However, where an attorney has been alerted to problems and does not adequately address them, then such gross neglect may be disciplinable as a failure to perform services competently.

All of the events which underlie the charges of improper supervision of staff arose while respondent was involved in long trials. Respondent tried the eight-month *Best Audio v. Federal Insurance Co.* case from December 1987 until August 1988. Respondent was aware of administrative problems which grew more acute during his 1988 trial, and he hired a law office management consulting firm, Sullivan & Skoda, in the summer of 1988 to evaluate his office systems. Respondent's testimony was inconsistent as to the extent to which he was supervising his employees during this period. The hearing judge found that respondent had failed to supervise a newly admitted attorney, John Hall, in the late winter of 1988 in the *Smith* case (count 51), after Hall did not properly answer discovery; filed supplemental answers at respondent's direction, but did not file an opposition to a motion to dismiss; and filed a reconsideration to the dismissal order at respondent's direction. Hall was fired by respondent before the June 17, 1988 hearing on the motion, which was denied.

During the spring 1988, three additional significant errors occurred which are the subject of the State Bar's exceptions. Respondent's calendar clerk noted the hearing date but not the response deadline to a motion to dismiss in the *Kagan* case (count 11), so no opposition to the motion was filed. When the motion hearing was held on May 13, 1988, respondent had conflicts in his schedule so that he had to rely on his newly hired associate, Arthur Hampton, to secure a delay in the consideration of the motion. The motion was placed later in the calendar, but when it was called, the associate had left the courtroom, and respondent had not yet appeared. The motion to dismiss was granted, and respondent was unsuccessful in a later bid to vacate the dismissal. The hearing judge found that these omissions were negligent, but not clearly reckless.

The same associate was assigned to take over the *Young* case in June 1988, after respondent fired the associate who had handled discovery in the case and who had lost a defense motion to compel answers. Neither respondent nor Hampton apparently reviewed the file since Hampton prepared another opposition to the discovery motion instead of supplying the court ordered discovery by the June deadline. Because the interrogatories were never answered, the defense motion to dismiss the case was granted on September 23, 1988. Hampton left respondent's employ in November 1988. The hearing judge found that as a result of the sudden departure of respondent's associate and the time pressures involved, the misconduct was negligence but not a reckless disregard of the client's interests.

We differ with the hearing judge's analysis that respondent's supervision was not willful or grossly negligent during this time. Respondent admitted that he was aware of administrative problems. These were not isolated instances of neglect, but recurrent. The extensive turnover in personnel in 1988, with respondent in court and out of the office the entire time, only amplified and worsened the situation.

Other client interests were sacrificed as a result. While the hiring of the management firm was laudable, respondent remained ultimately *the* one entrusted with the client causes of actions lost during this time. Our conclusion also rests on respondent's failure to take minimal steps necessary for reasonable supervision of cases when he knew that his available time was limited, such as regularized review of client files and a regular practice of monitoring the status of associates' work. (*Moore v. State Bar* (1964) 62 Cal.2d 74, 81.) We find that respondent had sufficient notice of problems with his legal and nonlegal staff to require closer monitoring of their work and his failure to supervise adequately was grossly negligent.

During the three-month *Bisson, et al. v. Interinsurance Exchange of the Automobile Club of Southern California* case, from December 1989 until February 1990, respondent assigned two appeals to a new associate, Thomas Szakall. In the *Carter* case (count 38), respondent was appealing the dismissal entered as a result of the failure of another of respondent's associates, Wanda Grasse, to file a third amended complaint within 30 days after a demurrer was sustained. Szakall filed the notice of appeal, but did not designate the record on appeal. Notice was apparently sent to respondent's office regarding this omission, but the filing was still not made, and the appeal was dismissed on April 23, 1990. Carter was never advised of the dismissal by respondent's office. Szakall left respondent's employ in February 1990.

Szakall was also assigned to file the opening brief due on January 30, 1990, appealing the dismissal of the *Roberts* case (count 9) (dismissal granted on October 27, 1988). Respondent had been granted a number of extensions to file this brief. Szakall assured the client by letter dated December 27, 1989, that a brief would be filed. It was not filed. As a result, the appeal was dismissed on February 5, 1990. The client was not advised of the dismissal for several months thereafter.

Szakall was admitted to practice in June 1974. In contrast to the Supreme Court's analysis in *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354 of a supervising attorney's responsibilities toward a novice attorney, respondent could expect to entrust the responsibility of the two appeals to an attorney of Szakall's overall experience without respondent's extensive supervision. Moreover, Szakall was hired by respondent just prior to the incidents at issue, so his experience with Szakall's work ethic and reliability were limited. Unlike *Bernstein v. State Bar, supra*, 50 Cal.3d at p. 231, respondent had no knowledge of any prior errors or other difficulties faced by Szakall. If Szakall's lapses were viewed as isolated instances, respondent was merely negligent. However, respondent's earlier neglect of an associate's work in the *Carter* case, and his failure in both matters to advise the clients of the errors and the loss of their appeals after he learned of them demonstrates his overall reckless disregard of the two clients' cases.

In sum, we find clear and convincing evidence in counts 4, 9, 11, and 38 of respondent's neglect of his clients' cases amounting to a reckless disregard of his duty under rule 3-110(A).

Accepting cases without sufficient time, resources, and ability to perform competently

In count 30, respondent was charged with repeatedly accepting cases or continuing representation in cases when he knew or should have known that he did not have or would not acquire as of the time of performance sufficient time, resources, and ability to perform with competence. Both former rule 6-101(B)(2) and rule 3-110(A) were cited in the notice. Respondent makes four arguments, which he also raised at the hearing level: the count does not allege that respondent failed to act competently; that the change in the competency rule in May 1989 made the issue of time or resources irrelevant to his conduct after May 1989; that failure to communicate does not indicate a lack of time to devote to his cases, and that the count does not provide adequate notice that his alleged failure to supervise employees would be encompassed in this count. The State Bar adopts the reasoning of the hearing judge that there was adequate notice to respondent of the scope and nature of the conduct addressed in the count; that the change in the rule after May 1989 is one of emphasis, not substance; and that the focus of the charge is the competent performance of respondent.

Respondent's argument that the count did not charge him with performing incompetently is meritless, as is his contention that he did not have sufficient notice from the count (and the facts of the enumerated counts incorporated therein) that allegations that he did not supervise his staff adequately would be considered in this omnibus count.

[7] The Supreme Court has addressed the issue of the connection between inadequate communication and insufficient time to perform competently. In *Garlow v. State Bar* (1988) 44 Cal.3d 689, 706, the Court recognized that an attorney who avoided client phone calls and failed to communicate to the client the status of court matters was no longer acting as a diligent counsel and as a result should have recognized that he was no longer in a position to represent the clients competently under former rule 6-110(B)(2). In *Calvert v. State Bar, supra*, 54 Cal.3d at pp. 772, 782-783, the Court found that the attorney should have known she lacked sufficient time to devote to her client's case when she told the client her case was not "emergency work" and stopped taking the client's phone calls, and her continued representation under those circumstances violated former rule 6-101(B)(2).

[8] We agree with the hearing judge that respondent has not demonstrated that the competency rule changed in substance when it was revised and adopted effective May 29, 1989. Respondent argues that under rule 3-110(B), an attorney may no longer be found to have engaged in incompetent legal practice if he or she will not have sufficient time to provide or continue competent representation. In the submission made to the California Supreme Court in December 1987 requesting approval of the Rules of Professional Conduct, the Board of Governors, through the State Bar staff, summarized the proposed changes to the rules. The then proposed rule 3-110(A) was written to continue the prohibitions on failing to act competently found in then rule 6-101(A)(2), and rule 3-110 (B) was "derived from current rule 6-101(A)(1) and (B). It is intended to define competence." (*Request that the Supreme Court of Cal. Approve Amendments to Rules of Prof. Conduct*, State Bar of Cal., Dec. 1987, p. 31 (December 1987 Request for Approval of Rule Amendments.)) The definition of "ability" was unchanged in rule 3-110(C). (*Ibid.*) Significantly, the analysis does not state that it is creating a new standard[8] or modifying the definition of competency,[9] but rather was drawing upon what was established in the old rule. We agree with the hearing judge that the concept of diligence incorporates the requirement to devote adequate time and resources in performing competently. (See *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 378.)

Cooperation with the State Bar's Investigation

[9a] The State Bar challenges the appropriateness of the distinction drawn by the hearing judge between respondent's failure to respond to investigative letters sent to him before his first meeting with deputy trial counsel on June 25, 1991, and those which were initiated after that date. Citing to our opinion in *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 644, the judge interpreted the requirement that "attorneys respond in some fashion to State Bar investigators' letters" by finding that once respondent had met with the deputy trial counsel and had indicated in that meeting his willingness to cooperate through his counsel in any and all matters raised by the State Bar, he should be accorded the benefit of the doubt in assuming cooperation with the deputy trial counsel was cooperation with the State Bar. However, the judge also rejected the notion raised by respondent that his cooperation as of June 21, 1991, excuses him from responses requested months before. The judge balanced the requirement for speedy cooperation with the expectations respondent reasonably had that recent State Bar inquiries would be included in the June meeting.

8. See, e.g., analysis of rule 3-400(B) and the then new requirement to advise clients in writing of the right to independent counsel prior to settling a malpractice action. (December 1987 Request for Approval of Rule Amendments at p. 36.)

9. See, e.g., analysis of then proposed rule 3-310(B), which noted that the proposed rule was derived from former rule 5-102(B), and was an expansion of the requirements as well. (December 1987 Request for Approval of Rule Amendments at p. 34.)

He concluded that letters which sought written replies from respondent less that six weeks before his meeting with the deputy trial counsel could be reasonably expected to constitute contemporaneous cooperation with the State Bar's inquiry.

[9b] We agree with the hearing judge's analysis, and find no basis for additional culpability findings.

Other challenges to the hearing judge's culpability findings

The State Bar raises a number of additional issues relating to culpability findings under the general heading of failure to perform and abandonment. We find that the facts as found by the hearing judge support culpability in only two of the instances, counts 10 and 46, raised by the State Bar. There is not clear and convincing evidence of disciplinary misconduct in the remaining exceptions in its brief.

Counts 10 and 46 concern willful misconduct in trial strategy which amounted to a reckless failure to perform competently. In the *Varon* case, respondent risked the dismissal of his clients' cause of action by waiting until the last minute to request a stipulation to extend the five-year limit to bring a case to trial, in which opposing counsel refused to consent. Respondent was not only reckless in not submitting and requesting opposing counsel's consent outside of the 30 days needed for notice to go to trial, but in stipulating to the prior extension that would run during the time he was scheduled for trial in the eight-month *Best Audio v. Federal Insurance Co.* case, which began in early December 1987.

In the *Finnigan* case (count 46), respondent risked his clients' case by not filing the post-trial brief requested by the trial judge. The defense had already requested in writing a month before respondent's brief was due that if respondent did not file the brief, a mistrial be declared. The trial judge did declare a mistrial for the preponderance of the case and then invited the motion for dismissal for failure to prosecute. Respondent made a conscious decision to favor the work due in preparation for trial in another matter over what was required in this case. All of respondent's clients were entitled to competent representation and his inaction in this case constituted a violation of rule 3-110.

DISCIPLINE RECOMMENDATION

The parties differ widely as to the appropriate discipline. The State Bar believes that respondent's misconduct constituted a habitual disregard of client matters and moral turpitude requiring disbarment. Respondent contends that there is less misconduct than found by the hearing judge—a position which we have rejected—less evidence in aggravation and more mitigation than was credited, and consequently, less discipline is appropriate.

Mitigation and Aggravation

Standard 1.2(b)(ii), Standards for Attorney Sanctions for Professional Misconduct (standards), provides that an aggravating circumstance includes "current misconduct found or acknowledged by the member [which] evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct." We have identified some "pattern" misconduct cases as evidencing a habitual disregard for client interests amounting to moral turpitude. (See e.g., *In the Matter of Collins* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 1, 15.) "Habitual disregard by an attorney of the interest of his or her clients combined with the failure to communicate with such clients constitute acts of moral turpitude justifying disbarment." (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.)

In this case we have found respondent culpable in 18 client matters in which there were 12 instances of failure to perform legal services competently (not including the omnibus count 30, charging incompetent practice over the same period by not devoting sufficient time and resources to his cases), 5 cases in which he did not return the client file promptly, 14 client matters in which he failed to communicate with his clients, the failure to report sanctions in one case, the failure to obey a court order in another case, and the abandonment of two clients. Moreover, respondent failed to cooperate with the State Bar's investigation of fourteen of the cases. The hearing judge, in considering far fewer violations, found two patterns of misconduct in aggravation. The failures

to cooperate with the State Bar formed one, but much of the violations in the pattern of incompetent representation he found were subsumed in the omnibus count 30. We agree with the judge that it makes little difference whether count 30 existed or not for purposes of discipline; the total picture of respondent's conduct is what controls.

[10a] A pattern of misconduct may be found even though the acts and omissions encompass a wide range of improper behavior. (*Read v. State Bar* (1991) 53 Cal.3d 394, 423.) It is significant that respondent's numerous acts of neglect extended over a long period of time, 10 years, indicating a continuous course of professional misconduct. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 595.) It continued even after respondent attempted to address his case management problems by hiring a management consultant and after the State Bar contacted him about client complaints.

[10b] None of this neglect entailed dishonesty or false statement. However, in cases of habitual disregard of client interests,"[e]ven when such neglect is grossly negligent or careless, rather than willful and dishonest, it is an act of moral turpitude and professional misconduct justifying disbarment. [Citations.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 566.)

[10c] We conclude from the facts of these 18 client matters that respondent habitually disregarded his client's interests and failed to communicate with them and, therefore, committed acts of moral turpitude.

The most troublesome aspect of this case is that respondent appeared oblivious for at least 10 years to the central causes of his problems: his immersion into a very demanding trial practice while maintaining a significant client base in which frequent deadlines occurred; his serving as sole principal of his law practice; and his failure to institute any regularized supervisory procedures adequate to deal with his caseload. These problems were manifest throughout the 10-year total span in which the misconduct in this record occurred. Respondent allowed himself to be overwhelmed by his own failure to understand that, for a long time, he had become the sole trial attorney at the same time that he was the sole principal responsible for managing all aspects of all cases in his office. Clients' cases were seriously delayed or lost because of respondent's sheer inability to discharge the duties he had undertaken. As sympathetic as we can be to respondent's plight, we can neither condone it nor allow it to continue, given the number of matters, the total breadth of violations, and the length of time involved. Three of the counts in which respondent was found culpable—the Brodowy, Carter and Smith matters—involved *multiple* mishandlings of the same client's case by respondent or by his office staff.

The other factors in aggravation while very serious appear less significant. There was demonstrable client harm in the dismissal of client causes of action in eight cases where respondent was found to have provided reckless or incompetent legal services. (Std. 1.2(b)(iv); *In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 646.) We concur with the hearing judge that there is not clear and convincing evidence of bad faith, dishonesty, or concealment. (Std. 1.2(b)(iii).) However, respondent's failure to return client files in two matters, even up to the trial dates in the cases, demonstrated an indifference toward rectification of his misconduct.

There is some evidence in mitigation in the record. Respondent does not have a prior record of discipline (std. 1.2 (e)(i)) and his many years of practice prior to the commencement of misconduct is indeed significant in mitigation as well. (*Hawes v. State Bar*, *supra*, 51 Cal.3d at p. 596.) However, we cannot conclude that there has been a lack of harm to clients *overall*, nor has his conduct been shown to be aberrational. Respondent testified that he has reduced the size of his practice dramatically, recognizing one source contributing to his incompetent practice, but we cannot agree that payment of malpractice judgments constitutes either an "objective step promptly taken spontaneously demonstrating remorse . ." (std. 1.2(e)(vii)) or "spontaneous candor and cooperation displayed to the victims of the member's misconduct . . ." (std. 1.2(e)(v)). His pro bono work is so remote in time (20 years) as to be minimal in weight, and his demonstration of good character fell short of the clear and convincing standard. (Standard 1.2(e)(vi).) We concur that the evidence in aggravation far outweighs that presented in mitigation. (Standard 1.6(b)(i).)

DISCIPLINE

This is not the first case we have reviewed in which the attorney had no prior discipline and in which intentionally dishonest acts, such as misrepresentations and misappropriation of client funds, were not the essence of the disciplinary charges. In *In the Matter of Collins*, (*Supra*) 2 Cal. State Bar Ct. Rptr. 1, we surveyed the Supreme Court decisions that presented "pattern-type" misconduct in such cases and examined the few instances where the evidence in mitigation prevailed and suspension was imposed rather than disbarment. "[W]hen the Supreme Court has deemed suspension adequate, it had 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." (*Id.* at p. 15.) We concluded in the *Collins* case that no such "dramatic misfortune" was evident and that in light of the large number of misdeeds spanning six of the nine years the attorney had been in practice, his minimal showing of rehabilitation, the fact that moral turpitude was involved in the overall neglect, his failure to remedy the harm caused, and the likelihood that he would repeat his misconduct mandated his disbarment. (*Id.* at p. 16.) *Collins* did involve several counts of misappropriation of funds which this case does not.

[11a] On the issue of degree of discipline, we acknowledge that no case which we have examined, is exactly like this one with no prior record of discipline over a lengthy practice but with such a panoply of protracted failure to communicate with clients, incompetent practice, and failure to supervise subordinate staff affecting so many different clients over so long a period of time, yet not involving dishonesty or the mishandling of client funds. In *Walker v. State Bar*, *supra*, 49 Cal.3d at p. 1117, the attorney had abandoned his entire law practice. He was disbarred. In *Billings v. State Bar* (1990) 50 Cal.3d 358, the attorney was also disbarred on findings of 15 counts of complete or partial abandonment of clients starting shortly after admission to practice law, coupled with practicing law while under suspension and a misdemeanor drunk driving conviction causing serious bodily injury to another. Our decision in *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, in which the Supreme Court imposed suspension on our recommendation, is not fairly comparable to this case as it involved far fewer, less serious violations occurring over a much shorter time period with most stemming from problems surrounding a single employee. When a later proceeding showed that Kaplan had engaged in additional misconduct, including failure to promptly deliver trust funds and engaging in conflicts of interest, we recommended disbarment. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal.State Bar Ct. Rptr. 547.)

[11b] Although respondent served many clients apparently with success and diligence over the years, still, many clients' cases were clearly delayed, endangered, lost or at great risk of loss, or prejudiced while in respondent's charge. Since attorney discipline is not punitive, but designed to protect the public, the courts, and the legal profession (see, e.g., std. 1.3; *In re Billings*, *supra*, 50 Cal.3d at pp. 365-366), we believe that the Court's expression in *Billings* is apt here: "Because [Billings] has engaged in numerous and repeated acts of misconduct over a lengthy period, we believe it is appropriate to require him to undergo the evaluation process of a reinstatement proceeding before we allow him to practice law again." (*Id.* at p. 367.)

RECOMMENDATION

For the foregoing reasons, we recommend that respondent Arthur Theodore Hindin be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice.[10] We further recommend that he be ordered to comply with the provisions of rule 955 of the

10. We have not included an order of inactive enrollment pursuant to Business and Professions Code, section 6007(c)(4) (amended eff. Jan. 1, 1997), as the hearing judge had not recommended disbarment and the statutory change re such inactive enrollment orders postdated the briefing and oral argument in this case. (See Rules Proc. State Bar, Title II, State Bar Court Proceedings, rule 305(b).)

California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code, as amended effective January 1, 1997.

I concur:
OBRIEN, P.J.

CONCURRING AND DISSENTING OPINION OF NORIAN, J.

I concur with and join in the majority's findings of fact and conclusions of law underlying the disbarment recommendation. I also concur in the results reached by the majority in affirming the hearing judge's dismissals of counts 6, 7, 17, and 29 in case number 88-O-12721 as the charges were closely interrelated or duplicative of other remaining charges.

I dissent with respect to the majority's affirmance of the hearing judge's dismissals of counts 1, 3, 8, 20, and 44 in case number 88-O-12721. Each of the five counts involved separate client matters. Even though the Office of Chief Trial Counsel, representing the State Bar (OCTC), moved to dismiss these counts in the interest of justice, it did not present any evidence or specific reason showing how the dismissal would further justice. Instead, OCTC pointed out to the lower court that there could be any number of reasons why it was seeking the dismissal of the counts. The court below dismissed the counts "in the interest of justice" without stating the specific reason or specific evidence that it weighed in doing so.

The parties, the lower court, and the majority have focused on whether the dismissals should be with or without prejudice, an issue I do not reach as I conclude that the counts should not have been dismissed in the first place. There is an important public interest at stake in State Bar disciplinary matters. Disciplinary charges that have been filed after OCTC has made a determination, based on sufficient proof, that reasonable cause exists for their prosecution, should not be dismissed unless the moving party demonstrates that the dismissal furthers the public interest. As OCTC presented no evidence or specific reason establishing that the dismissal of these counts furthered the public interest, the counts should not have been dismissed by the court below as a matter of law.

State Bar Court disciplinary proceedings are "neither civil nor criminal." *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447; see also *In re Ruffalo* (1968) 390 U.S. 544, 550-551 [attorney disciplinary proceedings are adversarial proceedings of quasi-criminal nature.) Nevertheless, we may look to these areas of the law for guidance.

The discretion of the courts of this state to dismiss a criminal charge in the furtherance of justice, whether on the court's or the prosecution's motion, is limited. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 opn. mod. on den. rehg. 13 Cal.4th 1016a.) "[A]ppellate courts have shown considerable opposition to the granting of dismissals [in the furtherance of justice] in instances where the People are thereby prevented from prosecuting defendants for offenses of which there is probable cause to believe they are guilty as charged. Courts have recognized that society. . . has a legitimate interest in 'the fair prosecution of crimes properly alleged.' [Citation.]" *People v. Orin* (1975) 13 Cal.3d 937, 946-947.)

The civil law of this state also limits a plaintiff's right to dismiss certain matters. "[T]he courts have recognized certain other necessary limitations on the supposed absolute right [of a plaintiff] to dismiss. The underlying principle is that, in some actions or proceedings, the plaintiff or petitioner is not the sole party in interest on his side and, though he has instituted the proceeding, is not entitled to terminate it." (6 Witkin, Cal. Procedure (3rd ed. 1985) Proceeding without Trial, § 71, p. 381.) The plaintiff's right to dismiss is limited in cases involving such issues as probating a will, child custody and guardianship, class actions, and share holder derivative suits. (*Ibid.*) As in the criminal area, there is a

legitimate public interest at stake in these cases and that interest limits the plaintiff's right to dismiss. (Cf. *Ford v. Superior Court* (1959) 171 Cal.App.2d 228, 230-231; *Estate of Raymond* (1940) 38 Cal.App.2d 305, 308; *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579.)

In attorney discipline matters, the principle concern is always the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3, Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct.) As in both criminal and certain civil matters, the State Bar is not the sole party in interest in State Bar discipline cases. The public has a legitimate interest in the fair prosecution of State Bar Court matters. Consideration of this interest is required in order for the discipline system to achieve its stated goals.[11]

Little protection is provided the public when properly alleged charges are dismissed on motions that do not establish that the dismissal will further the public interest in the fair prosecution of the matter. The reasons offered by OCTC in support of its motion to dismiss the counts do not establish this.

CONCLUSION

The hearing court's dismissals of counts 1, 3, 8, 20, and 44 in case number 88-O-12721 should be reversed. Those counts should be reinstated, severed from the present proceeding, and remanded to the hearing department. OCTC would then have the choice to prosecute the reinstated counts, file an appropriately supported motion to dismiss the counts, or seek an abatement pending Supreme Court action on our disbarment recommendation in the present proceeding.

My crucial concern is that the majority's holding on this issue may be interpreted to provide for the dismissal of properly filed charges without a full and adequate consideration of the public interest at stake. The court abdicates its judicial function to properly dispose of the charges brought before it when this occurs.

NORIAN, J.

11. The majority acknowledges that it is in the public interest that disciplinary charges be disposed of on their merits. (See, i.e., Maj. Opn., *Ante*, at p. 53.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Inderjeet Singh Aulakh

A Member of the State Bar

No. 92-O-12971

Filed June 30, 1997

SUMMARY

In a single client matter, respondent failed to perform legal services competently, improperly withdrew from employment while his client was incarcerated, failed to refund unearned fees, and failed to render an accounting to the client. The hearing judge recommended that he be suspended from the practice of law for a period of one year, that execution of the suspension be stayed, and that he be placed on probation for a period of three years, on conditions, including restitution and 45 days' actual suspension. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent sought summary review of five issues, which did not involve the hearing judge's factual findings, culpability conclusions, or discipline recommendation, seeking dismissal of the proceeding. The State Bar disputed each of the issues raised by respondent, agreed with the recommended actual suspension and in addition, urged that the hearing judge's restitution requirement be modified. The review department found no merit to any of the issues raised by either party.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Dal Cerro

For Respondent: Inderjeet Singh Aulakh

HEADNOTES

[1 a, b] **101 Procedure—Jurisdiction**
135 Procedure—Rules of Procedure
135.10 Procedure—Rules of Procedure—Division I, General Provisions
139 Procedure—Miscellaneous
169 Standard of Proof or Review—Miscellaneous

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.

The complaining clients' settlement of their civil matter against respondent and the clients' release of all claims against him does not preclude the State Bar from proceeding with the disciplinary matter. A disciplinary proceeding is not a controversy between two individuals, the complainant and the accused attorney, but is an adverse proceeding against the accused attorney and may be instituted and prosecuted upon the complaint of any person knowing the facts upon which the proceeding is based. The complaining person or client is not a party to the disciplinary proceeding, and need not appear and testify at trial. Thus, the disciplinary case was not a right, claim, or cause of action that accrued to the complaining clients; and therefore it was not a claim that they could release or otherwise compromise.

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

Regardless of whether a criminal court erred in concluding that respondent did properly perfect an appeal, respondent's failure to perform services competently occurred as a result of his withdrawing and leaving his client in jail without counsel following the criminal court's ruling, whether that ruling was correct or not. Respondent had an ethical obligation to his client to perform competently regardless of the criminal court's ruling, especially in view of the client's incarceration and later release on a writ of habeas corpus.

[3 a-c] **130 Procedure—Procedure on Review**
167 Abuse of Discretion
169 Standard of Proof or Review—Miscellaneous

On review of a discovery order on appeal of a hearing judge's decision that fully disposes of an entire proceeding, not only must an abuse of discretion be shown, but also the erroneous ruling must be shown to have been so prejudicial that it constituted a miscarriage of justice. No abuse of discretion was found where respondent presented no competent evidence that the place of the depositions he sought to compel was within the 150-mile range; and no showing of a miscarriage of justice was made where the apparent reason for seeking the depositions was to show that the complaining clients had repudiated their State Bar complaint, a fact not relevant to the disciplinary charges.

[4] **171 Discipline—Restitution**

The review department rejected the argument that respondent should be required to make restitution before being relieved of his actual suspension because he intended to leave the United States. If ordered by the Supreme Court, respondent will be required to make restitution regardless of his place of residence. If he fails to comply with the Supreme Court order, his failure will result in further disciplinary action, again regardless of his place of residence. In short, respondent's place of residence was not relevant to the restitution requirement.

[5] **135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers**
165 Adequacy of Hearing Decision
169 Standard of Proof or Review—Miscellaneous

In summary review proceedings, the full record was not before the review department therefore it could not consider any issues other than those raised by the parties, absent the conversion of the matter into a plenary review proceeding. Accordingly, where the review department did not

modify the hearing judge's decision as a result of the summary review proceeding, the hearing judge's decision remained the final decision of the State Bar Court.

Additional Analysis

Culpability

Found

270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]

OPINION

OBRIEN, P.J.:

Respondent Inderjeet Singh Aulakh seeks summary review of certain legal issues in this proceeding. The hearing judge recommended that respondent be suspended from the practice of law for a period of one year, that execution of the suspension be stayed, and that he be placed on probation for a period of three years, on conditions, including restitution and 45 days' actual suspension. In a single client matter, respondent failed to perform legal services competently, improperly withdrew from employment while his client was incarcerated, failed to refund unearned fees, and failed to render an accounting to the client.

Respondent seeks summary review of five issues, which do not involve the hearing judge's factual findings, culpability conclusions, or discipline recommendation. In fact, at the conclusion of the trial both parties agreed with the culpability conclusions. Although not entirely clear from respondent's opening memorandum on review, he is apparently seeking dismissal of this matter on the ground that the hearing judge's decision is "erroneous" because of the issues he raises.

Notice of oral argument was given respondent at his address of record. (Rule 61(b), Rules Proc. of State Bar, title II, State Bar Court Proceedings; Bus. & Prof. Code, § 6002.1, subd. (a)(1).) That notice was returned by postal authorities as undeliverable. Three days before the hearing, the clerk received a handwritten note from respondent indicating his desire to appear at oral argument, and giving a different return address. Notice was immediately reserved, indicating respondent could appear telephonically. Respondent appeared neither in person nor telephonically at the time of oral argument.

The State Bar agrees with respondent that this matter is appropriate for summary review, disputes each of the issues raised by respondent, agrees with the recommended actual suspension and in addition, urges that we modify the hearing judge's decision to require that respondent make restitution within 30 days of the effective date of the Supreme Court order and remain suspended until restitution is made. The State Bar does not contest the amount of the restitution, the hearing judge's factual findings or culpability conclusions, or otherwise contest the discipline recommendation.

By prior order, we provisionally found that the requirements for summary review were met, and after further review we conclude that this matter is appropriate for summary review. Based upon our independent review of the limited record before us, we find no merit to any of the issues that respondent raises on review. In addition, we find no merit to the State Bar's argument in favor of modifying the hearing judge's recommendation to require respondent to make restitution before being relieved of his actual suspension.

STATEMENT OF THE CASE

Floyd and Dawn Patterson each were convicted of a misdemeanor. A notice of appeal was timely filed. Mr. Patterson was sentenced to jail, but was allowed to remain free on bail pending resolution of the appeal. The Pattersons hired respondent to appeal their convictions. Respondent promptly filed a notice that he represented Mr. Patterson in the appeal, and he arranged for the preparation of a trial transcript. Because respondent did not file a proposed statement on appeal, the municipal court ruled that the appeal was in default and that there was accordingly no valid appeal pending. The municipal court denied respondent's request for an extension of time and immediately jailed Mr. Patterson. Respondent then decided that he would no longer represent the Pattersons. Mr. Patterson found a successor counsel, who obtained Patterson's release from jail, following 10 days incarceration, by filing a habeas corpus petition.

After a three-day trial, the hearing judge concluded that respondent recklessly failed to provide competent legal services in violation of rule 3-110(A) of the Rules of Professional Conduct,[1] improperly

1. Unless otherwise indicated, all references to rules are to the Rules of Professional Conduct of the State Bar of California.

withdrew from employment in violation of rule 3-700(A)(2), failed to refund unearned fees in violation of rule 3-700(D)(2), and failed to render an accounting in violation of rule 4-100(B)(3). The parties accepted these conclusions and filed closing briefs dealing only with discipline.

In mitigation, the hearing judge gave great weight to respondent's 20 years of discipline-free practice preceding his misconduct. In aggravation, the hearing judge found that respondent significantly harmed his client by leaving Mr. Patterson stranded in jail for 10 days and that respondent was very uncooperative during the disciplinary proceeding. The hearing judge recommended a one-year stayed suspension and a three-year probation, conditioned on actual suspension for forty-five days (rather than thirty days, as sought by the State Bar) and on restitution of $3,000 plus interest from October 1991. Because of respondent's poor financial condition, the hearing judge recommended that respondent be required to make monthly restitution payments of at least $100 and be allowed almost the full probationary period to complete restitution.

DISCUSSION

Respondent raises five issues in this summary review proceeding: (1) the Pattersons are bound by their settlement and release with respondent; (2) the 28-month period between the Pattersons' filing of a complaint and the State Bar's filing of a notice to show cause constituted laches; (3) the hearing judge misunderstood the requirements of the criminal appeal; (4) the hearing judge improperly refused to order the depositions of the Pattersons; and (5) respondent made an adequate threshold showing of selective prosecution and racial discrimination by the State Bar in disciplinary proceedings and was incorrectly prevented from pursuing discovery.

As indicated above, the State Bar disputes all respondent's claims and seeks a change in the restitution provision of the disciplinary recommendation. The State Bar argues that a notice filed by respondent in the review department indicating that he would be out of the United States for a period of time supports its requests that respondent be required to make restitution within 30 days of the Supreme Court's order in this proceeding and that he remain actually suspended until he completes restitution.

[1a] In support of his first issue, respondent argues that he and the complaining clients settled their civil matter and the clients signed a release of all claims against him. Respondent asserts that the release precludes the State Bar from proceeding with the disciplinary matter. The State Bar aptly points out that the rules of procedure clearly provide that a disciplinary matter can proceed regardless of any civil settlement reached with the complaining client. Indeed, the State Bar can prosecute a matter even if the complaining client withdraws the State Bar complaint. (See former rule 507, Trans Rules Proc. of State Bar; current rule 2408, Rules Proc. of State Bar, title III, General Provisions; Bus. & Prof. Code, § 6044.)

[1b] Furthermore, we note that the reasoning behind respondent's argument is fundamentally flawed. "A disciplinary proceeding . . . is not a controversy between two individuals, the complainant and the accused attorney, but is an adverse proceeding against the accused attorney and may be instituted and prosecuted upon the complaint of any person knowing the facts upon which the proceeding is based." (*Tapley* v. *State Bar* (1937) 8 Cal.2d 167, 172-173.) The complaining person or client is not a party to the disciplinary proceeding (rule 2.84, Rules Proc. of State Bar, title II, State Bar Court Proceedings), and need not appear and testify at trial (*McGrath* v. *State Bar* (1943) 21 Cal.2d 737, 740). Moreover, respondent's argument is against clear public policy that civil settlement not affect the State Bar's right to investigate and prosecute disciplinary matters. (Bus. & Prof. Code, § 6090.5.) In fact, the existence of such an agreement may subject one to discipline. (*Id*; rule 1-500(B).) Thus, the disciplinary case was not a right, claim, or cause of action that accrued to the complaining clients; and therefore it was not a claim that they could release or otherwise compromise.

We need not detail the arguments with regard to respondent's second issue. The mere lapse of time in the filing of a disciplinary complaint is no defense unless a showing of specific prejudice is made. (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 449.) Here, no such showing was made.

[2] In the third issue he raises, respondent essentially asserts that the criminal court erred in concluding that a default in the appeal had occurred. However, the hearing judge found respondent culpable of violating rule 3-110(A) based on his failure to perform competently after the client was jailed, not his failure to properly perfect the appeal. Respondent had an ethical obligation to his client to perform competently regardless of the criminal court's ruling, especially in view of the client's incarceration and later release on a writ of habeas corpus. Respondent's failure to perform was in withdrawing and leaving Mr. Patterson in jail without counsel following the municipal court's ruling, whether that ruling was correct or not. We find no merit to respondent's argument.

[3a] Respondent's fourth issue is also unpersuasive. He asserts that he was denied due process and a fair trial because he was not permitted to depose the Pattersons. The hearing judge denied respondent's motion to initiate contempt proceedings against the Pattersons after they failed to comply with a deposition subpoena by not appearing at their depositions. (See Bus. & Prof. Code, § 6051.) The hearing judge ruled that the Pattersons resided more than 150 miles from the scheduled place of the depositions. (See Code of Civ. Proc., § 2025, subd. (e); Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 180.) In effect, the hearing judge refused to compel the Pattersons' attendance at their depositions because respondent did not properly subpoena them.

[3b] Generally, the standard of review we apply to procedural rulings is abuse of discretion. (*In the Matter of Respondent L* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 454, 461, and cases there cited.) However, we have not articulated the standard to apply to the review of a discovery order on appeal of a hearing judge's decision that fully disposes of an entire proceeding. The closest civil or criminal rule provides guidance. (*In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 124, and cases there cited.) On appeal of a discovery order following a final judgment in civil cases, not only must an abuse of discretion be shown (*Schaefer* v. *Manufacturers Bank* (1980) 104 Cal.App.3d 70, 74), but also the erroneous ruling must be shown to have been so prejudicial that it constituted a miscarriage of justice (*Jaffe* v. *Alberston Co.* (1966) 243 Cal.App.2d 592, 617-618). We apply the same standard here. Respondent presented no competent evidence that the place of the depositions was within the 150-mile range. Accordingly, we find no abuse of discretion.

[3c] In any event, even assuming for the sake of argument that the hearing judge abused his discretion, respondent has not shown that the error resulted in a miscarriage of justice. Although respondent's brief on review is unclear as to how he was denied a fair trial, his apparent reason for seeking the Pattersons' depositions was to show that they had "repudiated" their State Bar complaint. As indicated above, this fact is not relevant to the disciplinary charges. In addition, inquiry into this area does not appear reasonably calculated to lead to the discovery of admissible evidence.

Respondent's fifth and final issue involves his claim that the hearing judge denied him discovery on the issue of selective prosecution. Respondent's motion to compel the State Bar to answer certain interrogatories regarding this subject was denied by the hearing judge. The factual support for this motion consisted of respondent's undocumented assertions regarding his attempts to help three people file complaints against attorneys with the State Bar and his again undocumented references to articles that appeared in the Daily Journal, a legal newspaper. The hearing judge ruled that respondent's "anecdotal presentation" did not establish a reasonable basis for a claim of selective prosecution, whether based on racial discrimination or otherwise.

As we have previously noted, it is by no means clear that the defense of selective prosecution even applies in State Bar disciplinary proceedings. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 107-108.) Nevertheless, assuming for the sake of argument that it does, and applying the above standard of review for discovery orders, we find no abuse of discretion by the hearing judge. As did the hearing judge, we conclude that respondent's "presentation is devoid of any persuasive factual content." (See also *In the Matter of Riley*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 108 [rejecting a similar factual showing in support of a selective prosecution

claim]; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 687-688 [rejecting "highly generalized" assertions in support of a selective prosecution claim].)

[4] Finally, we turn to the State Bar's argument that we should modify the recommended restitution requirement. The hearing judge based his recommended restitution order on respondent's "poor financial condition." The State Bar does not dispute this finding on review. Rather, it argues that respondent should be required to make restitution before being relieved of his actual suspension "in light of respondent's apparent intent to leave the United States . . . ." We find this argument unpersuasive. If ordered by the Supreme Court, respondent will be required to make restitution regardless of his place of residence. If he fails to comply with the Supreme Court order, his failure will result in further disciplinary action, again regardless of his place of residence. In short, respondent's place of residence is not relevant to the restitution requirement.

CONCLUSION

For the foregoing reasons, we find no merit to the arguments of the parties. **[5]** Accordingly, we do not modify the hearing judge's decision as a result of this summary review proceeding. In summary review, we do not have the full record before us and therefore cannot and do not consider any issues other than those raised by the parties, absent our conversion of this matter into a plenary review proceeding, which we decline to do. The hearing judge's decision therefore remains the final decision of the State Bar Court. (See rule 220, Rules Proc. of State Bar, title II, State Bar Court Proceedings.)

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Jeffrey Philip Meyer

A Member of the State Bar

No. 95-H-11303

Filed July 1, 1997

SUMMARY

In this reproval violation proceeding, a hearing judge found that respondent violated two of the conditions attached to a private reproval previously imposed on him by the State Bar Court. The hearing judge recommended that respondent by placed on one years' stayed suspension and two years' probation on conditions including seventy-five day's actual suspension. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar sought review contending (1) that the hearing judge's recommendation of 75 days' actual suspension was insufficient, (2) that the hearing judge erred in not recommending that respondent be required to notify his clients, opposing counsel, and the courts of his 75 days' actual suspension in accordance with rule 955 of the California Rules of Court, and (3) that the hearing judge erred in recommending that respondent file probation reports intermittently during his probation instead of recommending that respondent file his probation reports on a quarterly basis. In addition, the State Bar sought an additional finding in aggravation.

The review department rejected the State Bar's request for an additional finding in aggravation, but agreed with its contentions that 75 days' actual suspension was insufficient and that the hearing judge should have recommended that respondent file probation reports on a quarterly basis. The review department increased the recommended period of actual suspension from 75 days to 90 days and recommended that respondent be ordered to give notice of his 90-day period of actual suspension in accordance with rule 955. In addition, the review department increased the recommended period of stayed suspension from one year to two years and the recommended period of probation from two years to three years.

COUNSEL FOR PARTIES

For State Bar: Kristin L. Steinberg

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] 251.10 **Rule 1-110 [former 9-101]**

Attorney violated duty to comply with conditions attached to reproval previously imposed on him by State Bar Court by failing to file two probation reports and not providing proof of completion of six hours of continuing legal education.

[2] 591 **Aggravation—Indifference—Found**

Where respondent violated conditions attached to reproval by failing to file two quarterly probation reports and provide proof of completion of six hours of continuing legal education, respondent's failure to rectify those violations by belatedly filing the reports and providing the proof of completion once he learned a reproval violation proceeding was pending against him was an aggravating circumstances.

[3 a-c] 611 **Aggravation—Lack of Candor—Bar—Found**
691 **Aggravation—Other—Found**

Respondent's failure to file pre-trial statement and appear at various State Bar Court hearings were serious aggravating circumstances because they showed respondent comprehended neither the seriousness of the charges nor his duty to participate in disciplinary proceedings.

[4] 615 **Aggravation—Lack of Candor—Bar—Declined to Find**

An attorney's failure to appear at a disciplinary hearing of which he was not given notice is not an aggravating circumstance.

[5] 611 **Aggravation—Lack of Candor—Bar—Found**
691 **Aggravation—Other—Found**

Respondent's failure to appear at disciplinary trial in accordance with a notice to appear in lieu of subpoena served on him by State Bar was a particularly aggravating circumstance because it was the equivalent of disobeying a subpoena to appear at trial as the service of a notice to appear on a party has the same effect as the service of a subpoena.

[6] 615 **Aggravation—Lack of Candor—Bar—Declined to Find**

Respondent's failure to appear at and participate in a State Bar Court status conference noticed and held five days before respondent's answer to the notice of disciplinary charges was due or filed was not considered an aggravating circumstance.

[7 a-d] 806.59 **Standards—Disbarment After Two Priors**

Notwithstanding the standard providing for disbarment when a respondent has two prior records of discipline unless there is compelling mitigation, disbarment was not recommended even though respondent had two prior records because the nature and extent of those prior records lacked sufficient severity to warrant disbarment.

[8] **172.19 Discipline—Probation—Other Issues**
179 Discipline Conditions—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous

Reproval conditions attached to respondent's two prior reprovals requiring him to file quarterly probation reports were important steps towards respondent's rehabilitation and important means of protecting the public because they permitted the State Bar to monitor respondent's compliance with ethical standards.

[9 a, b] **172.19 Discipline—Probation—Other Issues**
179 Discipline Conditions—Miscellaneous
1093 Substantive Issues re Discipline—Inadequacy
1099 Substantive Issues re Discipline—Miscellaneous

In respondent's second disciplinary proceeding for his failure to comply with the quarterly reporting requirements imposed on him under two prior reprovals, it was inappropriate to include, in the discipline recommendation, a reporting condition with a lower frequency of reporting than that previously imposed on respondent, which he had been unable or unwilling to comply. Absent extraordinary and enunciated circumstances, the reporting condition should have at least required that respondent demonstrate that he can now comply with the reporting requirements previously imposed on him under his two reprovals by imposing the same reporting requirements on him prospectively. Recommending a lower reporting requirement would "reward" respondent for his noncompliance.

Additional Analysis

Culpability
Found
251.11 Rule 1-110 (former 9-101)
Aggravation
Found
511 Prior Record
521 Multiple Acts
535.10 Pattern
591 Indifference
Declined to Find
535.20 Pattern
535.90 Pattern
Standards
891 Violation of Reproval—Suspension
Discipline
1013.08 Stayed Suspension—2 Years
1015.03 Actual Suspension—3 Months
1017.09 Probation—3 Years
Probation Conditions
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1029 Other Probation Conditions

OPINION

NORIAN, J.:

The State Bar, through its Office of the Chief Trial Counsel (OCTC), seeks review of a hearing judge's decision recommending that respondent Jeffrey Philip Meyer be suspended from the practice of law for one year, that execution of the one-year suspension be stayed, and that he be placed on probation for two years subject to various conditions, including a 75-day period of actual suspension. This proceeding (*Meyer III*) is respondent's third disciplinary proceeding. Here the hearing judge's recommendation is based on his determination that respondent violated the conditions attached to a private reproval that was imposed on respondent in October 1993 by: (1) filing one probation report late; (2) failing to file two other probation reports; and (3) by not certifying that he had completed six hours of continuing legal education (CLE).

OCTC raises three points of error and seeks an additional finding in aggravation. First, OCTC contends that the hearing judge's recommendations of a one-year stayed suspension and a 75-day period of actual suspension are inadequate. Second, OCTC contends that the hearing judge erred: (1) in not recommending that respondent be required to notify, in accordance with rule 955 of the California Rules of Court (rule 955), his clients, opposing counsel, and the courts of his 75-day actual suspension; and (2) in not recommending that respondent file probation reports on a quarterly basis.

After independently reviewing the record (Rules Proc. of State Bar, title II, State Bar Court Proceedings [Rules Proc. for State Bar Court Proceedings], rule 305(a)), we reject OCTC's request for an additional finding in aggravation and recommend that respondent be placed on two year's stayed suspension, three years' probation with conditions, and an actual suspension of 90 days. In addition, we recommend that respondent be required to file probation reports on a quarterly basis instead of the intermittent basis recommended by the hearing judge and to take a professional responsibility examination. We also recommend that respondent by ordered to comply with rule 955. Because of our rule 955 recommendation, we need not address OCTC's arguments concerning that rule.

I. RESPONDENT'S DEFAULT

Respondent filed an answer to the notice of disciplinary charges (the notice). In addition, he participated in a number of court conferences in this matter; however, he failed to appear or participate at others.

OCTC properly served a notice to appear at trial on respondent, but he did not appear at the trial when it began on February 9, 1996. Thus, the hearing judge ordered the Clerk to enter respondent's post-answer default. (Rules Proc. for State Bar Court Proceedings, rule 201(b).) As a result of the entry of respondent's default, the factual allegations recited in the notice are deemed admitted. (Rules Proc. for State Bar Court Proceedings, rule 200(d)(1)(A).)

II. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

On October 5, 1981, respondent was admitted to the practice of law in this state and has been a member of the State Bar since that time.

OCTC does not challenge any of the hearing judge's findings of fact or conclusions of law with respect to respondent's culpability. Upon our independent review of the record, we adopt the hearing judge's findings and conclusions regarding culpability as summarized below.

A. October 1993 Private Reproval

On October 27, 1993, respondent was privately reproved in State Bar Court case number 92-H-16870 (*Meyer II*). (Bus. & Prof. Code, §§ 6077, 6078; Cal. Rules of Court, rule 956; former Transitional Rules of Procedure of the State Bar, rules 615, 616 [now Rules Proc. for State Bar Court Proceedings, rules 270, 271].) *Meyer II* was respondent's second private reproval and was imposed in accordance with a stipulation of facts and disposition entered into by respondent and OCTC. The stipulation provided respondent with actual knowledge of each of the conditions attached to his second reproval.

Under the conditions attached to the reproval in *Meyer II*, respondent was placed on probation for two years subject to conditions that required him to: (1) file probation reports on a quarterly basis throughout the term of his probation; and (2) complete six hours of CLE and provide proof of his completion of those six hours to OCTC's probation unit within one year after his reproval.

B. Failure to Comply with Conditions Attached to Reproval

Respondent timely filed his first three probation reports, but filed his fourth report one month late. Respondent did not timely file his fifth and sixth reports, which were due no later than January 10, 1995, and April 10, 1995, respectively. Nor did respondent timely provide the probation unit with proof of completion of six hours of CLE, which proof was due no later than October 27, 1994.

In April 1995 OCTC filed a notice of disciplinary charges against respondent alleging that he violated the terms of his reproval in *Meyer II* by: (1) not timely filing his fifth and sixth probation reports; and (2) not timely providing the probation department with proof that he completed 6 hours of CLE. As the hearing judge found, the record establishes by clear and convincing evidence that respondent did not timely file his fifth and sixth reports[1] or timely provide proof of CLE completion.

[1] Attorneys have a duty, under rule 1-110 of the Rules of Professional Conduct of the State Bar, to comply with the conditions attached to any private or public reproval imposed on them by the State Bar Court. Respondent willfully violated that duty with respect to the conditions attached to his reproval in *Meyer II* by: (1) not timely filing his fifth and sixth probation reports; and (2) not timely providing proof of his completion of six hours of CLE.

III. MITIGATING AND AGGRAVATING CIRCUMSTANCES

As the hearing judge concluded, there is no evidence of any mitigating circumstance. Other than requesting an additional finding in aggravation (which we address below), OCTC does not contest the hearing judge's determinations of aggravating circumstances. Except as otherwise noted, we adopt the hearing judge's determination of aggravating circumstances, which we summarize as follows.

A. Prior Records

Respondent has two prior records of discipline. (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(f); Rules Proc. for State Bar Court Proceedings, rule 216.) The nature and extent of each of these prior records is an aggravating circumstance. (Std. 1.2(b)(i).)

1. Meyer I

Respondent's first prior record of discipline (*Meyer I*) was a private reproval with conditions imposed on him on December 19, 1991, in State Bar Court case number 89-O-16456. *Meyer I* (together with the conditions attached to it[2]) was imposed in accordance with a stipulation of facts and disposition entered into by respondent and OCTC.

The misconduct underlying *Meyer I* occurred in 1989 and involved a one-client matter. In that client matter, respondent: (1) willfully violated Business and Professions Code section 6068, subdivision (m), by repeatedly failing to respond to the client's reasonable status inquiries and by failing to inform the client of significant developments in his case; and (2) willfully violated both rule 2-111(A)(2) of the former Rules of Professional Conduct of the

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1. The record also establishes that, as of February 7, 1996, respondent had not filed his seventh, eighth, and ninth (final) probation reports. However, those failures are not considered in the present default proceeding because they were not charged in this matter. (Cf. *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 217-218.)

2. The conditions attached to respondent's first reproval included: (1) a one-year period of probation in which respondent was required to file quarterly probation reports; and (2) completing the State Bar's Ethics School.

State Bar (effective January 1, 1975, to May 26, 1989) and rule 3-700(D)(1) of the former Rules of Professional Conduct of the State Bar (effective May 27, 1989, to September 13, 1992) by failing to forward the client's file to the client's new counsel in accordance with the client's instructions to do so.

2. *Meyer II*

Respondent's second prior record of discipline was *Meyer II*. It is the reproval in *Meyer II* that gave rise to the conditions that we now find have been violated in the present proceeding. As noted above, respondent's second reproval was imposed in October 1993 in accordance with a stipulation between him and OCTC.

In *Meyer II* respondent admitted and stipulated to willfully violating rule 9-101[3] of the former Rules of Professional Conduct of the State Bar (effective January 1, 1975, to May 26, 1989) by not complying with the conditions attached to his reproval in *Meyer I*. Respondent admitted violating the conditions attached to his first reproval by: (1) not filing his second probation report; (2) filing his third probation report 12 days late; and (3) not timely taking and completing the State Bar's Ethics School.

B. Multiple Acts

Respondent's misconduct in the present proceeding, *Meyer III*, involves three acts of wrongdoing: he did not timely file his fifth and sixth reports or timely provide proof of completion of six hours of CLE. Such multiple acts of wrongdoing are an aggravating circumstance. (Std. 1.2(b)(ii).)

C. Indifference Towards Rectification

The record establishes that, as of February 7, 1996, which was two days before the trial in this matter, respondent still had not filed his fifth and sixth probation reports or provided proof of his CLE completion.[4]

[2] Respondent's culpability in this proceeding is based on his failure to file his fifth and sixth probation reports and to provide proof of his completion of six hours of CLE. Therefore, respondent's failure to rectify his misconduct by belatedly filing those reports and providing the required proof once he was aware of this proceeding not only demonstrates, but also establishes his indifference towards rectification. That indifference is an aggravating circumstance. (Std. 1.2(b)(v).)

D. Failure to Cooperate

[3a] The hearing judge concluded that respondent's failures to cooperate and participate in this proceeding by not filing a pre-trial statement and by not appearing at the May 4, 1995, status conference; the December 21, 1995, status conference; the January 26, 1996, pre-trial conference; and the February 9, 1996, trial are aggravating circumstances. We agree that respondent's failure to file a pre-trial statement in accordance with rule 211 of the Rules of Procedure for State Bar Court Proceedings is an aggravating circumstance. (Std. 1.2(b)(vi) [failure to cooperate].)

[3b] Ordinarily, without a valid excuse or good cause, a respondent's failure to file a pre-trial statement or to appear and participate in a State Bar Court hearing (e.g., status conference, pre-trial conference, trial, etc.) of which he was given notice is a serious aggravating circumstance. Failing to appear and participate in such an instance shows that the respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (§ 6068, subd. (i); std. 1.2(b)(vi); *Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) **[4]** However, an attorney's failure to appear at a hearing of which he was not given notice is not an aggravating circumstance. (*Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, 1080; see also Rules Proc. for State Bar Court Proceedings, rules 200(d)(1)(C) [after entry of default, respondent entitled only to notice of the State Bar Court's decision and any request for review], 201(d).)

3. Former rule 9-101 is now rule 1-110 of the Rules of Professional Conduct of the State Bar.

4. At oral argument on May 22, 1997, OCTC represented that, as of that date, respondent still had not provided proof of CLE completion.

[3c] Respondent was given notice of each of the four hearings listed above. Accordingly, we agree with the hearing judge that respondent's failures to attend the later three hearings listed above are serious aggravating circumstances. [5] This is particularly true with respect to the February 9, 1996, trial because, in addition to being given notice of the trial, OCTC served on respondent a notice to appear in lieu of subpoena in accordance with Code of Civil Procedure section 1987. (Rules Proc. for State Bar Court Proceedings, rules 152, 210.) The service of a notice to appear on a party to a proceeding has the same effect as the service of a subpoena on a witness to appear before the court. (Code Civ. Proc., § 1987, subd. (b).) Thus, respondent, in effect, disobeyed a subpoena to appear before the State Bar Court.

[6] We disagree, however, that respondent's failure to appear and participate in the former hearing (i.e., the May 4, 1995, status conference) is an aggravating circumstance. OCTC served a copy of the notice of disciplinary charges in this proceeding on respondent by mail on April 13, 1995. Accordingly, respondent's answer was due no later than May 8, 1995, five days after the hearing. (Rules Proc. for State Bar Court Proceedings, rules 63(b), 102(a).) Thus, we reject the conclusion that respondent's failure to appear at the status conference that was scheduled, noticed, and held before respondent's answer was due or filed is an aggravating circumstance.

IV. REQUEST FOR ADDITIONAL FINDING

OCTC contends that respondent's current misconduct "demonstrates a pattern of misconduct under standard 1.2(b)(ii) when viewed in context with the prior misconduct and [r]espondent's behavior in this proceeding prior to the entry of his default." However, OCTC does not cite any authority to support its contention. Under Supreme Court precedent, "only the most serious instances of repeated misconduct over a prolonged period of time [can] be characterized as demonstrating a pattern of wrongdoing." (*Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14; see also *In the Matter of Rose*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 204.)

First, we see no pattern in similarity of respondent's past and current misconduct. *Meyer I* involved misconduct with respect to a client. *Meyer II* involved his failure to comply with the conditions attached to the private reproval imposed on him in his first prior record.

Second, even though we conclude that respondent's misconduct in the present proceeding is similar in nature to the misconduct involved in *Meyer II*, the present misconduct does not meet "the most serious instances of repeated misconduct" requirement for a pattern of misconduct under standard 1.2(b)(ii). This conclusion is consistent with our recent opinion in *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 529-530, in which we held that the respondent's six separate probation violations evidenced multiple acts of wrongdoing (not a pattern of misconduct) even though the respondent had a prior record of similar probation violations. Accordingly, we reject OCTC's request for an additional finding in aggravation.

V. POINTS OF ERROR

A. First Point of Error - Inadequate Discipline

In its first point of error, OCTC contends that the hearing judge's stayed and actual suspension recommendations are both inadequate. We agree. In addition, our independent review of the hearing judge's discipline recommendation (*In re Morse* (1995) 11 Cal.4th 184, 207; Rules Proc. for State Bar Court Proceedings, rule 305) convinces us that his recommendation of only a two-year period of probation is also inadequate.

To support its contention that the hearing judge's discipline recommendation is inadequate, OCTC cites to and discusses a number of disciplinary probation violation cases, including *Potack* v. *State Bar* (1991) 54 Cal.3d 132 and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 (recommended discipline adopted by Supreme Court). Those cases, however, are distinguishable on the basis of the aggravating circumstances. In each of those cases, the attorney had at least one prior record of discipline involving suspension. Respondent's prior records of discipline involve only reprovals. Accordingly, we do not consider those cases applicable in the present pro-

ceeding. We begin our analysis by looking to the standards; standards 1.7(b) and 2.9.

1. Standard 1.7(b)

[7a] Standard 1.7(b) provides that, if a respondent has two prior records of discipline, the discipline in the current proceeding "shall be disbarment unless the most compelling mitigating circumstances clearly predominate." However, the standards are guidelines that are not to be followed in talismanic fashion. (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221.)

[7b] We have previously held that standard 1.7(b) is to be applied with due regard to the nature and extent of the respondent's prior records. (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.) In *Meyer I* the misconduct involved a one client matter. According to the parties' stipulation of facts and disposition in *Meyer I*, respondent's misconduct was mitigated because respondent committed the misconduct during a period of time that he was under unusually great business pressures. In addition, per the parties' stipulation in *Meyer I*, respondent's misconduct harmed the client only to the extent that it caused the client unnecessary anxiety and emotional distress.

[7c] In *Meyer II* the misconduct involved three instances in which respondent's failed to comply with the conditions attached to the private reproval imposed on him by *Meyer I*. Moreover, according to the parties stipulation in *Meyer II*, these failures to comply were mitigated by the fact that, at the time, respondent was suffering from extreme emotional difficulties and depression caused by marital difficulties.

[7d] The nature and extent of respondent's two prior records of discipline are not sufficiently severe to justify our recommending disbarment in this proceeding under standard 1.7(b).

2. Standard 2.9

Standard 2.9 provides that an attorney's willful violation of his duty, under former rule 9-101 (now rule 1-110 of the Rules of Professional Conduct of the State Bar), to comply with the conditions attached to a reproval imposed on the attorney by the State Bar Court shall result in suspension. As OCTC points out, the only Supreme Court reported case applying standard 2.9 or otherwise dealing with an attorney's failure to comply with conditions attached to a reproval is *Conroy* v. *State Bar* (1990) 51 Cal.3d 799.

Attorney J. William Conroy (Conroy) had been previously privately reproved in 1986 for committing three unrelated acts of misconduct. (*Id.* at p. 802.) A condition attached to his reproval required him to take and pass the Professional Responsibility Examination (PRE) within one year after his reproval. (*Ibid.*)

Conroy failed to take and pass the PRE within the one-year deadline. (*Ibid.*) He did, however, take and pass it at the next available opportunity, which was approximately two months before the State Bar initiated a second disciplinary proceeding against him. (*Id.* at pp. 802, 803, fn. 4.)

In *Conroy* there were one mitigating circumstance and three aggravating circumstances. The sole mitigating circumstance was the attorney's late passage of the PRE. (*Id.* at p. 805.)

The first aggravating circumstance was Conroy's prior record of discipline, which was the private reproval from which the requirement that he take and pass the PRE arose. (*Ibid.*) The second aggravating circumstance was Conroy's failure to participate in the State Bar Court proceeding. (*Id.* at pp. 802-803, 805-806.) The third was Conroy's lack of remorse and failure to acknowledge the wrongfulness of his actions. (*Id.* at p. 806.)

In light of the misconduct, the single mitigating circumstance, and the three aggravating circumstances; the Supreme Court imposed a one-year stayed suspension on Conroy and placed him on probation for one year subject to conditions, including a 60-day period of actual suspension. (*Ibid.*) That is substantial discipline for an attorney's single failure to timely comply with a condition attached to a reproval particularly in light of the fact that the attorney belatedly complied three months after the deadline.

In light of the discipline in *Conroy*, we conclude that the hearing judge's discipline recommendation in the present proceeding for respondent's three failures to comply is inadequate. This is particularly true because respondent did not belatedly comply and because he has a prior record for failing to comply with similar conditions attached to his reproval in *Meyer I*.

After independently weighing the present misconduct and the aggravating circumstances and considering the purposes of attorney discipline in light of the two months' actual suspension imposed in *Conroy*, we conclude that a minimum of 90 days' actual suspension is warranted. We also conclude that an additional probation condition and a professional responsibility examination, not recommended by the hearing judge, are warranted and additionally that two years' stayed suspension and three years' probation are appropriate.

B. Second Point of Error - Probation Reports

In its second point of error, OCTC contends that the hearing judge erred by not recommending that respondent be required to file probation reports on a quarterly basis throughout the term of his two-year probation. Instead of recommending that respondent be required to comply with the standard probation reporting condition, which was approved by the State Bar Court's Executive Committee on November 5, 1990, and which requires reporting on a quarterly basis, the hearing judge, without explanation, recommended that respondent file only three reports on the following intermittent basis. The first report would be due between the fifth and sixth months of respondent's probation; the second would be due between the seventeenth and eighteenth months; and the third would be due within the last 30 days of his probation.

OCTC raises a number of policy arguments against the use of intermittent reporting periods similar to that recommended by the hearing judge in the present proceeding and in favor of the standard quarterly reporting periods. We, however, modify the recommended intermittent reporting periods without addressing directly those policy arguments.

[8] In *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 152, we modified the hearing judge's *unexplained* recommendation that the respondent's quarterly probation reporting requirement be delayed until after the respondent resumed the practice of law after his actual suspension. In doing so, we noted that an attorney's filing of *quarterly* reports is an important step towards the attorney's rehabilitation. (*Ibid.*) We reaffirm the conclusion that the quarterly reporting requirements imposed on respondent under his first and second reprovals were important steps towards his rehabilitation. These reporting conditions were also important requirements as a means of protecting the public because they permit the State Bar to monitor respondent's compliance with the State Bar Act and Rules of Professional Conduct. (Cf. *Ritter* v. *State Bar* (1985) 40 cal.3d 595, 605.)

[9a] This is the second disciplinary proceeding initiated against respondent for his inability or unwillingness to comply with a State-Bar-Court-ordered quarterly reporting requirement. Respondent has repeated failed to comply with the conditions attached to his reprovals in *Meyer I* and *Meyer II*. These repeated failures raise serious concern regarding respondent's rehabilitation and public protection. Accordingly, we do not find it appropriate to recommend a probation reporting requirement with a lower frequency of reporting than that previously imposed on respondent, which he has been unable or unwilling to comply.

[9b] Absent extraordinary and enunciated circumstances, the recommended reporting requirement should have at least required that respondent demonstrate that he can now comply with the quarterly reporting requirements imposed on him under his first and second reprovals by imposing the same requirements on respondent prospectively. Otherwise, respondent would be "rewarded" for his noncompliance by allowing a lower reporting requirement. We, therefore, recommend that respondent be placed on probation for three years and that he be required to file probation reports on a quarterly basis throughout those three years.

VII. DISCIPLINE RECOMMENDATION

We recommend that respondent Jeffrey Philip Meyer be suspended from the practice of law

in the State of California for two years, that execution of the two-year suspension be stayed, and that he be placed on probation for three years on the following conditions:

1. Respondent be actually suspended from the practice of law during the first 90 days of his probation.

2. Respondent shall comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California.

3. Respondent shall report, in writing, to the Probation Unit, Office of the Chief Trial Counsel, Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof during which his probation is in effect ("reporting dates"). However, if the date on which respondent's probation begins is less than 30 days before a reporting date, respondent shall file his first report no later than the reporting date next following the reporting date immediately following the beginning date of his probation. Each report shall state that it covers the preceding calendar quarter or applicable portion thereof and shall certify by affidavit or under penalty of perjury as follows:

(a) in his first report, whether he has complied with all the provisions of the State Bar Act, Rules of Professional Conduct, and other terms and conditions of the probation since the beginning date of his probation; and

(b) in each subsequent report, whether he has complied with all the provisions of the State Bar Act, Rules of Professional Conduct, and other terms and conditions of his probation during said period.

Furthermore, respondent shall file a final report covering the remaining portion of his probation following the last reporting date falling within the period of his probation certifying to the matters set forth in subparagraph (b) of this probation condition. Respondent's final report shall be filed no later than 60 days before the date his probation is scheduled to expire.

4. Respondent shall be referred to the Probation Unit of the Office of the Chief Trial Counsel for the 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.

5. Subject to the assertion of any applicable privilege, respondent shall fully, promptly, and truthfully answer all inquiries of the Probation Unit of the Office of the Chief Trial Counsel and any probation monitor assigned under these conditions of probation that are directed to respondent, whether orally or in writing, relating to whether he is complying or has complied with the terms and conditions of his probation.

6. Respondent shall promptly report, and in no event in more than 10 days, to the Membership Records Office of the State Bar of California, the Probation Unit of the Office of the Chief Trial Counsel, and to his assigned probation monitor all changes of information including a current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code and a current telephone number.

7. Within one year after of the effective date of the Supreme Court's order in this matter, respondent shall attend no less than six hours of courses that are California Mandatory Continuing Legal Education approved in law office management, attorney/client relations, or general legal ethics and that are approved in advance by the Probation Unit of the Office of the Chief Trial Counsel. Respondent must provide satisfactory proof of attendance to the Probation Unit, Los Angeles within that one year. This condition of probation is separate and apart from respondent's Mandatory Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing these six hours of courses.

8. Respondent shall attend and satisfactorily complete the State Bar's Ethics School within

one year after the effective date of the Supreme Court order in this matter and furnish satisfactory proof of such to the Probation Unit of the Office of the Chief Trial Counsel within that same year. This condition of probation is separate and apart from respondent's Mandatory Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing the State Bar's Ethics School.

9. Respondent's period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective.

10. At the expiration of the period of this probation, if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two years shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court's order in this proceeding and to furnish satisfactory proof of his passage to the Probation Unit of the Office of the Chief Trial Counsel within that year.

It is also recommended that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts in subdivisions (a) and (c) of rule 955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.[5]

Finally, we also recommend that the State Bar be awarded its costs in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997).

We concur:

OBRIEN, P.J.
STOVITZ, J.

5. When an attorney has been ordered to comply with rule 955, the attorney must file a rule 955(c) affidavit regardless of whether the attorney has any clients. (*Powers* v. *State Bar* (1988) 44 Cal.3d 337, 341). Furthermore, an attorney's failure to fully and timely comply with rule 955 is extremely serious misconduct for which disbarment is generally the sanction ordered. (*Bercovich* v. *State Bar* (1990) 50 Cal.3d 116, 131; California Rules of Court, rule 955(d).)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Corey Leon Steele

A Member of the State Bar

Nos. 89-O-16879, 92-O-20083

Filed July 29, 1997

SUMMARY

The hearing judge concluded that respondent formed a partnership and split fees with a nonlawyer and recklessly failed to control his law practice for more than two years. She also determined that he personally committed acts of moral turpitude and dishonesty through deliberate concealment, misappropriation, and misrepresentation and violated many ethical rules. Further, she found that he lacked candor during the disciplinary proceeding and established no significant mitigation. She recommended a four-year stayed suspension and four-year probation, conditioned on actual suspension for two years and until respondent makes restitution and proves his rehabilitation. (Hon. Ellen R. Peck, Hearing Judge)

Respondent requested review. He claimed that a small amount of lost testimony was crucial to proving his credibility. Yet he specifically disputed only one culpability conclusion: that he failed to notify a client about the receipt of a settlement check. He contended that he candidly testified during the disciplinary hearings, that the evidence in mitigation deserved more weight, and that the lost testimony required this proceeding to be remanded for a new trial. Alternatively, he asserted that the proper discipline was a stayed suspension for three years and actual suspension for no longer than six months.

The State Bar also requested review. Although it supported the hearing judge's credibility determinations against respondent, conclusions of culpability, and findings in aggravation and mitigation, it argued that the appropriate discipline was disbarment.

The review department accepted the hearing judge's determinations of credibility. It agreed with almost all her conclusions of culpability and with her findings about aggravating and mitigating factors. To protect the public, maintain high professional standards by attorneys, and preserve confidence in the legal profession, it recommended disbarment.

COUNSEL FOR PARTIES

For State Bar:	David C. Carr
For Respondent:	Erica Tabachnick, Arthur L. Margolis

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] 221.00 State Bar Act—Section 6106

Respondent's failure to control his law practice amounted to moral turpitude where he let a nonlawyer take over much of his practice, sign client trust account checks, and handle all financial records without proper supervision; where he took no decisive steps to stop the nonlawyer from telling clients and others that the nonlawyer was his partner; where his detachment enabled the nonlawyer to engage in extensive dishonesty and theft; and where, after the nonlawyer confessed to embezzlement, he did not report the nonlawyer to the authorities, fire the nonlawyer, or (at the very least) stop the nonlawyer's handling of his bank accounts so to protect his client's funds from further theft.

[2 a-c] 822.10 Standards—Misappropriation—Disbarment
831.20 Standards—Moral Turpitude—Disbarment
831.30 Standards—Moral Turpitude—Disbarment
831.40 Standards—Moral Turpitude—Disbarment
831.90 Standards—Moral Turpitude—Disbarment

Disbarment was the appropriate discipline where respondent recklessly failed to control his law practice, personally committed other acts of moral turpitude and dishonesty, violated a number of ethical rules, displayed lack of candor at trial, and failed to establish any significant mitigation.

Additional Analysis

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
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)]
275.31 Rule 3-510 [former 5-105]
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

Aggravation

Found

521 Multiple Acts
601 Lack of Candor—Victim

Mitigation

Found but Discounted

725.32 Disability/Illness
725.33 Disability/Illness
735.30 Candor—Bar

740.32 Good Character
740.33 Good Character
740.39 Good Character
745.31 Remorse/Restitution
745.32 Remorse/Restitution
745.39 Remorse/Restitution

Declined to Find

795 Mitigation—Other—Declined to Find

Discipline

1010 Disbarment

OPINION

STOVITZ, J.:

A hearing judge of the State Bar Court concluded that Corey Leon Steele (respondent) formed a partnership and split fees with a nonattorney and failed to control his law practice for more than two years. According to the hearing judge, respondent personally committed acts of moral turpitude and dishonesty through deliberate concealment, misappropriation, and misrepresentation and violated many ethical rules. Further, the hearing judge found that respondent lacked candor during the disciplinary proceeding and established no significant mitigation. The hearing judge recommended a four-year stayed suspension and four-year probation, conditioned on actual suspension for two years and until respondent makes restitution and proves his rehabilitation.

Respondent sought review. He claims that a small amount of lost testimony is crucial to proving his credibility. Yet he specifically disputes only one culpability conclusion: that he failed to notify a client about the receipt of a settlement check. He contends that he candidly testified during the disciplinary hearings, that the evidence in mitigation deserves more weight, and that the lost testimony requires this proceeding to be remanded for a new trial. Alternatively, he recommends a stayed suspension for three years and actual suspension for no longer than six months.

The State Bar's Office of the Chief Trial Counsel (State Bar) also sought review. Although the State Bar supports the hearing judge's credibility determinations against respondent, conclusions of culpability, and findings in aggravation and mitigation, it asks that we recommend disbarment.

We agree with the hearing judge's determinations of credibility, with almost all her conclusions of culpability, and with her findings about aggravating and mitigating factors. To protect the public, maintain high professional standards by attorneys, and preserve confidence in the legal profession, we recommend disbarment.

I. PROCEDURAL HISTORY

Respondent was admitted to practice law in California in June 1978.

In 1993, the State Bar filed notices to show cause in cases number 89-O-16879 and number 92-O-20083, and the cases were consolidated. Before trial, the parties submitted a partial written stipulation of facts. Hearings were held for four days in October 1993, two days in February 1994, and two days in April 1994. The hearing judge filed a 68-page decision in October 1994 and a 4-page order clarifying the decision two months later. Both parties sought review.

In January 1995, the court reporter mailed transcripts of almost all the entire trial to the parties. The transcripts did not cover the morning session of the hearing on October 29, 1993, because the audio tape of this session was lost.

In February 1996, the parties were ordered to agree upon and file a statement of facts adduced by testimony and/or stipulation at the morning session of the hearing on October 29, 1993. To the extent that they could not agree on a joint statement, each party was ordered to file a statement of their view of such facts. The parties could not agree to a joint statement, and the State Bar filed its statement about the missing testimony in March 1996.

Respondent moved to vacate the hearing judge's decision instead of filing a statement about the missing testimony. After the denial of his motion, he submitted his required statement in May 1996.

II. DISCUSSION

After independently reviewing the record (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we conclude that respondent's arguments lack merit and that the appropriate discipline is disbarment.[1]

1. The hearing judge dismissed many charges with prejudice. Except as discussed *post*, we agree with these dismissals and find no need to address them in this opinion.

A. Lost Testimony and Credibility Determinations Against Respondent

We first address respondent's contentions about the small portion of lost testimony and about the hearing judge's credibility determinations against him.

The Los Angeles District Attorney's Office questioned respondent about embezzlement by his office manager Jim Gray (Gray). On December 28, 1989, while represented by counsel, respondent gave a recorded statement (recorded statement) under oath to the district attorney's office.

During the disciplinary hearings, respondent claimed that the recorded statement contained inaccuracies and exaggerations. He denied his prior assertions that he had let Gray basically take over his office.

On the morning of October 29, 1993, respondent testified about the medication which he took on December 28, 1989. According to both parties, the lost testimony included respondent's assertions that he was taking Xanax and Tofranil and that his use of these drugs impaired his memory and resulted in confused, inaccurate, exaggerated, rambling discourse in the district attorney's office. We accept that he made such assertions.

On the morning of October 29, 1993, respondent also provided limited testimony about his training and supervision of Gray. According to the State Bar, the lost testimony included assertions that although respondent had no manuals about office procedures, he showed Gray many sample documents and regularly monitored and discussed Gray's performance with Gray. Respondent is unable to confirm or dispute the State Bar's summary of his assertions on the morning of October 29, 1993, about his training and supervision of Gray. If true, such assertions would inure to respondent's advantage. We accept that he made them.

Yet we find that respondent's medication on December 28, 1989, does not adequately explain the inconsistencies between his recorded statement and his testimony almost four years later. His psychiatrist, Dr. Gerner (Gerner), testified that patients generally had difficulty with memory during the first week or two of taking Xanax and Tofranil, but that these effects faded. Respondent began taking the medications in the early fall of 1989, months before the recorded statement. We also recognize that respondent took medication on December 28, 1989, and that, according to Gerner, an acute dose might have temporarily kept respondent from giving "an absolutely accurate statement." Yet Gerner did not testify that such a dose would have seriously impaired respondent's recall or induced false memories.

Other factors also undermine respondent's attack on the truth of his prior assertions in the recorded statement. He made these assertions when events had recently occurred and should have been fresh in his mind. Read by themselves, these assertions reflect neither confusion nor poor memory. Further, he gave the recorded statement under oath with counsel present as part of the district attorney's investigation of Gray's embezzlement from respondent's law office. Although he informed the prosecutor that he was taking medication, the record indicates no statement by him to the prosecutor that the medication could cause inaccuracies and exaggerations. Like the hearing judge, we find the lack of such a statement to be curious. Also curious is respondent's claim that he did not discover the alleged inaccuracies and exaggerations in the recorded statement until 1992 or 1993, after avoidance of criminal prosecution and under investigation by the State Bar.

We give little weight to respondent's testimony that he regularly monitored and discussed Gray's performance with Gray. As found by the hearing judge, such regular monitoring and discussions are inconsistent with respondent's extremely serious office mismanagement for over two years.

We reject respondent's claim that the small amount of lost testimony is critical to his credibility. The hearing judge based her credibility determinations against respondent on several factors, including the inconsistencies between his recorded statement of December 28, 1989, and his testimony on the morning of October 29, 1993. Yet she also found that the testimony observations of insurance company agents and his clients, as well as his extensive office

mismanagement and other misconduct, undermined his credibility. Having observed respondent's demeanor throughout the hearings, she determined that he lacked candor at trial. The eight available volumes of transcripts support this determination. We accept her credibility findings, which deserve great weight (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *Ainsworth* v. *State Bar* (1988) 46 Cal.3d 1218, 1233) and are discussed further *post*.

B. Respondent's Partnership With Gray

Turning to the charges against respondent, we begin with count ten of case number 89-O-16879. This count addresses his partnership with Gray.

Respondent met Gray in November 1984, and they became close friends. He hired Gray to work as a clerk and legal assistant in his personal injury practice in May 1985.

A few months later, respondent heard Gray state to clients that Gray was his partner. Although he told Gray that the statement was improper, he did not protest decisively because he found Gray good for business and wanted to keep Gray's services. Gray continued for years to assert that Gray was an attorney.

According to respondent's recorded statement, Gray "basically took over the whole office." Respondent "was doing the litigation aspect," but Gray "was doing everything else." As discussed *ante*, we find these statements to be true. Respondent does not dispute that Gray conducted initial interviews with clients, discussed clients' treatments with doctors, monitored treatment schedules, gathered medical records and reports, wrote demand letters, and negotiated settlements.

In the recorded statement, respondent asserted that he was in his office 15 to 20 hours a week and that Gray and Etan Boritzer (Boritzer), a nonlawyer whom he employed as a process server and general clerk, ran his office 85 percent of the time. In the disciplinary hearings, he confirmed spending only 15 to 20 hours a week in his office and contended that Gray and Boritzer ran his office about 50 percent of the time, when he was in court. He also testified that he increasingly became detached from his office and that Gray increasingly controlled it. We find that respondent largely delegated the control of his office to Gray.

In the recorded statement, respondent admitted that he did not know 85 percent of his clients. In the disciplinary proceeding, he conceded that he did not know how many clients he had. We find that he knew only a limited number of his clients between March 1986 and August 1988.

Respondent told Gray to keep a list of clients showing the sums they were paid and the doctors they used. He did not receive such a list from Gray, but discovered that the Los Angeles District Attorney's Office had such a list, apparently prepared by Gray.

In May or June 1986, Gray became a signatory on respondent's client trust account and general business account. From then until August 1988, respondent delegated to Gray the responsibility to do all accounting for both accounts. Gray, however, never balanced the check book for the client trust account; nor did respondent.

Respondent kept his personal funds in the client trust account. He used $50,000 to $60,000 of personal funds held in the client trust account as a down payment for a house.

In the recorded statement, respondent said that Gray asked for payment on a commission basis, that he told Gray such payment was illegal, and that nevertheless he paid Gray a percentage of his gross income. In the disciplinary proceeding, he asserted that Gray really received not a "strict" percentage, but a salary which varied according to his gross income. We find that he paid Gray amounts depending on his gross revenues.

Respondent represented many car accident victims. His office sought reimbursement for the medical expenses of these clients from their car insurance carriers, their medical insurance carriers, and the defendants' medical insurance carriers. He concedes that he did not see 50 percent of the checks sent to his office and that Gray misappropriated some checks.

Respondent, Gray, and respondent's secretary all signed clients' names to settlement checks and releases, despite their lack of authority from clients to do so. After Gray resigned, respondent changed his standard attorney-client employment agreement so that it authorized him to sign documents for clients.

In early 1988, respondent suspected that something might be wrong with the handling of his bank accounts. He hired a bookkeeper to audit his client trust and general business accounts, and he randomly spot-checked accounts. The record specifies the scope of neither the audit nor his spot-checking. No mishandling of funds was uncovered.

Many settlement checks and checks for clients were deposited into respondent's general business account between 1985 and early 1988. According to respondent, he deposited settlement checks into his general business account to reimburse himself for advances to clients. He testified that the advances represented interest-free loans to clients who had agreed to them in writing and that he had advised each client to seek independent counsel, had allowed each client several days to do so, and had failed to send copies of the agreements to some clients. He produced no loan agreement or client testimony to corroborate his testimony.[2]

We adopt the hearing judge's finding that respondent's testimony about his handling of settlement checks (i.e., his depositing settlement checks into his general business account to reimburse himself for interest-free loans to clients) lacks credibility. Respondent asserts that he provided his files to the authorities, and he suggests that the Los Angeles District Attorney's Office and/or the State Bar lost some files.[3] Although one of fifteen file boxes may have been lost, the loss of some files does not adequately explain respondent's failure to supply a single loan agreement or to call a single client to verify his testimony. Further, his alleged payment of medical liens before settling clients' cases is not credible.

In July 1988, Gray told respondent that Gray had embezzled a client's medical payment check. The confession apparently resulted from a medical provider's discovery that the check had been cashed without payment for medical services. Gray also told respondent that Gray had embezzled a total of at least $25,000 since 1985 and wished to resign. Respondent did not know about such embezzlement before the confession.

Respondent did not report Gray's theft to the authorities. He asked Gray to remain because he felt that he could not afford to lose Gray's services. He offered to pay the sum owed to the medical provider and to reimburse other medical providers and clients for stolen funds if Gray agreed to stay on, to pay back the funds, and to refrain from future embezzlement. Gray agreed. Two days later, respondent left on a previously planned vacation. Gray then resigned.

When questions later arose about Gray's management of the law office, respondent repeatedly left telephone messages asking Gray for information. When Gray did not respond, respondent left a message threatening to report Gray to the authorities.

Gray went to the Los Angeles District Attorney's Office and claimed that respondent had used him as a middle-man to embezzle funds. The district attorney's office did not charge respondent, but Gray was convicted of grand theft.

Although respondent challenged the hearing judge's credibility determinations against him, he disputed none of her specific culpability conclusions in this count ten of case number 89-O-16879.

[1a] According to the hearing judge, respondent committed acts of gross negligence in failing to control his practice. She concluded that these acts amounted to moral turpitude within the meaning of Business and Professions Code section 6106, which provides that an act of moral turpitude, dishonesty, or

2. As discussed *post*, two clients testified as character witnesses in favor of respondent.

3. Also, respondent testified that by the time of the disciplinary hearings, he had destroyed some files and failed to examine others.

corruption constitutes a cause for disbarment or suspension.[4]

[1b] We agree with this conclusion, although we find that respondent's extreme departure from a proper standard of care is better described as reckless. For more than two years, he let Gray, a nonlawyer, take over much of his practice, sign client trust account checks, and handle all financial records without proper supervision. Despite evidence that Gray was telling clients and others that Gray was his partner, respondent took no decisive steps to stop Gray. He increasingly became detached from his practice and let Gray control it. His detachment enabled Gray to engage in extensive dishonesty and theft. Even when Gray confessed to embezzlement, respondent did not report Gray to the authorities, fire Gray, or (at the very least) stop Gray's handling of his bank accounts so to protect his client's funds from further theft.

We also agree with the hearing judge that respondent violated several of the former Rules of Professional Conduct:[5] rule 3-101 (prohibiting aid to any person in the unauthorized practice of law) by letting Gray take over much of his practice; rule 3-102 (prohibiting the direct or indirect splitting of legal fees with a nonlawyer) by paying Gray a percentage of the fees in certain cases; rule 3-103 (prohibiting the formation of a partnership with a nonlawyer if the partnership's activities include the practice of law) by letting Gray refer to Gray as respondent's partner, splitting fees with Gray, and allowing Gray to run much of the law office and handle the trust and office accounts; rule 8-101(A) (requiring the deposit of funds received for a client's benefit in a client trust account and prohibiting the commingling of personal funds with trust funds) by putting settlement checks in his personal account and by putting at least $50,000 of his personal funds in his trust account; and rule 8-101(B)(3) (requiring the maintenance of complete financial records and the rendering of appropriate accountings to clients) by repeatedly failing to inform clients about the handling of funds received on their behalf. Yet insofar as the facts establishing his culpability of these violations include the facts establishing his culpability under section 6106, we attach no additional weight to such duplication in determining the proper discipline. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose served by duplicative allegations of misconduct].)

The facts underlying respondent's violations in count ten of case number 89-O-16879 partially or wholly underlie some violations in other counts. To the extent of any such duplication, we give no extra weight to the violations in the other counts for the purpose of assessing discipline.

In this regard, we observe that the hearing judge dismissed the section 6106 charges in the Stoller, Morrison, Fisch, and Barber matters, because they duplicated the section 6106 charge in count ten. Although we agree that the charges were duplicative insofar as they rested on the same facts, we disagree with the hearing judge's dismissals. Respondent violated section 6106 in the Stoller, Morrison, Fisch, and Barber matters because his reckless failure to supervise his practice amounted to moral turpitude. These duplicative violations, however, merit no additional weight in our analysis of the proper discipline. We need not, and do not, discuss them further in this opinion.

C. Stoller Matter

Count one of case number 89-O-16879 deals with respondent's representation of Bryan Stoller (Stoller) in a personal injury case in 1988. Stoller's insurer was initially responsible for paying Stoller's medical bills, under the medical payment provision of his policy, but was entitled to reimbursement. Although Stoller's insurer issued four checks totalling $4,200 to pay Stoller's medical bills, respondent's office did not inform Stoller that it had received these checks. Gray signed and embezzled three checks amounting to $3,120; the fourth check for $1,080

4. All references to sections denote provisions of the Business and Professions Code.

5. Unless otherwise indicated, all references to rules denote the provisions of the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

was never negotiated. Stoller's insurer sent three letters addressed to respondent's clerk Boritzer as Stoller's "attorney." After Boritzer informed Stoller's insurer that Gray was Stoller's "attorney," the insurer sent four letters to Gray as Stoller's "attorney." Stoller's case was settled in August 1988, and Gray embezzled the $4,200 due to Stoller's insurer as reimbursement for its medical payments. Respondent told Stoller's insurer about Gray's embezzlement and eventually paid the amounts due to Stoller and Stoller's physician.

Respondent testified that he had seen Stoller's file, but could not remember when he first saw it. According to his own testimony, he failed to inform Stoller's insurer that he was Stoller's attorney and that neither Boritzer nor Gray was an attorney.

The hearing judge concluded that respondent was culpable of three rule violations in the Stoller matter. We agree with these conclusions, which respondent does not dispute. Respondent violated rule 3-101 by aiding Boritzer and Gray in the unauthorized practice of law, rule 8-101(A) by not depositing the four checks from Stoller's insurer into a client trust account, and rule 8-101(B)(1) (requiring prompt notification of a client about the receipt of funds for the client's benefit) by not informing Stoller that his office had received the four checks.

D. Morrison Matter

Count three of case number 89-O-16879 concerns respondent's representation of Rita Morrison (Morrison) in a personal injury matter. In July 1987, respondent settled Morrison's case; and the defendant's insurer issued a settlement check, which was promptly deposited into respondent's client trust account. Respondent sent Morrison a $945 check for her share of the settlement in August 1993, but did not know whether the check had been cashed by the time of trial.

The hearing judge concluded that respondent violated rule 8-101(B)(1) by failing to notify Morrison about the receipt of the settlement check. Respondent testified, however, that he telephoned Morrison two or three times and wrote to her about the settlement check. Yet his file on Morrison's case contained no notes memorializing any of the alleged telephone calls, no copy of the alleged letter, and no record indicating that such a letter had been sent, received, or returned as undeliverable. Also, the hearing judge repeatedly found respondent's memory of key events unreliable.

Asserting that he failed to keep notes of all conversations with clients and had a faded memory of events long ago, respondent challenges the hearing judge's credibility determination against him. Yet he offers no explanation for the total absence of any record about the letter in Morrison's file. Nor does he acknowledge that receiving settlement checks and notifying clients about them are important matters which usually are documented. We defer to the hearing judge's credibility determination and agree with her culpability conclusion.

E. Heneberry Matter

Count four of case number 89-O-16879 deals with respondent's representation of William Heneberry (Heneberry), who was assaulted in March 1984. Respondent testified that Heneberry orally agreed to settle for any amount from $1,000 to $50,000 and gave respondent the authority to sign any settlement release and settlement check for Heneberry. In April 1986, Heneberry died of a cause unrelated to the assault.

Respondent made a $50,000 settlement demand in June 1986, but later told Gray to find out what settlement Gray could get. Gray agreed in July 1986 to a $2,500 offer from the defendant's insurer. In a telephone conversation with the insurer, Gray said that Heneberry would be contacted and would personally sign the settlement release. Respondent testified that he did not know about this conversation.

The insurer promptly sent Gray a letter confirming the offer and enclosing a $2,500 check. This letter set out two requirements as conditions precedent to the settlement: that the offer be relayed to Heneberry and that the release be executed by Heneberry.

Respondent testified that he reviewed Heneberry's file, including the insurer's settlement letter, and knew about the two requirements. According to his testimony, his office tried to reach Heneberry by telephone and by mail. A member of respondent's staff signed Heneberry's name on the $2,500 check. After paying himself and Heneberry's

doctors, respondent placed Heneberry's net recovery of $313.75 in his client trust account, where it remained.

Respondent testified that a friend informed him of Heneberry's death several months after the settlement, but that he did not notify the insurer. Also, he testified that he did not try to compromise any of Heneberry's medical bills and did not hear from any relatives, heirs, or representatives of Heneberry.

The hearing judge determined that respondent lacked candor at several points in his testimony. She found that Heneberry did not orally authorize respondent to settle for any amount from $1,000 to $50,000 and to sign any settlement release and check for Heneberry.

We agree with this finding. Respondent could not recall when he received such authorization. Nor did his file for Heneberry's case contain any contemporaneous notes memorializing such an important matter.

The hearing judge also found that respondent and his staff knew about Heneberry's death when Gray agreed to settle for $2,500 in July 1986. A month earlier, respondent had demanded $50,000. During June 1986, his staff signed and sent medical releases to Heneberry's doctors. According to the hearing judge, the most probable reason for Gray's acceptance of an offer 95 percent lower than respondent's original demand was the discovery from one of the doctors that Heneberry had died in April 1986.

Respondent testified that he made the $50,000 demand to test the insurer and later reviewed his records. According to respondent's testimony, he recommended a lower demand to Heneberry, who expressly agreed to a reduction. Respondent had no explanation for this testimony when he was confronted with the fact that he did not even make the $50,000 demand until two months after Heneberry's death.

Claiming that his testimony was plausible and uncontradicted, respondent challenges the finding that he knew about Heneberry's death before the settlement. Yet his testimony was vague and inconsistent. We defer to the credibility determination of the hearing judge, who had ample opportunity to observe respondent's demeanor.

Regardless of this credibility determination, the hearing judge concluded that respondent's conduct after reviewing the insurer's settlement letter violated section 6106. We agree with this conclusion, which rests on respondent's own testimony. For the sake of argument, it can be assumed that respondent's version of events was correct (i.e., that Heneberry had authorized the acceptance of any settlement from $1,000 to $50,000 and that respondent did not know of Heneberry's death before the insurer's $2,500 settlement offer). Yet according to respondent's own testimony, he was aware that the insurer required the offer to be relayed to Heneberry and the release to be executed by Heneberry as conditions precedent to the settlement. Instead of informing the insurer that these conditions had not been met, respondent went through with the settlement. Respondent further testified that he discovered Heneberry's death months later, but did not notify the insurer of this discovery. By his own admission, respondent concealed items of information which he knew were critical to the insurer. This concealment involved personal dishonesty within the scope of section 6106.

The hearing judge concluded that respondent was culpable of two rule violations in the Heneberry matter. We agree with these conclusions, which respondent does not dispute. Respondent violated rule 5-105 (requiring an attorney to notify a client promptly of a written settlement offer) by not informing the legal representative of Heneberry's estate about the $2,500 settlement offer and rule 8-101(B)(1) by not informing the legal representative of Heneberry's estate about the receipt of the settlement check.

F. Randall Gray Matter

Count five of case number 89-O-16879 concerns respondent's handling of a personal injury claim for Randall Gray.[6] Respondent settled this

6. Randall Gray is not related to respondent's office manager, Jim Gray.

claim, but never provided a written accounting to Randall Gray. Dr. Edmund Chein (Chein) and Dr. Enid Reed (Reed) provided medical services to Randall Gray. Respondent stipulated that on May 30, 1986, he paid Chein $765 for services to Randall Gray by a check drawn on his client trust account. The record shows that respondent did not write a check to Reed, whose bill totalled $750. Respondent also stipulated that on June 4, 1986, he deposited the settlement check in his client trust account and wrote himself a $15,800 check to cover his fees and costs and to reimburse himself for paying Randall Gray's medical expenses. According to one of respondent's exhibits, his fees and costs for the Randall Gray matter amounted to $11,176.38.

The hearing judge concluded that respondent violated section 6106 by personally misappropriating $4,623.62. We agree with this conclusion, which rests on respondent's own stipulation and exhibit. He paid himself $15,800 from the settlement check when he was entitled to only $11,176.38. Because he wrote the $765 check to Chein five days before the deposit of the settlement check in his client trust account, the $765 check was not paid from the settlement check. Further, medical liens were required to be paid out of the client trust account. Nor did respondent provide documentary proof of making any payment to Chein or Reed from the $15,800 which he took.

The hearing judge also concluded that respondent violated rule 8-101(B)(3) by failing to render an appropriate accounting to Randall Gray. We agree with this conclusion, which respondent does not dispute.

G. Nonaka/Goto Matter

Count six of case number 89-O-16879 addresses respondent's handling of the personal injury cases of Haru Nonaka (Nonaka) and her daughter, Kuniko Goto (Goto). Nonaka spoke no English and authorized Goto to act for her. On January 13, 1987, without the clients' knowledge or authorization, respondent's office settled their cases with Allstate Insurance Company (Allstate) for a total of $21,000, consisting of $8,000 to Nonaka and $13,000 to Goto. Allstate immediately sent the settlement releases and checks, on which respondent's staff signed Nonaka's and Goto's names without authorization. The checks were deposited into respondent's client trust account.

Sometime in January 1987, Gray informed Goto that her case and Nonaka's case had been settled for a total of $19,000. Goto told Gray that she had not authorized the $19,000 settlement, had desired a larger settlement, and wanted an accounting.

From January through March 1987, Goto repeatedly asked Gray for documentation about the settlement. Respondent's office provided no such documentation.

Goto testified about a conversation which she had with respondent in early 1987. The hearing judge found Goto's testimony credible, and respondent does not dispute it. According to her testimony, Goto complained directly to respondent about the lack of authorization for the settlement and about the total purported settlement amount of $19,000. Also, according to her testimony, respondent personally told her that her case and Nonaka's case had been settled for a total of $19,000 and were worth only $19,000.

Neither Gray nor respondent informed Goto that her case and Nonaka's case had actually been settled for a total of $21,000. Nor did Gray or respondent advise Goto about the possibility of any additional payments for medical expenses.

On March 20, 1987, Goto received her portion of the $13,000 settlement with Allstate. In March and April 1987, Goto and Nonaka also received additional payments for medical expenses from other insurers. On April 24, 1987, Goto went to respondent's office to sign checks and was told for the first time that her case and Nonaka's case had been settled for a total of $21,000.

Goto never got accountings for her case and Nonaka's case from respondent's office. Before trial, she had not seen the accountings submitted into evidence by respondent. These accountings bear no date or signature by anyone in respondent's office; no cover letters are attached to them; and the spaces for the clients to sign and date them are blank.

The hearing judge found that respondent personally misrepresented the total amount of the

settlement as $19,000 rather than $21,000. She also found that Goto told respondent about the lack of authorization for the settlement and that he did not inform Allstate. The hearing judge concluded that respondent's misrepresentation to Goto and concealment of vital information from Allstate involved personal deceit and collusion within the scope of section 6106.

Further, the hearing judge found that respondent did not provide the clients with accountings and that the repeated requests for settlement documentation implied a request for disbursement of the settlement funds. The hearing judge thus concluded that the failure to supply accountings violated rule 8-101(B)(3) and that the two-month delay in disbursing settlement funds violated rule 8-101(B)(4) (requiring the prompt payment of a client's funds upon request).

We agree with the hearing judge's culpability conclusions and the findings upon which she based them. Respondent disputes none of these conclusions or findings.

H. Fisch Matter

Count seven of case number 89-O-16879 deals with the personal injury case of Joan Fisch (Fisch). Respondent settled her case in 1988, and Gray embezzled $5,000 of the settlement. Upon discovering the embezzlement, respondent reimbursed her for $5,000. As further reimbursement, he later provided free legal services valued at $2,500 to her.

We agree with the hearing judge's conclusion that by failing to supply an appropriate accounting, respondent violated rule 8-101(B)(3).[7] He does not dispute this conclusion, although he asserts, apparently in mitigation, that Gray's embezzlement prevented him from giving an accurate accounting.

I. Barber Matter

Count eight of case number 89-O-16879 concerns the personal injury case of Kelli Barber (Barber). An agreement to settle this case was reached, and Barber met with Gray in January 1988. Gray gave her a $5,572 check as an advance. Gray also promised her an additional $2,000 to $3,000 after the receipt of the settlement check, although the further amount still due to her was $5,029.

The settlement check arrived in March 1988, but Barber received no additional payment. Nor did she ask respondent's office about further payment.

On or before May 16, 1989, the Los Angeles District Attorney's Office contacted her about the settlement. She talked with respondent, who gave her $1,000 on May 16, 1989, and promised her more money. Thereafter, he provided her with two checks totalling $4,029, the remaining amount he owed her.

In August 1993, Barber received a written accounting of the disbursement of the settlement funds.

We agree with the hearing judge's conclusion that respondent violated rule 8-101(B)(3) by failing to provide an appropriate accounting. Respondent does not dispute this conclusion. Yet apparently in mitigation, he states that Gray's embezzlement kept him from rendering an accurate accounting.

According to the hearing judge, respondent violated rule 8-101(B)(4) by not paying the additional $5,029 due to Barber promptly after receiving the settlement check in March 1988. Further, the hearing judge pointed out that when respondent discovered, in May 1989, that Barber was due more money, he immediately paid her only $1,000.

7. The notice to show cause in case number 89-O-16879 charged respondent with violating rules 8-101(B)(2) and 8-101(B)(4). At the pre-trial conference on October 18, 1993, the parties agreed that the notice should be "corrected" to charge a violation of rule 8-101(B)(1) rather than rule 8-101(B)(2). The hearing judge's decision refers to rule 8-101(B)(1) instead of rule 8-101(B)(3). We take the parties' "corrected" reference to rule 8-101(B)(1) in the pre-trial agreement and the hearing judge's reference to rule 8-101(B)(1) in the decision to be clerical errors that should have referred to rule 8-101(B)(3) because the Fisch matter was tried and decided as a matter involving a failure to provide a proper accounting.

Although respondent does not dispute the hearing judge's conclusion that respondent violated rule 8-101(B)(4), we reject it. As noted *ante*, rule 8-101(B)(4) required the prompt payment upon request of funds which a client is entitled to receive. Respondent did not violate this requirement before May 16, 1989, because until then Barber requested no payment of the additional funds due to her. Nor does the record contain clear and convincing evidence that he violated the requirement thereafter. The record does not establish exactly when respondent gave Barber the two checks totalling $4,029, the amount which he still owed her after the $1,000 payment on May 16, 1989. This lack of evidence prevents a determination of whether respondent complied with rule 8-101(B)(4)'s requirement to pay funds promptly upon request.[8]

J. Wegorowski Matter

Count nine of case number 89-O-16879 deals with the personal injury case of Kenneth Wegorowski (Wegorowski). In 1987, Wegorowski's insurer issued two checks totalling $2,061 to cover Wegorowski's medical expenses. Gray diverted these checks and embezzled the funds.

The hearing judge concluded that respondent violated rule 8-101(B)(1)[9] by failing to notify Wegorowski promptly about the receipt of the insurer's checks and rule 8-101(B)(3) by failing to render an appropriate accounting to Wegorowski. We agree with these conclusions, which respondent does not dispute.

K. Pedinoff Matter

Case number 92-O-20083 addresses respondent's handling of the personal injury case of Cheryl Pedinoff (Pedinoff). In April 1990, he executed a medical lien in favor of Pedinoff's physician. In early 1991, he settled Pedinoff's case, received the settlement check, deposited it in his client trust account, and withheld $470 to pay the medical lien. In October 1992, he sent a check for $282 to the physician, who immediately returned it because it did not cover the full amount of the lien. Respondent sent a $470 check to the physician in January 1993.

The hearing judge concluded that respondent violated the current Rules of Professional Conduct in effect since May 27, 1989, rule 4-100(B)(4).[10] We agree with this conclusion, which respondent does not dispute.

L. Aggravating Factors

1. Lack of candor

Lack of candor during a disciplinary proceeding is an aggravating factor. (Rules Proc. of State Bar, title IV, Stds. for Attorney Sanctions for Prof. Misconduct (standards), std. 1.2(b)(vi).) As discussed *ante*, we agree with the hearing judge's finding that respondent was not candid at trial.

Honesty is a core value of the legal profession. Because dishonest representations to the State Bar are very serious (see *Chang* v. *State Bar* (1989) 49

8. Rule 8-101(B)(4) was effective only through May 26, 1989, and was superseded by rule 4-100(B)(4) of the Rules of Professional Conduct thereafter in effect.

9. The hearing judge referred to rule 8-101(A) instead of rule 8-101(B)(1). We construe this reference as a typographical error. The notice to show cause charged a violation of rule 8-101(B)(1).

10. The hearing judge referred to rule 8-101(B)(4), which was effective only through May 26, 1989. We construe this reference as a typographical error. Both the notice to show cause and the first amended notice to show cause in case number 92-O-20083 refer to current rule 4-100(B)(4). Like rule 8-101(B)(4), current rule 4-100(B)(4) provides that upon request by a client, an attorney must promptly pay any funds which the client is entitled to receive. Both rules apply to the obligation of an attorney to pay third parties out of funds held in trust, including the obligation to pay holders of medical liens. (Cf. *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979.)

Cal.3d 114, 128), we give much weight in aggravation to respondent's lack of candor.

2. Multiple acts of misconduct

Multiple acts of wrongdoing constitute an aggravating factor. (Std. 1.2(b)(ii).) The hearing judge found that respondent engaged in such acts. We agree with this finding, which respondent does not dispute.

M. Mitigation

1. Character testimony

Testimony about an attorney's legal ability and dedication to clients can establish a mitigating factor. (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667.) Respondent presented favorable character testimony by ten character witnesses, including seven lawyers and two clients (Fisch and Barber). The hearing judge discounted their testimony because of respondent's lack of candor at trial.

Respondent stresses the testimony of his character witnesses, who attested to his honesty. According to him, the hearing judge failed to give their testimony sufficient weight.

An extraordinary demonstration of good character from a wide range of references who are aware of the full extent of an accused attorney's misconduct is a mitigating factor. (Std. 1.2(e)(vi).) The State Bar asserts that respondent's character witnesses attested to his honesty, but did not provide an extraordinary demonstration of good character. Further, the State Bar points out that only two of the witnesses knew about the hearing judge's tentative culpability conclusions.

We find that the testimony by respondent's character witnesses is a mitigating factor, although we discount it for the reasons indicated by the hearing judge and the State Bar.

2. Respondent's psychological condition

Extreme emotional difficulties mitigate misconduct if the attorney suffered these difficulties at the time of the misconduct, engaged in misconduct as a direct result of them, and no longer suffers from them. (Std. 1.2(e)(iv).) The hearing judge accepted testimony by Gerner that respondent's family background and upbringing made him unable to deal with Gray. She also noted that respondent began seeing Gerner in August 1988, after Gray's resignation, for anxiety attacks. Gerner treated him regularly until September 1992 and occasionally thereafter. According to the hearing judge, respondent's treatment for his psychological condition and his apparent recovery from anxiety attacks were "important steps of recovery," but she discounted the mitigating effect of the condition and the anxiety attacks. She asserted that Gerner did not identify the anxiety attacks as directly responsible for respondent's misconduct and did not conduct testing to determine whether the misconduct resulted from other causes.

Respondent points out that his problems with Gray precipitated his anxiety attacks and his therapy with Gerner. According to Gerner, respondent's psychological condition prevented him from perceiving and addressing Gray's wrongdoing. Gerner testified that Gerner had terminated respondent's therapy because of his emotional growth, that respondent was unlikely to engage in similar future misconduct, and that he would seek help if he did. According to respondent, the hearing judge should have given greater weight to Gerner's testimony.

As the State Bar observes, Gerner pointed out respondent's lack of life experience and diagnosed him solely on the basis of statements from him and his father. The State Bar asserts that respondent's naivete may have played some part in his misconduct, but did not amount to an extreme emotional difficulty. According to the State Bar, respondent's dependence on Gray was financial, not psychological; and his emotional condition merits no weight in mitigation.

We find that respondent's psychological makeup contributed to his misconduct, but was hardly an extreme emotional difficulty and deserves little, if any, weight in mitigation. Respondent's misconduct resulted more from greed than gullibility. Although he knew that Gray improperly stated to clients that Gray was his partner, he admitted that he did not take

strong steps to stop these statements because he found Gray good for business and wanted to retain Gray's services. Even after Gray confessed to extensive embezzlement and wished to resign, respondent wanted to keep Gray as his office manager and left Gray in control of his client trust and business accounts while he took a vacation.

3. Reforms in office management

Objective steps which spontaneously demonstrate remorse and which are designed to atone timely for any consequences of the attorney's misconduct constitute a mitigating factor. (Std. 1.2(e)(vii).) Such steps may include reforms in office management.

In the latter part of 1992 or in the early part of 1993, respondent hired a consultant to help reform his office procedures. The consultant supplied a comprehensive procedures manual for his office in March 1993. Respondent testified that he had implemented most of the new procedures. Apparently, the hearing judge accepted his testimony and considered such reforms in office management as a mitigating factor. The State Bar argues that the reforms should be discounted because he did not employ the consultant until long after Gray quit and he knew of the disciplinary charges.

We accord little weight in mitigation to respondent's office reforms. Although Gray admitted extensive embezzlement in July 1988, more than four years elapsed before respondent hired the consultant. Further, he had long been under the pressure of disciplinary investigation when he started to implement the reforms suggested by the consultant. The reforms thus amount to neither a spontaneous demonstration of remorse nor a timely atonement for the consequences of his misconduct.

4 .Restitution

Restitution may also constitute a mitigating factor under standard 1.2(e)(vii).

Respondent's restitution is incomplete. By the time of trial, Heneberry's net recovery of $313.75 remained in respondent's client trust account; respondent did not know whether Morrison had cashed the $945 check sent to her; and neither Randall Gray nor Fisch had received an accurate accounting or proper reimbursement.

The hearing judge found respondent's steps to make restitution to be a mitigating factor, but discounted them because he took them slowly and under the pressure of disciplinary investigation. Respondent criticizes this discounting on the ground that he made restitution as he was able to determine the amount owed to each client. The State Bar supports the hearing judge's view.

We too agree with the hearing judge. Respondent's desultory efforts to make restitution merit very little weight in mitigation. They hardly reflect a spontaneous demonstration of remorse or a timely atonement for the consequences of his misconduct. Further, respondent testified to no attempt at locating Heneberry's heirs or legal representative and had no idea whether Morrison resided at the address where he sent the $945 check.

5. Recognition of wrongdoing

Recognition of wrongdoing may be a mitigating factor under standard 1.2(e)(vii). The hearing judge found that respondent showed some remorse and sorrow, but still portrayed himself as Gray's victim and lacked a deeper awareness of his own responsibility. According to respondent's opening brief on review, he demonstrated a full understanding "that, while he was, in fact, a victim, he contributed to that situation because of his [prior] psychological and emotional limitations." The State Bar agreed with the hearing judge.

We too find that respondent's recognition of wrongdoing deserves very little weight in mitigation. In his opening brief on review, he describes himself as Gray's "unsuspecting prey." Despite undisputed culpability conclusions to the contrary, he asserts in his responsive brief that he "did not deliberately misappropriate funds" or mislead clients and "acted promptly to rectify the damage."

6. Cooperation during the disciplinary proceeding

Cooperation during a disciplinary proceeding is a mitigating factor. (Std. 1.2(e)(v).) The hearing judge found respondent's cooperation to have been sporadic at best. Respondent points out that he cooperated by agreeing to a partial stipulation of facts. Yet his lack of candor at trial undercut such cooperation. The partial stipulation merits some weight in mitigation, but much less than it would otherwise warrant because of his lack of candor.

7. Inability to provide accurate accountings

As noted *ante*, respondent asserts that he was unable to provide accurate accountings in the Fisch and Barber matters because of Gray's embezzlement. Respondent may consider this inability to account as mitigation.

Depending on the circumstances, the inability to comply with an ethical requirement may be a mitigating factor. (Cf. std. 1.2(e)(iv).) Yet the fact that Gray's embezzlement prevented respondent from supplying accurate accountings does not mitigate his misconduct because his own recklessness and greed made the embezzlement possible. Nor does the record show that after learning of the embezzlement, he made an attempt to give Fisch and Barber the best accountings that he could provide under the circumstances.

N .Discipline

The hearing judge concluded that respondent's failure to control his law practice involved moral turpitude; that he deliberately concealed Heneberry's death from an insurer, misappropriated $4,623.62 in the Randall Gray matter, and misrepresented the combined amount of Nonaka's and Goto's settlements; and that he violated many rules. In aggravation, she found that respondent lacked candor during the disciplinary proceeding and committed multiple ethical violations. In mitigation, she found several factors, all of which she discounted. Relying on *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411 (*Jones*), she recommended a four-year stayed suspension and four-year probation, conditioned on actual suspension for two years and until he makes restitution and complies with standard 1.4(c)(ii).

Although respondent challenges the hearing judge's credibility determinations, he specifically disputes only one culpability conclusion: the failure to notify Morrison about the receipt of a settlement check. He contends that he candidly testified during the disciplinary hearings and that the evidence in mitigation deserves more weight. According to him, the lost testimony requires this proceeding to be remanded for a new trial. Alternatively, citing *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178 (*Nelson*) and our recently published opinion *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615 (*Bragg*), he contends that the appropriate discipline is stayed suspension for three years and actual suspension for a maximum of six months.

The State Bar supports the hearing judge's credibility determinations against respondent, conclusions of culpability, and findings in aggravation and mitigation. Citing *Grim* v. *State Bar* (1991) 53 Cal.3d 21, *Baca* v. *State Bar* (1990) 52 Cal.3d 294, *Harford* v. *State Bar* (1990) 52 Cal.3d 93, *Ainsworth* v. *State Bar* (1988) 46 Cal.3d 1218, *Rimel* v. *State Bar* (1983) 34 Cal.3d 128, and *Weir* v. *State Bar* (1979) 23 Cal.3d 564, the State Bar urges disbarment.

As discussed *ante*, we agree with the hearing judge's credibility determinations, almost all her conclusions of culpability, and her findings about aggravating and mitigating factors. In analyzing discipline, we look to the standards for guidance. (See *In re Morse*, *supra*, 11 Cal.4th at p. 206; *Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090.) Standard 1.3 identifies the primary purposes of discipline as protecting the public, courts, and legal profession; maintaining high professional standards by attorneys; and preserving public confidence in the legal profession. Under standard 1.6(a), the most severe of the different applicable sanctions is to be imposed when an attorney commits various ethical violations that call for different sanctions. Of the standards applicable to respondent's misconduct, standards 2.2(a) and 2.3 call for the most severe sanctions. Standard 2.2(a) requires the disbarment of an attor-

ney who has wilfully misappropriated trust funds unless the amount of the misappropriated funds is insignificantly small or unless the most compelling mitigating factors clearly predominate. Under standard 2.3, culpability of moral turpitude, fraud, or intentional dishonesty or culpability of concealing a material fact must result in disbarment or actual suspension, depending upon the extent to which the victim is harmed or misled, the magnitude of the misconduct, and the degree to which the misconduct relates to acts within the practice of law.

We also consider other cases. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) The hearing judge's reliance on *Jones* and respondent's reliance on *Nelson* and *Bragg* are misplaced. Unlike Jones, Nelson, and Bragg, respondent engaged in personal acts of moral turpitude apart from collusion with a nonattorney.

[2a] Although none of the cases cited by the State Bar is exactly on point, the State Bar appropriately urges disbarment. Respondent formed a reprehensible partnership with Gray. He told Gray about the impropriety of misrepresenting to clients that Gray was an attorney, but let Gray continue to make such misrepresentations because he wanted to retain Gray's lucrative services. Knowing that Gray's request for payment on a commission basis was improper, he paid Gray amounts depending on his gross revenues. With reckless disregard for the consequences, he let Gray control much of his practice, sign checks for trust funds, and handle all financial records without proper supervision. When Gray confessed to embezzlement, he did not report Gray to the authorities or accept Gray's offer to resign because he felt that he could not afford to lose Gray's services; nor did he even stop Gray from dealing with trust funds. He thus repeatedly favored his own financial interest over the interests of his clients and the requirements of the law.

[2b] In addition, respondent personally committed other acts of moral turpitude and dishonesty. In the Heneberry matter, he deliberately concealed from the insurer his failure to comply with the conditions precedent to the settlement and his discovery of Heneberry's death. In the Randall Gray matter, he deliberately misappropriated $4,623.62. In the Nonaka/Goto matter, he deliberately misrepresented the combined amount of the settlement as $19,000 rather than $21,000 and concealed from the insurer the lack of his clients' authorization for the settlement.

[2c] Respondent also violated a number of rules, displayed a lack of candor at trial, and failed to establish any significant mitigation. In these circumstances, public protection concerns call on us to recommend that respondent be required to successfully undergo a formal reinstatement proceeding before resuming the practice of law.

III. RECOMMENDATION

We recommend that respondent be disbarred. In addition, we recommend 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 rule 955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court's order. We also recommend that the State Bar be awarded costs under section 6086.10 and that these costs be payable in accordance with section 6140.7 (as amended effective January 1, 1997).

IV. ORDER

We order that respondent be involuntarily enrolled as an inactive member of the State Bar in accordance with Business and Professions Code section 6007, subdivision (c)(4). This order is effective 15 days after service by mail.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Jerome Berg

A Member of the State Bar

Nos. 92-O-11486, 92-O-11504

Filed August 5, 1997

SUMMARY

The hearing judge concluded that respondent committed dishonest acts and wilfully violated the rule against charging or collecting an illegal or unconscionable fee by extensive fraudulent billing in one matter and that he wilfully violated the rule against withdrawing disputed trust funds in a second matter. In mitigation, the hearing judge determined that respondent had done some pro bono work. Also, the hearing judge commented on respondent's multiple instances of serious misconduct and his truculence as aggravating circumstances. The hearing judge recommended disbarment. (Hon. Eugene E. Brott, Hearing Judge)

On review, respondent disputed the hearing judge's culpability conclusions. The State Bar supported these conclusions, but asserted that the hearing judge should have found respondent culpable of additional ethical violations.

The review department agreed with the hearing judge's culpability conclusions, except for adding a conclusion in the second matter that respondent wilfully failed to make prompt payment of funds which the client had requested and was entitled to receive. The review department rejected respondent's arguments that the hearing judge improperly gave preclusive effect to a superior court judgment against him in the first matter, that the hearing judge was biased against him, that the former rule against charging or collecting an illegal or unconscionable fee was unconstitutionally vague and did not apply to a case where a third party had assumed the client's obligation to pay the attorney's fees, that the hearing judge improperly limited his time to present mitigation evidence, that the statute of limitations barred the disciplinary charges against him, and that the State Bar improperly used secret documents against him. The review department gave minimal mitigating credit to respondent's pro bono work and no mitigating credit to work which he allegedly did for the client in the first matter and for which he unsuccessfully had sought compensation. In aggravation, the review department found a prior record of discipline, a pattern of misconduct, and a lack of insight into the wrongfulness of his actions. The review department affirmed the hearing judge's disbarment recommendation.

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 State Bar: Erica Markum, Andrea Wachter

For Respondent: Robert Rudolph

HEADNOTES

[1 a-g] 139 **Procedure—Miscellaneous**
159 **Evidence—Miscellaneous**
162.90 **Quantum of Proof—Miscellaneous**
169 **Standard of Proof or Review—Miscellaneous**
191 **Effect/Relationship of Other Proceedings**
199 **General Issues—Miscellaneous**

A hearing judge properly applied collateral estoppel and denied respondent the right to relitigate the issue of dishonest billing in a disciplinary proceeding where respondent had fully litigated the issue in a superior court action; where the jury in the prior action had determined by clear and convincing evidence that respondent had acted with oppression, fraud, and malice; and where no unfairness resulted from precluding the relitigation of the issue.

[2] 290.00 **Rule 4-200 [former 2-107]**

The former rule against charging or collecting an illegal or unconscionable fee was not unconstitutionally vague because the rule set forth standards which gave a person of ordinary intelligence a reasonable opportunity to know what was prohibited.

[3 a-b] 290.00 **Rule 4-200 [former 2-107]**

The former rule against charging or collecting an illegal or unconscionable fee applied to cases where a third party had assumed the client's obligation to pay the attorney's fees.

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

Respondent wilfully violated the rule requiring that an attorney promptly pay funds which the client has requested and is entitled to receive where a client asked respondent for her share of a settlement, where respondent disbursed his share of the settlement to himself, and where respondent waited without compelling reason for six weeks to disburse the client's share of the settlement to the client.

[5] 531 **Aggravation—Pattern—Found**

Respondent engaged in a pattern of misconduct where he sent a client multiple fraudulent billings, representing numerous monthly bills, covering a continuous period of in excess of 10 months.

[6] 831.90 **Standards—Moral Turpitude—Disbarment**

Repeated fraudulent billing, involving moral turpitude, is a matter from which the public deserves substantial protection. When this misconduct is combined with the additional misconduct of not

promptly paying over proceeds to a client and not retaining disputed fees in a trust account, and with respondent's inability or unwillingness to accept the judicial process, it places the public, the courts, and the profession at risk. Nothing less than disbarment was appropriate to control this risk.

Additional Analysis

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
290.01 Rule 4-200 (former 2-107)

Not Found

213.35 Section 6068(c)
213.75 Section 6068(g)
221.50 Section 6106

Aggravation

Found

511 Prior Record
621 Lack of Remorse

Mitigation

Found but Discounted

765.32 Pro Bono Work

Declined to Find

795 Other

Discipline

1010 Disbarment

OPINION

OBRIEN, P.J.:

Respondent Jerome Berg has been charged with three counts of professional misconduct. Count one charged respondent with overbilling The Dentists Insurance Company (TDIC) while acting as *Cumis* counsel[1] for TDIC's insureds in 41 malpractice actions filed against dentists covered by TDIC malpractice insurance. Prior to the commencement of these State Bar Court proceedings, TDIC filed a superior court action against respondent alleging causes of action for fraud and deceit, negligent misrepresentation, breach of oral contract, breach of the covenant of good faith and fair dealing, restitution, and money had and received. Following a 12-day trial, a jury awarded compensatory damages to TDIC in the sum of $282,024.86. In addition to entering judgment on the jury's award, the court awarded costs to TDIC.

In answer to three special interrogatories, the jury also found, by clear and convincing evidence, that respondent had acted with oppression, malice, and fraud. That judgment was affirmed in the Court of Appeal, and review was denied by the California Supreme Court and the United States Supreme Court.

In reference to his billing of TDIC (count one), respondent was found by the hearing judge to have committed dishonest acts in violation of Business and Professions Code section 6106,[2] prohibiting an attorney from committing an act involving moral turpitude, dishonesty or corruption as well as a violation of rule 2-107 of the former Rules of Professional Conduct of the State Bar (effective January 1, 1975 to May 26, 1989)[3], (now rule 4-200 with some changes). That former rule prohibited charging or collecting an illegal or unconscionable fee.

Count two arises out of two separate engagement letters between respondent and Linda Reynolds Miller (Reynolds) and respondent's withdrawal of funds from his trust account that represented a portion of the settlement proceeds of the subject matter of the two engagement letters. In that count, respondent was found culpable of violating rule 4-100(A)(2), requiring an attorney not to withdraw trust funds for the attorney's use where the client disputes the attorney's right to the funds.

In count two the hearing judge determined that there was not clear and convincing evidence that respondent violated rule 4-100(B)(4) (requiring, on request, the prompt payment of monies the client is entitled to receive), section 6068, subdivision (c) (maintain only just actions), section 6068, subdivision (g) (prohibiting an attorney from commencing or continuing a proceeding from corrupt motive), or section 6106 (prohibiting acts of moral turpitude, dishonesty).

In count three it was alleged that respondent's response to the State Bar's initial investigative inquiries in connection with count two was made with an intent to deceive, in violation of section 6106. The hearing judge found that there was a lack of clear and convincing evidence of such a violation.

Respondent has filed a 95-page opening brief, accompanied by an appendix containing 525 pages, which appear to be an amalgam of transcripts and documents filed in State Bar Court proceeding number 96-TE-04697, portions of transcripts, declarations, periodical articles and other material, some from the matter before us and some from the superior court action by TDIC. We rely solely on the record including the transcript of the proceedings in the hearing department in this proceeding in considering this review. We note that State Bar case number

1. *San Diego Federal Credit Union* v. *Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358 requires an insurer to pay for retained independent counsel for the defense of a lawsuit against the insured, where the insurer reserves the right to deny coverage at a later date when punitive damages are in issue and the insurer denies coverage for punitive damages.

2. References to section are to sections of the Business and Professions Code.

3. References to former rules refer to these former rules. References to rules refer to the current Rules of Professional Conduct, effective May 27, 1989.

96-TE-04697 is not before us, nor are the superior court proceedings, except as to those portions that were received into evidence in this proceeding by the hearing judge.

Respondent seeks review of all findings of culpability, but his briefs address the finding of culpability and discipline on count one almost exclusively. On the other hand, the State Bar seeks review of counts two and three, asserting that respondent violated rule 4-100(B)(4) and section 6106 by delaying six weeks in providing his client with her share of settlement proceeds. The State Bar also seeks review of the determination that clear and convincing evidence of respondent's misrepresentations to the State Bar investigator in violation of section 6106 was lacking.

Following our independent review of the record, we affirm the hearing judge's determination as to culpability on count one. In count two we make a finding under our duty of de novo review of a violation of rule 4-100(B)(4), but otherwise affirm the hearing judge's findings as to that count. We also affirm the findings as to count three and affirm the hearing judge's recommendation that respondent be disbarred.

II. CONTENTIONS OF PARTIES

Although presented in a multitude of forms in his briefs, the primary issue raised by respondent in count one is the propriety of the preclusive effect given by the hearing judge to the superior court action by TDIC against respondent. Respondent further argues that: (1) the hearing judge was biased against him; (2) the charge against him under former rule 2-107 is unconstitutionally vague; (3) the hearing judge's limitation on his time to present a portion of his mitigation evidence relating to work done for TDIC after they terminated his right to compensation as *Cumis* counsel unduly restricted his right to present a defense to count one; (4) the charges are barred by the statute of limitations; and (5) the State Bar used "secret" documents against him.

The State Bar supports the factual findings and conclusions of the hearing judge as to count one, but argues that there is clear and convincing evidence of a violation of rule 4-100(B)(4) and section 6106 in count two, and that respondent's misrepresentations to the State Bar investigator constitute an additional violation of section 6106 in count three.

We first consider the propriety in count one of giving preclusive effect to TDIC's superior court action against respondent, and then deal with the balance of the arguments asserted.

III. DISCUSSION

A. Count One — Alleged False Billing

Respondent is charged with presenting false and misleading billing statements to TDIC between the period of March 1987 and May 1988. Commencing in November 1985, respondent was associated as *Cumis* counsel in some 41 malpractice actions against 4 dentists insured by TDIC. There was no written fee agreement between TDIC and respondent, but there was an oral agreement that respondent would be paid at a rate of $150 an hour for services rendered to the insured dentists.

For services purportedly rendered between March 1987 and the end of that year respondent was paid by TDIC the total sum of $357,024.86. The majority of these charges were billed at the rate of $150 an hour, as orally agreed, while a portion were billed at $175 an hour without either notice to TDIC or its agreement. Respondent regularly billed TDIC for work before it was performed without either disclosing that fact to TDIC or obtaining its agreement. These bills, rendered monthly and separately on each of the 41 cases, reflected by date various services purportedly rendered, a description of the purported services, the time purportedly devoted to that service together with a total number of hours, multiplied by an hourly rate. The bills clearly represented that the indicated work had been performed. Respondent's bills were replete with descriptions such as "receipt of pleading," "records review," and "case preparation."

The record showed that on a large number of days respondent represented on bills that he personally worked in excess of 24 hours and that on a substantial number of days respondent represented

he had personally worked in excess of 100 hours. This information was not discovered by TDIC until it did a complete audit of respondent's bills in 1988. Respondent identified his billing method as "bulk billing." Such a billing method was never agreed to by nor discussed with TDIC.

Respondent produced no time records, testifying that they had been destroyed within 90 to 180 days following each billing because TDIC had not complained. Respondent did not prepare pleadings in the malpractice cases other than one or two statements for settlement conferences. He prepared no memoranda, deposition summaries, written opinions, or other evidence reflecting productive work on the files in question. Respondent's files on these matters were disorganized and contained little in the way of evidence of client conferences. Respondent testified that he had an employee in his office count the number of pages of documents received pertaining to the TDIC matters and multiply that number by three minutes a page to determine his hours for billing purposes.

It was clear that many of the documents received were identical for each of the 41 cases, with the exception of the caption. Even so, they were each included in the scheme for determining time.

Upon the adoption of Civil Code section 2860, effective January 1, 1988, which section effectively amended the requirement that insurance companies provide *Cumis* counsel, TDIC determined that it was no longer obligated to pay for or provide *Cumis* counsel to its insured dentists whom respondent was representing. After January 1, 1988, TDIC continued to receive bills from respondent, claiming that additional work had been performed prior to that date. By May 1988 TDIC stopped payment on those bills and following investigation determined that they had overpaid respondent some $250,000 based on bills representing work that had falsely been claimed to have been performed.

As indicated above, the bills were separately rendered monthly on the 41 separate files, and the fraudulent billing was not discovered until an audit of all of respondent's bills was completed.

These charges ultimately resulted in TDIC's successful action in the San Francisco Superior Court. That action included charges of fraud and deceit. In the superior court action, respondent cross-complained for the bills TDIC refused to pay and for other work allegedly performed after January 1, 1988, totaling $162,000. As to some issues raised by respondent's cross-complaint, the court granted TDIC's motion for summary judgment. As indicated above, the jury returned a verdict against respondent on TDIC's claims in the sum of $286,024.86 and against respondent on the remaining issues in his cross-complaint.

In response to special interrogatories, the jury found, by clear and convincing evidence, that respondent acted with oppression, malice and fraud.

In an unpublished opinion, the First Appellate District Court of Appeal affirmed the judgment entered on the jury verdict in the superior court, as well as the order granting TDIC's motion for summary judgment. There, as here, respondent argued that he was entitled to be compensated for his work as *Cumis* counsel after the effective date of Civil Code section 2860. The appellate court affirmed the superior court determination that respondent was not entitled to such compensation from TDIC. The California Supreme Court and the United States Supreme Court denied review.

1. There was no error in giving the superior court judgment preclusive effect

In the superior court action, following a 12-day trial, the jury determined by clear and convincing evidence respondent was guilty of oppression, malice and fraud in his billings to TDIC for the period of March 1987 through May 17, 1988. In the disciplinary proceeding before us, respondent was charged with providing false and misleading billing statements to TDIC by representing work to have been personally performed that was not, in fact, performed, all covering the identical time period. In the superior court action, TDIC's claims manager testified that, following a full audit, he concluded that respondent had defrauded his employer through false billings by about $250,000.

As noted in the appellate court decision: "Litigation management expert, M. Brand Cooper, testified as to how attorneys generally keep track of time spent and bill their clients. At TDIC's request, Cooper had reviewed Berg's billings in this case. After describing that process and the reports it generated, Cooper testified that in his opinion Berg's billings were 'unreasonable, excessive, dishonest and don't bear any relationship to the work that was actually expended. . . .' For reasons which he described in detail, he concluded that 'the overwhelming majority of the descriptions on the bills represent descriptions of work that was not performed.' Finally, he testified that appropriate compensation for the work Berg did as *Cumis* counsel was between $10,000 and $50,000."

[1a] Respondent urges error in the hearing judge denying him the right to re-litigate the propriety of his billing. We disagree. This court, in *In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327-329, extensively analyzed the applicability of collateral estoppel, relying partially on *Stolz* v. *Bank of America* (1993) 15 Cal.App.4th 217, at 222, and concluded that in the appropriate case that doctrine is applicable to State Bar Court proceedings.

[1b] Under that analysis the initial inquiry in the issue preclusion known as collateral estoppel is whether or not the issues on which preclusion are sought were, in fact, litigated in the prior action.

[1c] The transcript in the prior action was introduced into evidence in the State Bar Court proceedings, along with the verdict, evidence of the jury determination of oppression, malice and fraud, and the unpublished appellate court decision. Both our review of the record in the prior action and the appellate court opinion confirm that the issue of the false billing was fully litigated in the superior court action.

Respondent takes a contrary view. He argues his evidence in mitigation changes the issues before this court, claiming, among other things, that he later performed the work for which he billed. He points out that in the civil proceedings he was prohibited from presenting that evidence. Such an argument misses the point. The issue in both trials was the propriety of the billing. The fact, if true, that respondent harbored some intention to later perform the work that he represented in bills as having been completed has no bearing on culpability based on a charge of false billing under either section 6106 or former rule 2-107. The issues are identical to those before the jury on a question of fraudulent billing.

The fact that additional evidence may be admitted in the State Bar Court proceedings on the issue of discipline (i.e., evidence in mitigation and aggravation) has no effect on the issues before either the hearing judge or this court on the question of respondent's culpability on count one.

[1d] The second issue to consider in collateral estoppel is whether or not the civil determination was made under the same standard of proof as required in disciplinary matters before the State Bar Court or the California Supreme Court. (*In the Matter of Applicant A*, *supra*, 3 State Bar Ct. Rptr. at p. 329.) Rule 213, Rules of Procedure of the State Bar, title II, State Bar Court proceedings requires that the State Bar prove culpability in disciplinary matters "by clear and convincing evidence." In the San Francisco Superior Court action the jury determined "by clear and convincing evidence" that with regard to the facts of the case respondent acted with oppression, malice and fraud. There can be no question that the standards of proof in the two matters were identical.

[1e] The remaining issues in the determination of applicability of collateral estoppel in bar court proceedings are whether: (1) the party before this court was a party to the civil proceedings; (2) there was a final judgment on the merits in the civil proceeding; and (3) it would be unfair to precluding re-litigation of the issue or issues in question. (*In the Matter of Applicant A*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 329.)

[1f] It is clear that the defendant in the superior court action is the respondent now before us and that there was a final judgment in the prior action. On the third point, respondent asserts with great vigor that there is unfairness in prohibiting re-litigation of the propriety of his billing because the proceedings in the San Francisco Superior Court were unfair, primarily for the reason that he was not permitted to show

work he performed after he was notified that he would no longer be paid by TDIC, and that the superior court's application of Civil Code section 2860 was unconstitutional. He further argues that the appellate court was incorrect in the analysis of the issues. In referring to that argument, the hearing judge put it: "I'm not going to rule on whether you had a fair trial. I think the Court of Appeal did that." We agree and decline to deal with an issue that has been resolved before a California Court of Appeal and that the California Supreme Court and the United States Supreme Court have declined to review. However, we do note that from a review of the entire record there is no unfairness by the State Bar Court in refusing respondent the right to re-litigate the propriety of his billing to TDIC.

[1g] In summary, we affirm the hearing judge's exercise of discretion in applying the issue preclusion in the matter before us.[4] We note that the United States Supreme Court has approved the exercise of discretion by the trial judge in such a situation. (*Parklane Hosiery Co. Inc.* v. *Shore* (1979) 439 U.S. 322, 331.)

2. Former rule 2-107 was not unconstitutionally vague

[2] In his opening brief in a section entitled "vagueness," respondent cites cases raising the issue of lack of notice to one charged with disciplinable professional misconduct. He then appears to argue that former rule 2-107 fails to set forth standards for advanced billing. We agree that disciplinary rules must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 108.) However, such standards are explicitly set forth in former rule 2-107(B).

Although not clear, respondent appears to argue that he was doing "advance billing" with the intention of later performing the work and that former rule 2-107 does not specifically proscribe such "advance billings." Such a position must fail for the obvious reason that there was a clear representation in each bill sent to TDIC by respondent that the work had, in fact, been performed. Thus, bills were false on their face. Had TDIC agreed to "advanced billing" then the issue could be considered. No such evidence appears in the record. A witness for TDIC did testify, by way of example, that if .3 hours work billed on September 3 was, in fact, done on September 7, it would make no difference stating, "If he did the work he is entitled to payment." Such a statement is a far cry from approving payment of over $250,000 worth of work that had not been performed at the time of the billing when the bills represented that the work had been performed.

3. The relationship between respondent and TDIC is governed by former Rule 2-107

[3a] Respondent argues that, since the dentists and not TDIC were his clients, he did not owe a high duty of loyalty to TDIC as suggested in the hearing judge's decision. We need not reach the issue of a formal description of the relationship between respondent and TDIC. It is enough to say that he owed the duty of honesty and integrity that lawyers owe to all persons. (Cf. *Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 567; see also Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 2.3.) In addition, TDIC, the insurance company for the dentists, stood in the shoes of the dentists. The obligation of TDIC to pay respondent arose out of their policies of insurance covering the dentists. The attorney-client relationship was with the dentists, not the insurance company, but the insurance company was obligated to pay no more than was reasonable for the services rendered to the clients. Absent insurance, the client would have been obligated to pay for the services. To argue

4. Although we hold that collateral estoppel was properly applied to preclude respondent from re-litigating the jury's finding that respondent's billing practices involved oppression, malice and fraud with respect to TDIC, we have independently determined that his fraudulent billing scheme is disciplinable under California law and the appropriate discipline to recommend as a result. The ultimate question in this proceeding is whether respondent should be disciplined, and if so, what the discipline should be. These are questions unique to the attorney discipline system, and are questions *not* determined by the application of collateral estoppel.

that an attorney does not owe the same duty regarding billing to a third person who has agreed to pay the reasonable attorney fees for the client as would be owed to the client, is to create a distinction without a difference. (Cf. *id.*)

[3b] Former rule 2-107(A) stated: "A member of the State Bar shall not enter into an agreement for, charge or collect an illegal or unconscionable fee." That proscription is not limited to charges to the client, although obviously that would be the most common application. The term "client" is used only in setting forth some of the factors to be used in determining the reasonableness of the fees in former rule 2-107(B). We determine that the proscriptions of former rule 2-107 apply with equal force to those cases, such as the present case, where a third party has assumed the obligation to pay the attorney's fees. However, we voice no opinion on the applicability of former rule 2-107 where a court awards fees according to agreement or statute to the prevailing party in litigation.

4. Respondent was not unduly restricted in presenting mitigation evidence

Respondent argues that he was prejudiced by the hearing judge limiting his time to present evidence in mitigation of the work that he performed after being notified by TDIC that they would no longer pay for his services allegedly rendered after January 1, 1988. We note that the court invited respondent to present in summary form the work he allegedly performed for which he was not paid. This resulted in exhibit N, a 26-page document that presents in summary form the work allegedly performed by respondent after January 1, 1988. The court received it in evidence even though the first 14 pages of that exhibit covered a period prior to the end of 1987. As counsel for respondent indicated, respondent was prepared to go forward with documents supporting each entry in exhibit N, but indicated that "going through all of the items which are summarized here in Exhibit N would probably take us a couple of weeks." Exhibit N was accepted into evidence, and respondent was permitted, over the objection of the State Bar, to enter into a narrative covering some 30 pages of transcript on that exhibit.

Respondent fails to accept that the evidence was admitted solely for purposes of mitigation, and continues to argue that the evidence goes to culpability. As we have discussed *ante*, we hold otherwise.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time . . . ." (See also 1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 298, pp. 268-270.) The sole purpose for considering the evidence in question was to show mitigation. The essence of the material was clearly set forth in the exhibit received in evidence covering the efforts respondent put forth after his compensation had been terminated. We further note that the mitigating effect of those efforts is lessened by respondent's testimony that when he performed those services he expected to be compensated for them. We find a commendable exercise of discretion by the hearing judge.

5. The charges are not time barred

Respondent argues that an action based on fraud is barred unless proceedings are commenced within three years of discovery, citing Code of Civil Procedure section 338, subdivision (d). At the time this matter arose, the rules concerning disciplinary matters had no limitation period. (But see Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 51(h) [new rule on limitations effective only on complaints and reports received by the State Bar after July 1, 1995].) Therefore, the mere lapse of time in the filing of a disciplinary complaint is no defense absent a showing of specific prejudice. (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 449.) No such showing has been made.

6. The State Bar did not use "secret papers" against respondent

Respondent argues that he was refused access to the briefs filed by the parties in *In the Matter of Applicant A*, *supra*, 3 Cal. State Bar Ct. Rptr. 318. That was a moral character proceeding, which is confidential and not public under section 6060.2. As recited in that opinion, the applicant waived confidentiality only as to the decision that was published.

Respondent asserts that the State Bar had access to these briefs, and that he was denied such access. While such an assertion is not supported by the record, assuming it to be true, it entitles respondent to no relief. The situation is no different than any prosecuting agency or private law office that may have internally available prior research on an issue addressed in a published opinion similar to that at hand. Respondent cites us to no authority suggesting that the "use," if any, of such material is improper. The argument is devoid of merit.

B. Count Two — Handling of the Proceeds of the Reynolds Settlement

Reynolds engaged respondent to represent her in two separate automobile accident cases involving personal injury to Reynolds. In the earlier case, an engagement letter dated September 7, 1989, provided that the attorney's fees would be one-third of the recovery if the case settled before a trial-setting conference and forty percent if it settled thereafter. In the later case, an engagement letter effective January 12, 1990, stated that the fees would be forty percent of the net recovery. Since the defendants in the two cases were insured by the same insurance carrier, the cases were consolidated.

The two cases were arbitrated, and no trial-setting conference was held, resulting in an award of $18,500. Thereafter, respondent was able to negotiate a settlement in the total sum of $27,500, which was not allocated between the two cases. Respondent calculated his fee at forty percent of the total recovery, amounting to $10,571.24 and set that forth on a settlement statement. Reynolds signed that statement containing the forty percent allocation to attorney's fees on June 25, 1991. However, on June 26 she wrote respondent objecting to his taking forty percent on both matters when the earlier agreement called for but one-third. That letter was received in respondent's office on June 28.

On June 28, 1991, respondent issued to himself a check drawn on his client trust account in the sum of $3,571.24, and on July 10, 1991, he issued a second check on the same account to himself for what he claimed as the balance of his fees in the sum of $7,000, which represented a total of forty percent of the $27,500 recovery. Respondent testified that he was unaware of Reynolds's letter of June 26 and first became aware of a fee dispute as the result of a letter from Reynolds dated July 23, 1991. In the July 23 letter Reynolds reiterated her position and demanded payment of her portion of the proceeds.

Following receipt of the July 23 letter, respondent sent a revised settlement statement suggesting that Reynolds sign it under protest, that respondent would deliver the uncontested portion to Reynolds, and that "we can work on resolving the disputed portion." Although it was mentioned in the engagement letters, respondent did not suggest that the fee dispute be arbitrated by the local bar association. (See, generally, § 6200 [arbitration of attorney's fees].) On August 2 Reynolds signed the revised statement reiterating her position. On August 6, respondent sent to Reynolds the undisputed portion of $15,274.37.

Three days later Reynolds filed a small claims action against respondent for the disputed amount of fees, and respondent countered with a municipal court complaint alleging that her failure to cooperate as a client had cost him a much larger fee. Following a judgment in favor of Reynolds, respondent filed a notice of appeal, but the appeal was dismissed when respondent failed to deposit fees. That judgment was satisfied.

1. The payment of fees to respondent and proceeds to Reynolds

The hearing judge determined that respondent was culpable of a violation of rule 4-100(A)(2), requiring that when an attorney's right to a portion of trust funds is disputed by a client, the dispute must be resolved before the disputed portion may be withdrawn by the attorney. On the other hand, the hearing judge determined an absence of clear and convincing evidence that respondent violated rule 4-100(B)(4), requiring, on request, prompt payment by an attorney of monies the client is entitled to receive or that he violated § 6106 (proscribing acts involving moral turpitude, dishonesty).

Reynolds's letter of June 26, 1991, was admittedly received by respondent's office on June 28. In

that letter Reynolds disputed respondent's right to the total fees he claimed and further stated that she expected a check for the full amount she claimed due her. Respondent testified that he did not see that letter and was not aware of its contents until long after he took his fees.

As the hearing judge points out, even if this is true, respondent failed to provide any evidence of a return to trust of the disputed portion of the fees, even after admittedly being put on notice of the dispute. We agree with the hearing judge's determination that respondent is culpable of violating rule 4-100(A)(2), because he did not return the disputed portion to his client trust account pending the dispute's resolution, (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758) and in taking disputed fees out of trust.

[4a] The charge of violation of rule 4-100(B)(4) presents a more involved question. It is fundamental that respondent had no more right to his fees than did the client to her share of the settlement proceeds. The question is whether we charge respondent with knowledge of Reynolds's June 26, 1991, letter that was in his office at the time of his withdrawal of the balance of his claimed fees.

[4b] In the normal course of the operation of a law office an attorney should not be at risk of discipline for the failure to have knowledge of every item of information that comes to the office. (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795-796; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 726.) Here, however, the attorney took action regarding trust funds in which a client had an ownership interest, to the detriment of the client and to his advantage, without considering the information that the client had, in fact, provided him. There is no explanation in the record for respondent taking a portion of the settlement proceeds without simultaneously providing to the client her portion of those proceeds. There is nothing that suggests that respondent was entitled to some priority in the disbursement of the settlement proceeds of client's matters.

[4c] We agree with the hearing judge that a six-week delay in the disbursement of proceeds of a settlement would not, per se, result in a violation of rule 4-100(B)(4). However, when an attorney disburses his or her portion of client's settlement proceeds for the account of the attorney and thereafter delays in disbursing the client's portion of such proceeds for a material period of time without compelling reason, serious concerns as to whether such a violation has occurred are raised.

[4d] Respondent was working with the subject matter of the June 26 letter from the client; it was a matter in which he owed the highest duty to the client to act fairly, and he was obligated to review the file and other information sent him by the client, including her demand for payment. Under the circumstances of this case, we do charge respondent with the knowledge of the information the client had provided to him.

[4e] In the face of that demand, combined with the fact that respondent made disbursements to himself, and absent good reason for holding the funds, we conclude contrary to the hearing judge that respondent's failure to make disbursement to the client for a period of six weeks constitutes a wilful violation of rule 4-100(B)(4). However, like the hearing judge, we do not conclude that respondent's failure involved moral turpitude in violation of section 6106.

2. The filing of a civil action against Reynolds

In count two respondent is also charged with violation of section 6068, subdivision (c) requiring an attorney to maintain only such actions as appear just. In addition, he is charged with commencing or continuing an action from corrupt motive of passion or interest in violation of section 6068, subdivision (g). The object of these charges is the municipal court action respondent filed against Reynolds in response to her small claims filing.

We agree with the hearing judge that there is no clear and convincing evidence of the motivation behind respondent's actions in filing such a response to the small claims action. However, respondent's conduct does raise questions about his motivation. He did not suggest that the dispute could be resolved through arbitration with the local bar association,

even though it was in the fee agreements. In addition, the dispute was clearly within the jurisdiction of the small claims court. However, as indicated by the trial court, respondent's conduct was within his legal rights. We conclude there is an absence of clear and convincing evidence that respondent acted from a corrupt motive in violation of section 6068, subdivision (g). Likewise, we conclude that there is no clear and convincing evidence that the action was unjust in violation of section 6068, subdivision (c).

C. Count Three — Respondent's representations to the State Bar Regarding the Reynolds Charges

In September 1992, a State Bar investigator wrote respondent inquiring about the Reynolds matter. On October 2, 1992, respondent wrote, replying that Reynolds objected to the fee for the first time on August 2, 1992, and that when he withdrew his fees there was no fee dispute. The State Bar alleges these statements were false and made with the intent to deceive, involve moral turpitude, and, therefore, violate section 6106.

The hearing judge points out that it is plausible that in his October letter to the State Bar respondent may have confused the time he received information that Reynolds disputed the fee. Even though controverted, respondent's version supports a reasonable inference of absence of misconduct, which the hearing judge was free to find. (See, generally, *Davidson* v. *State Bar* (1976) 17 Cal.3d 570, 573-574.) Even though we have charged respondent with knowledge of Reynolds's June 26 demand for payment for purposes of rule 4-100(B)(4), we do not attribute that knowledge to him for moral turpitude purposes under section 6106. Resolving reasonable doubt in favor of respondent (*Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 852), we agree that the State Bar has not shown a violation of section 6106 by clear and convincing evidence.

D. Alleged Bias by the Hearing Judge

With respect to his contentions regarding bias of the hearing judge, we note initially that respondent has failed or refused to support them with cites to the transcript by page and line, nor has he identified any exhibits by the number or letter of the exhibit and page of the exhibit, but only by reference to the massive appendix he has prepared. As we noted earlier, that appendix contains reference to material that is not properly before us. As a consequence, respondent has failed to comply with rule 302(a) of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings and waived any error. (Cf. rule 15(a), Cal. Rules of Court; 9 Witkin, Cal. Procedure, (3d. ed. 1985) Appeal, § 475, pp. 467-468.) Nonetheless, we have exercised our discretion and searched and located the relevant portions of the record in the furtherance of justice.

Respondent takes exception to the hearing judge's observation in the decision that, when respondent was asked about his state of mind and the nature and quantity of the work he actually performed he rambled, related anecdotes, and gave details of underlying malpractice cases. We have reviewed the record and confirmed that respondent repeatedly used a question as a platform to initiate a description of material that may or may not have been related to the question asked and regularly exceeded the bounds of the question without fully answering it. In spite of repeated reminders by both the court and his own counsel, this conduct continued throughout the trial. The identical conduct was noted by the appellate court in the civil trial. Even the examples cited by respondent as providing direct responses to questions from the court show that respondent exceeded the bounds of the questions in giving his answers.

A reading of the record demonstrates that the hearing judge took an evenhanded approach to attempting to obtain from a difficult witness the information essential to reaching a just decision in this matter. The record reflects an unfortunate determination on the part of respondent to describe events in his own way, regardless of the specific questions put to him. We find no indication of bias on the part of the hearing judge. In fact, we laud the hearing judge's effort to set forth the factors he relied on in making his credibility determinations. (See *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227 [court should declare how it weighed the evidence and determined the credibility of the parties and witnesses]; see also Evid. Code, § 780, subd. (c) [in making credibility determinations,

finder of fact may consider the extent of the witness's capacity to perceive, recollect, and communicate the matter about which he testifies].)

IV. DISCIPLINE

A. Mitigating Circumstances

We have reviewed the hearing judge's determinations of mitigation and agree. Respondent testified that he did some pro bono immigration cases in the 1960's, that he was a trustee at his temple and assisted in the acquisition of land for the temple in the 1970's, and that he did some pro bono work for a doctor and a professor and for the Union of Physicians by preparing its bylaws in the 1980's. In 1989 he suffered a heart attack that severely limited his activities for a period of approximately six months. In the 1990's he worked on a social security case and an unemployment case, as well as writing an amicus brief for the Union of Physician and served as a consultant to the Union of Physicians, all pro bono. We give minimal mitigating credit to such pro bono work.

Respondent sought to show, by way of mitigation, that he devoted an enormous amount of time to TDIC matter for which he was not paid and urged that as mitigation. However, respondent admits that he expected to be paid for those hours even though TDIC initially refused to do so. In addition, respondent produced no billings, time records or work-product that substantiates his claim. Respondent sought compensation for that time in his cross-complaint against TDIC in the superior court. That claim was denied. There is no clear and convincing evidence that the work was ever performed, and if performed, it was in the expectation of being compensated. Thus, we find no basis for mitigation in the scenario recited concerning the alleged work for which respondent sought compensation from TDIC.

In summary, there is no showing by clear and convincing evidence that demonstrates that the public, courts, and legal profession would be adequately protected by reduced discipline, pursuant to standard 1.2(e).

B. Aggravating Circumstances

Respondent has a prior record of discipline. On January 24 , 1986, respondent was privately reproved for one count of client abandonment that occurred over the period from 1981 through 1983. Standard 1.2(b)(i) suggests that a prior record of discipline demonstrates a need for a greater degree of disciple than otherwise might be warranted.

There were multiple fraudulent monthly bills in the TDIC matter, each representing one of the 41 cases on which respondent was *Cumis* counsel. Respondent was found to have billed throughout 1987 and well into 1988 for services that had not, in fact, been performed. The fraudulent bills stopped only when TDIC commenced its audit of respondent's charges and refused further payment. Standard 1.2(b)(ii) indicates that multiple acts or a pattern of misconduct is an aggravating circumstance.

[5] We determine that the multiple fraudulent billings, representing numerous monthly bills, covering a continuous period of in excess of 10 months, constitutes a pattern of misconduct.

As the hearing judge noted: "Respondent's unconscionable fees and deliberate misrepresentations to TDIC over an extended period of time clearly established his culpability of multiple instances of serious misconduct, all of which involved moral turpitude. 'Such dishonest conduct is inimical to both the high ethical standards of honesty and integrity required of member of the legal profession and to promoting confidence in the trustworthiness of members of the profession.' (*Stanley* v. *State Bar*, *supra*, 50 Cal.3d 555, 567.)"

Throughout the proceedings in the superior court, Court of Appeals, and even through argument to this court, respondent has refused to acknowledge any misconduct in his billing. It has been determined that he repeatedly fraudulently billed TDIC. That determination has been affirmed on appeal, and respondent's basic response is that the decision is in error. In spite of the finality of that determination, respondent devotes some 80 pages of his brief in arguments that miss the point of the fact that a final

determination has been made of his fraudulent misconduct. As did the hearing judge, we quote from *In re Morse* (1995) 11 Cal.4th 184, 209: "Of course, [respondent], like any attorney accused of misconduct, had the right to defend himself vigorously. [Respondent's] conduct, however, reflects a seeming unwillingness even to consider the appropriateness of his statutory interpretation or to acknowledge that at some point his position was meritless or even wrong to any extent. Put simply, [respondent] went beyond tenacity to truculence."

Put another way, respondent's "defense did not rest on a good faith belief that the charges were unfounded, but on a blanket refusal to acknowledge the wrongfulness of conceded conduct. [Citation.]" (*Carter* v. *State Bar* (1988) 44 Cal.3d 1091, 1101.) This applies to both the TDIC matter, which we have determined involves moral turpitude, and the trust account violations concerning his client Reynolds. Respondent's lack of insight into the wrongfulness of his actions is an aggravating factor. (*Id.* at pp. 1100-1101.)

C. Appropriate Level of Discipline

We look for like cases to assist in the determination of the appropriate discipline. In *Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, the Supreme Court determined that there was an absence of a pattern of willful failure to perform services, but concluded that disbarment was appropriate because of the existence of multiple instances of serious misconduct.

In *Dixon* v. *State Bar* (1985) 39 Cal.3d 335, respondent was culpable of moral turpitude, attempting to charge an unconscionable fee, failing to maintain a record of client funds and account for them, and failing to refund fees paid in advance and not expended on the client's behalf. There the court pointed out: "Moreover, as in the previous proceedings, petitioner has been firm in his refusal to admit wrongdoing or to show remorse. He continues to assert, albeit based on shifting descriptions of the facts, that his conduct was appropriate and he owes no refund to his clients." (*Id.* at pp. 343-344.) Dixon had a prior suspension and was disbarred.

In the instant case, respondent has shown no remorse and has continuously asserted the propriety of his conduct even though it has been determined to have been fraudulent. This denotes an unwillingness to accept the judicial process, even aside from the disciplinary process. It suggests that, for respondent, the sole interpretation of the Rules of Professional Conduct and the State Bar Act is his own.

[6] We take the repeated fraudulent billing, involving moral turpitude, to be a matter from which the public deserves substantial protection. When this misconduct is combined with the misconduct found in the Reynolds matter, consisting of not promptly paying over proceeds to a client and not retaining disputed fees in a trust account, and respondent's inability or unwillingness to accept the judicial process, it places the public, the courts, and the profession at risk. In the judgment of this court, nothing less than disbarment will appropriately control this risk.

V. ORDER

Respondent has been involuntarily enrolled as an inactive member of the State Bar under section 6007 subdivision (c)(4) in State Bar Court proceeding 96-TE-04697 and will remain so absent further order. Nonetheless, we consider the application of section 6007, subdivision (c)(4) (as amended effective January 1, 1997) mandatory. We order that respondent be involuntarily enrolled as an inactive member of the State Bar in accordance with section 6007, subdivision (c)(4), effective 15 days after service by mail of this order on respondent.

V. RECOMMENDATION

We recommend that respondent be disbarred. We further recommend that respondent be ordered to comply with the requirements of rule 955(a) of the California Rules of Court within 30 days after the effective date of the Supreme Court order in this matter and file the affidavit provided for in paragraph (c) of that rule within 40 days after the effective date of the order, showing his compliance with that order.

In addition, we recommend that costs be awarded to the State Bar in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997.)

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Melody Lynne Jolly

A Member of the State Bar

No. 94-C-18931

Filed August 22, 1997

SUMMARY

Respondent was convicted of making false statements and submitting false documents for the purpose of obtaining a loan (18 U.S.C. §1010), a felony involving moral turpitude. The State Bar filed a motion seeking respondent's summary disbarment pursuant to the provisions of Business and Professions Code section 6102, subdivision (c), as amended effective January 1, 1997. Respondent's criminal offense and conviction occurred before January 1, 1997.

The review department denied the motion for summary disbarment, concluding that Business and Professions Code section 6102, subdivision (c), as amended effective January 1, 1997, should not be applied retroactively, and that summary disbarment was not appropriate under the former version of the statute. By separate order, the case was referred to the hearing department for a hearing.

COUNSEL FOR PARTIES

For State Bar: David Carr

For Respondent: Arthur Margolis

HEADNOTES

[1] **139 Procedure—Miscellaneous**
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding

In determining whether an attorney's convictions meet the statutory criteria for summary disbarment, the review department is limited to the record of conviction and any undisputed facts

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that may exist. Where the record of conviction did not establish that the offenses were committed in the course of the practice of law or in any way such that a client of respondent's was a victim, the offenses did not meet the criteria for summary disbarment under the version of Business and Professions Code section 6102, subdivision (c), in effect prior to January 1, 1997. Summary disbarment was warranted, if at all, only under the present version of the statute.

[2] **139 Procedure—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1553.59 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment

A retroactive law is one that affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. Respondent's crimes were committed and her conviction occurred when the prior version of Business and Professions Code section 6102, subdivision (c) was in effect and her offenses were not within the scope of the former version of the statute. In addition, as respondent would not have been subject to summary disbarment, she had a right under the former version of the statute to a hearing and to present evidence prior to the imposition of discipline. The application of the present version of section 6102, subdivision (c) under these circumstances would be retrospective.

[3 a-e] **139 Procedure—Miscellaneous**
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act
1553.59 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment

It is presumed an amendment to a statute operates prospectively unless the Legislature has expressly stated the contrary or, after considering all pertinent factors, there is clear indication of a legislative intent that the statute operate retrospectively. Business and Professions Code section 6102, subdivision (c) does not contain an express retroactivity provision and after considering extrinsic factors, including public protection and due process, the review department concluded that section 6102, subdivision (c) should not be applied retroactively.

[4 a, b] **139 Procedure—Miscellaneous**
1549 Conviction Matters—Interim Suspension—Miscellaneous
1553.59 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment

The important public interest served by the summary disbarment statute does not show that the legislature intended the statute to operate retroactively. A summary disbarment proceeding, by definition, excludes an evidentiary hearing in the State Bar Court prior to disbarment. However, pursuant to Business and Professions Code section 6101, subdivision (a), upon receipt of a certified copy of the record conviction, attorneys convicted of a felony or a crime involving moral turpitude are interimly suspended from the practice of law pending final disposition of the proceeding. Thus, even if an evidentiary hearing is held, the attorney convicted of an offense that would warrant disbarment is immediately suspended from the practice of law and can remain suspended until disbarred. Accordingly, the public is promptly protected from attorneys convicted of crimes of dishonesty regardless of whether summary disbarment occurs. Moreover, the opportunity for a referral hearing is not designed to lower professional standards.

[5] **139 Procedure—Miscellaneous**
192 Due Process/Procedural Rights

An attorney's reliance on the former law is a factor to consider in determining the constitutional question of whether the retroactive application of the statute would deny due process. However, if, as a matter of statutory construction, the provision is prospective, no constitutional question is presented.

Additional Analysis

[None.]

OPINION

OBRIEN, P. J.:

The State Bar filed a motion on March 26, 1997, seeking the summary disbarment of respondent Melody Lynne Jolly pursuant to the provisions of Business and Professions Code section 6102, subdivision (c), as amended effective January 1, 1997.[1] In order to rule on the motion we must decide whether the current version of section 6102, subdivision (c), should be applied retroactively to respondent's criminal offenses, an issue of first impression.

After reviewing of the record of conviction and considering the arguments of the parties and the relevant law, we conclude that the statute should not be applied retrospectively. Thus, whether summary disbarment should be recommended as a result of these criminal offenses must be governed by the former version of the statute. As summary disbarment is not appropriate under the former version of the statute, we deny the motion for summary disbarment and, by separate order, refer this matter to the hearing department for a hearing.

BACKGROUND

In March 1996, respondent was convicted of five counts of making false statements and submitting false documents for the purpose of obtaining a loan to be insured by the Department of Housing and Urban Development. (18 U.S.C. § 1010.) The offenses occurred in August 1991 and June 1993. By order filed April 16, 1996, and effective May 24, 1996, respondent was interimly suspended from the practice of law pending final disposition of the disciplinary case as the offenses were felonies. (See § 6102, subd. (a).) By order filed June 13, 1996, we concluded that the offenses involved moral turpitude per se, an additional basis for the interim suspension. The convictions are now final.

Based on the State Bar's motion for summary disbarment, we ordered respondent to show cause why her summary disbarment should not be recommended to the Supreme Court. In reply, respondent asserts several arguments in opposition, including that section 6102, subdivision (c), should not be applied retroactively. We set the matter for oral argument to address the issue of whether summary disbarment was appropriate. Both parties have filed supplemental briefs.

DISCUSSION

The present version of section 6102, subdivision (c), provides in relevant part that the Supreme Court shall summarily disbar an attorney upon finality of the criminal conviction if the offense is a felony and an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude. The former version of the statute provided for the summary disbarment of an attorney upon finality of the conviction if the offense was a felony and met both of the following criteria: (1) an element of the offense was 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.

[1] In determining whether the present convictions meet the statutory criteria for summary disbarment, we are limited to the record of conviction and any undisputed facts that may exist. (In the Matter of Lilly (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, 476.) The record of conviction in the present case does not establish that the offenses were committed in the course of the practice of law or in any way such that a client of respondent's was a victim.[2] The State Bar does not assert otherwise.

1. All further references to sections are to the Business and Professions Code unless otherwise noted. For convenience, we refer to the enactment of section 6102 effective January 1, 1997, as the current version of the statute, and the enactment of section 6102 that was in effect prior to January 1, 1997, as the former version.

2. Although respondent submitted her declaration in her brief on review, which has not been controverted by the State Bar, we rely only on the record of conviction.

Thus, the offenses do not meet the criteria for summary disbarment under the former version of the statute. Summary disbarment is warranted, if at all, only under the present version.

[2] A retroactive law is one that affects "'rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.' (Citations.)" (*Aetna Cas. & Surety Co.* v. *Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391.) Respondent's crimes were committed and her conviction occurred when the prior version of section 6102, subdivision (c), was in effect. Her offenses were not within the scope of the former version of the statute. In addition, as she would not have been subject to summary disbarment, respondent had a right under the former version of the statute to a hearing and to present evidence prior to the imposition of discipline. (Former § 6102, subd. (d) [currently § 6102, subd. (e)]; *In re Strick* (1983) 34 Cal.3d 891, 899-890.) The application of the present version of section 6102, subdivision (c), under these circumstances would clearly be retrospective.

[3a] As both parties to this proceeding acknowledge, it is an established canon of interpretation that statutes are to be given retrospective operation only if it is made clear that the legislature intended such application. (*Evangelatos* v. *Superior Court* (1988) 44 Cal.3d 1188, 1207.) "[I]t is presumed an amendment to a statute operates prospectively unless the Legislature has expressly stated the contrary or, after considering all pertinent factors, there is clear indication of a legislative intent that the statute operate retrospectively. (Citation.)" (*City of Los Angeles* v. *Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1019-1020, fn. 2.) This presumption applies to procedural statutes as well. (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 495, p. 686, and cases there cited.)[3]

[3b] This presumption has been codified. (See, e.g., Civ. Code, § 3; Code Civ. Proc., § 3; Pen. Code, § 3.) Although no similar provision exists in the Business and Professions Code, the presumption has been applied to section 6146 of the Business and Professions Code. (*Wienholz* v. *Kaiser Foundation Hospitals* (1989) 217 Cal.App.3d 1501, 1506.) There, the Court noted that section 3 of the Civil Code does no more than codify the general rule of construction applicable to statutes which do not contain a provision regarding retroactivity. (*Ibid.*) Accordingly, we deem it appropriate to apply the presumption to section 6102.

[3c] As both parties also acknowledge, section 6102 does not contain an express retroactivity provision. "[T]he absence of any express provision directing retroactive application strongly supports prospective operation of the measure." (*Evangelatos* v. *Superior Court*, supra, 44 Cal.3d at p. 1209.) However, we must also look to extrinsic sources to determine if the legislature intended retroactive operation. (*Ibid.*)[4]

[4a] The State Bar argues several extrinsic factors indicate that section 6102 was intended to operate retrospectively. First, the State Bar asserts that the summary disbarment statute serves the important state interest of protecting the public from dishonest attorneys. According to the State Bar, the amended statute effectuates this purpose and shows the Legislature must have intended the retroactive application of the amendments. Although we agree that the summary disbarment statute serves an important public interest, we do not find this argument persuasive.

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3. As noted *post* and as this case demonstrates, the amendments to section 6102 expand the criminal offenses that may subject the attorney to summary disbarment. We therefore view the amendments as mainly substantative.

4. The parties have argued at length regarding whether the presumption against retroactivity is to be applied only after it is determined that it is impossible to ascertain the legislative intent. To the extent that the State Bar is arguing that the presumption is applied only as a matter of last resort, we reject the argument. *Evangelatos* v. *Superior Court, supra*, 44 Cal.3d at pp. 1208-1209, makes clear that statutes are presumed to operate prospectively unless expressly declared otherwise or unless it is very clear from extrinsic sources that the legislature intended otherwise. Nevertheless, in view of our conclusion below that we cannot ascertain a legislative intent to apply the statute retroactively, our holding would not change even if we applied the presumption as the State Bar seems to be arguing.

[4b] A summary disbarment proceeding, by definition, excludes an evidentiary hearing in the State Bar Court prior to disbarment. However, pursuant to section 6101, subdivision (a), upon receipt of a certified copy of the record conviction, attorneys convicted of a felony or a crime involving moral turpitude are interimly suspended from the practice of law pending final disposition of the proceeding. Respondent has been interimly suspended since May 24, 1996. Thus, even if an evidentiary hearing is held, the attorney convicted of an offense that would warrant disbarment is immediately suspended from the practice of law and can remain suspended until disbarred. Accordingly, the public is promptly protected from attorneys convicted of crimes of dishonesty regardless of whether summary disbarment occurs. Moreover, as we observed in *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 687, the opportunity for a referral hearing "is not designed to lower professional standards."

[5] The State Bar next argues that the extent and legitimacy of respondent's reliance on the former law is a factor to be considered. However, we agree with respondent that reliance is a factor to consider only in determining the constitutional question of whether the retroactive application of the statute would deny due process. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 591-593.) However, if, "as a matter of statutory construction, the provision is prospective, no constitutional question is presented." (*Evangelatos* v. *Superior Court*, supra, 44 Cal.3d at p. 1206.)

Lastly, the State Bar argues, citing to *Fox* v. *Alexis* (1985) 38 Cal.3d 621, 629-630, that the context of the legislation indicates a retrospective intent. Although not very clear, the State Bar seems to be arguing that the retroactive application of section 6102 will not cause confusion. We agree that the context of the legislation, and other factors enunciated in *Fox* aid in determining legislative intent. [3d] After considering the factors set forth in *Fox*, (*Id.* at 629), we find nothing that suggests the legislature intended a retrospective application of section 6102, subdivision (c).[5] Therefore, this argument is not relevant to the issue before us.

DiGenova v. *State Board of Education* (1962) 57 Cal.2d 167, is also instructive. DiGenova was a public school teacher who had been convicted of certain sex offenses. DiGenova's teaching credentials were revoked, and he was dismissed from his teaching job based on the conviction and on a statutory scheme which was essentially the same as section 6102, that provided for credential revocation and dismissed without notice hearing after finality of the conviction. However, the effective date of the statutes at issue in that case was after the offense and conviction. The Supreme Court declined to apply the statutes retroactively, concluding that there was no indication that the legislature intended retrospective application. The public interest at stake in *DiGenova*, protection of school children, is at least as significant as the public protection issue involved here. Further, the Supreme Court observed in *DiGenova* that the Legislature may have concluded that the retroactive application of statutes was undesirable in view of the public protection afforded by other provisions of the Education Code. (*Id.* at pp. 177-178.) Similarly, the Legislature may have reached the same conclusion here based on the public protection afforded by the interim suspension.

We also are cognizant of the Supreme Court's statement in *In re Ford* (1988) 44 Cal.3d 810, 816, footnote 6, that the "retroactive application of the new statutory provision on summary disbarment is not necessarily precluded by the absence of an express legislative mandate. (Citation.)" However, the Court expressly did not decide the retroactivity issue. (*Id.*) In addition, as support for this statement, the Court cited to *Fox* v. *Alexis*, supra, 38 Cal.3d at p. 629. There the Court indicated that a wide variety of factors were relevant to the determination of legislative intent. [3e] As indicated above, we have not relied solely on the absence of an express legislative

5. We disagree with the State Bar's assertion that the amended statute "merely omits an unnecessary requirement from the criteria for summary disbarment." In our view, the inclusion of any felony involving moral turpitude as a basis for summary disbarment greatly expands the criminal offenses subject to summary disbarment.

intent. We have considered a number of other factors. Thus, we do not view the footnote in *In re Ford* as directing that a summary disbarment statute is to be applied retroactively. We further note that the Court's opinion in *Evangelatos* v. *Superior Court*, supra, 44 Cal.3d 1188, was filed after its opinion in *In re Ford*.

CONCLUSION

For the foregoing reasons, we conclude that the present version of section 6102, subdivision (c) does not contain an express retrospective provision and that the extrinsic factors do not make clear that the Legislature intended the amendments to apply retroactively. Accordingly, we determine that the present version of the statute should not be applied to respondent's conviction. Further, the offenses do not meet the criteria for summary disbarment under the former version of section 6102, subdivision (c). The State Bar's motion for summary disbarment is therefore denied. As the convictions are now final and involve moral turpitude per se, we will by separate order refer this case to the hearing department for a hearing and a decision recommending the discipline to be imposed.[6]

We concur:

NORIAN, J.
STOVITZ, J.

6. The parties raise a number of other arguments. We conclude that the retroactivity issue is dispositive and therefore do not reach the other issues.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DARNEL A. PARKER

A Member of the State Bar

No. 95-PM-17584

Filed October 7, 1997

SUMMARY

In this probation revocation proceeding, the hearing judge recommended that respondent be suspended and placed on probation on conditions, including that respondent participate in a substance abuse program approved by the hearing judge, and that respondent report his compliance directly to the hearing judge. The State Bar sought summary review, asserting that the hearing judge lacked jurisdiction to monitor conditions of probation.

The review department concluded that the State Bar's legal arguments were not persuasive, finding no legal reason why the Supreme Court could not impose the challenged condition of probation if it so desired. Nevertheless, the review department also concluded that placing the hearing judge in a supervisory role over respondent's compliance with a probation condition was inconsistent with the current Rules of Procedure of the State Bar and that it presented procedural and practical problems that weighed against imposing it. The review department remanded the case to the hearing judge in order for him to fashion an appropriate discipline recommendation.

COUNSEL FOR PARTIES

For State Bar: David Carr

For Respondent: No Appearance

HEADNOTES

[1 a-c] **135.82 Procedure—Revised Rules of Procedure—Probation**
139 Procedure—Miscellaneous
1711 Probation Cases—Special Procedural Issues
1719 Probation Cases—Miscellaneous

Under the current statutes and rules governing probation proceedings, the State Bar has the exclusive jurisdiction to conduct investigations and bring disciplinary charges. The State Bar may

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file disciplinary charges if it finds in its discretion that there is reasonable cause to believe that an attorney has violated the State Bar Act or Rules of Professional Conduct. Upon reasonable cause to believe that an attorney has violated a condition or conditions of probation, the State Bar may file either an original disciplinary proceeding based on the violation or a motion to revoke probation.

[2 a, b] **135.82 Procedure—Revised Rules of Procedure—Probation**
139 Procedure—Miscellaneous
1711 Probation Cases—Special Procedural Issues
1719 Probation Cases—Miscellaneous

Under the current statutes and rules governing probation proceedings, the State Bar has exclusive jurisdiction to supervise members placed on probation and exclusive authority to initiate probation revocation proceedings. Nevertheless, the Supreme Court retains plenary authority over the regulation and discipline of attorneys. Neither the statutes nor the rules of procedure limit the Supreme Court's plenary authority. The Supreme Court may, in the exercise of its plenary authority, impose a hearing judge supervised probation condition regardless of the statutes and rules covering disciplinary proceedings. By imposing such a probation condition, the Supreme Court would necessarily confer jurisdiction on the hearing judge to monitor compliance. Thus, the review department did not find persuasive the State Bar's argument that the hearing judge lacked jurisdiction to supervise probation conditions.

[3 a-i] **135 Procedure—Rules of Procedure**
135.30 Division III, Pleadings/Motions/Stipulations (rules 100-135)
1711 Probation Cases—Special Procedural Issues
1719 Probation Cases—Miscellaneous

The current procedures squarely place on the State Bar the responsibility of monitoring, investigating, and initiating proceedings alleging probation violations. Imposing a hearing judge supervised probation condition presented a number of problems under this structure. The review department declined to recommend such a condition, especially where, as here, there was no showing that the procedures in place for probation proceedings were not adequate to achieve the goals of attorney disciplinary probation.

[4 a, b] **165 Adequacy of Hearing Decision**
1711 Probation Cases—Special Procedural Issues
1719 Probation Cases—Miscellaneous

As respondent had a substance abuse problem, an appropriate substance abuse condition of probation was warranted. The review department did not have the entire record before it on summary review and was unable to determine a suitable condition. It therefore remanded the case to the hearing judge. As the modification of one probation condition may require the modification of other conditions, the review department did not limit the hearing judge on remand to reconsideration of the substance abuse condition alone. The hearing judge could reconsider the entire discipline recommendation, including the probation conditions.

Additional Analysis

None

OPINION

OBRIEN, P.J.:

In this probation revocation proceeding, the hearing judge concluded that respondent Darnel A. Parker failed to comply with several conditions of his two-year disciplinary probation, which was incident to a one-year stayed suspension imposed on him in Supreme Court case number SO45302[1] (*Parker I*). Because of these violations, the hearing judge recommended that respondent's probation be revoked, that respondent be suspended for one year, that execution of that suspension be stayed, and that respondent be placed on probation for three years on conditions, including 90 days' actual suspension.

The State Bar, through its Office of the Chief Trial Counsel (OCTC), seeks summary review of only one probation condition contained in the hearing judge's discipline recommendation. The challenged probation condition is the condition that would require respondent to participate in a substance abuse program approved by the hearing judge rather than the State Bar's Probation Unit and report directly to the hearing judge instead of to the Probation Unit or a probation monitor appointed by the Probation Unit. OCTC asserts on review that the hearing judge lacks jurisdiction to monitor conditions of probation and requests that we remand the case to the hearing judge with instructions that he omit the probation condition. Respondent appeared sporadically during the hearing department proceeding, but has not participated on review.

By prior order, we found that the requirements for summary review were provisionally met, and after further review, we conclude that this matter is appropriate for summary review. Based on our independent review of the limited record before us, we conclude that the OCTC's legal arguments are not persuasive. We find no legal reason why the Supreme Court could not impose the challenged condition of probation if it so desired. Nevertheless, we conclude that placing the hearing judge in a supervisory role over respondent's compliance with a probation condition is inconsistent with the current Rules of Procedure of the State Bar and that it presents procedural and practical problems that weigh against imposing it.

In addition, recommending such a condition of probation to the Supreme Court would, in effect, place before the court the issue of whether it is appropriate in this case to disregard the current rules of procedure for probation proceedings. We decline to do so, especially where, as here, there is no indication that the Probation Unit cannot properly supervise respondent's probation or that the current probation procedures are not adequate to achieve the goals of disciplinary probation.

The hearing judge concluded that the circumstances presented in this case indicated that something other that the standard substance abuse recovery condition of probation was warranted. As we do not have the entire record before us, we shall remand the case to the hearing judge in order for him to fashion an appropriate discipline recommendation, including conditions of probation consistent with this opinion.

FACTS AND FINDINGS

Although the factual findings and culpability conclusions are not at issue in this summary review proceeding, we briefly summarize them for background purposes. Respondent has been a member of the State Bar of California since October 1988.

Under the Supreme Court's order in *Parker I*, which was effective May 16, 1995, respondent was suspended from the practice of law for one year, execution of which was stayed, and placed on two years' probation on conditions, including 30 days' actual suspension. That discipline resulted from respondent's convictions for violating Penal Code section 148.9, subdivision (a) (giving false identification to a police officer); Vehicle Code section 23152, subdivision (b) (driving with 0.08 percent or more blood alcohol content); and Vehicle Code section 12500, subdivision (a) (driving without a

1. State Bar Court case number 93-C-17740.

valid driver's license). As part of his criminal probation, respondent was ordered to attend a drinking driver program. Respondent did not timely attend the drinking driver program. Then, after obtaining an extension of time to attend, he appeared at the program after consuming alcohol. He subsequently admitted to violating his criminal probation, which was reinstated with additional terms.

The conditions of respondent's disciplinary probation in *Parker I* required him to submit quarterly reports. He was to declare in each report that, during the period of time covered by the report, he had complied with the State Bar Act, Rules of Professional Conduct, and conditions of his criminal probation. He was also to submit, with each report, satisfactory evidence of his compliance with an approved substance abuse recovery program. The hearing judge in the present proceeding concluded that respondent failed to submit the quarterly reports due in October 1995 and January 1996 and thereby also failed to submit the information required in each report.

DISCUSSION

The condition of probation at issue in this proceeding, number 6(c), requires respondent to appear before the hearing judge (or any other hearing judge if he is not available) within 30 days of the effective date of the Supreme Court's order in this proceeding and provide the hearing judge with evidence of his enrollment in a substance abuse recovery program that meets with the hearing judge's approval. The condition also requires respondent to provide satisfactory evidence of his compliance with the substance abuse recovery program upon demand of a State Bar Court judge throughout the period of the probation.

OCTC's central argument on review is that the hearing judge lacks jurisdiction to monitor probation conditions under the current statutes and rules of procedure governing probation proceedings. We begin our analysis with a brief overview of those statutes and rules.[2]

[1a] The present State Bar Court was established by the Board of Governors of the State Bar (board) in 1989 at the direction of the Legislature to act in the board's place in the determination of disciplinary, reinstatement, and inactive enrollment matters. (Bus. & Prof. Code, § 6086.5.)[3] The State Bar Court is authorized to exercise the powers and authority to decide disciplinary, reinstatement, and inactive enrollment matters that are vested in the board "except as limited by rules of the board." (*Ibid.*) The board, not the State Bar Court, is authorized to adopt rules of procedure. (§§ 6086, 6086.5.)

[1b] The Probation Unit is currently part of OCTC. (Rule 2701, Rules Proc. of State Bar, title III, General Provisions.) The board has delegated the responsibility of supervising attorneys on disciplinary probation to OCTC under the current Rules of Procedure of the State Bar. OCTC has the exclusive jurisdiction to conduct investigations and bring disciplinary charges. (*Ibid.*) OCTC may file disciplinary charges if it finds in its discretion that there is reasonable cause to believe that an attorney has violated the State Bar Act or Rules of Professional Conduct. (Rule 2604, Rules Proc. of State Bar, title III, General Provisions.) Of course, an attorney violates multiple sections of the State Bar Act when he fails to comply with a condition of disciplinary probation. (§§ 6068, subd. (k); 6103.)

[1c] Upon reasonable cause to believe that an attorney has violated a condition or conditions of probation, OCTC may file either an original disciplinary proceeding based on the violation or, as in the present case, a motion to revoke probation. (§ 6093, subd. (b); Rule 560, Rules Proc. of State Bar, title II, State Bar Court Proceedings.)

Probation revocation proceedings are distinct and separate disciplinary matters. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct.

2. For an overview of the origin and use of probation in attorney discipline proceedings, see *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298-299.

3. All further references to sections are to the Business and Professions Code unless otherwise noted.

Rptr. 525, 535; see also § 6093, subd. (b).)[4] The State Bar Court has the power to recommend to the Supreme Court an attorney's suspension or disbarment for violating conditions of disciplinary probation. (§ 6078.)

[2a] OCTC asserts that, pursuant to the above provisions, its Probation Unit has exclusive jurisdiction to supervise members placed on probation and that OCTC has the exclusive authority to initiate probation revocation proceedings. We agree. Nevertheless, the Supreme Court retains plenary authority over the regulation and discipline of attorneys. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 47-48; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 474.) Section 6087 makes clear that the State Bar Act does not alter or limit the plenary powers of the Supreme Court. Thus, neither the statutes nor the board's rules of procedure governing disciplinary probation matters limit the Supreme Court's plenary authority.[5]

[2b] OCTC does not cite to and our research does not reveal any authority that would limit or preclude the Supreme Court, in the exercise of its plenary authority, from imposing recommended probation condition number 6(c) in this case regardless of the statutes and rules covering disciplinary proceedings. Probation condition number 6(c), by its terms, would require a hearing judge to monitor respondent's compliance. The Supreme Court would, by imposing that probation condition, necessarily confer jurisdiction on the hearing judge to monitor compliance. Thus, we do not find persuasive OCTC's argument that the hearing judge lacks jurisdiction to supervise probation conditions.

[3a] Nevertheless, as indicated above, the current procedures squarely place on OCTC the responsibility of monitoring, investigating, and initiating proceedings alleging probation violations. The practical effects of imposing recommended probation condition number 6(c) are inconsistent with those procedures.

[3b] First, only OCTC can investigate and initiate disciplinary proceedings. If the hearing judge suspects that respondent has violated the condition he or she cannot investigate the matter; nor can the judge initiate a probation revocation proceeding even if it is determined that there is probable cause for the revocation. The hearing judge would be limited to recommending to OCTC that it take action in the matter. OCTC would have the exclusive authority to decide whether to do so. As a practical matter, the hearing judge would not be able to enforce compliance with recommended probation condition number 6(c) by means of a probation revocation proceeding or original disciplinary proceeding.

4. Although disciplinary probation proceedings are similar to criminal probation proceedings, there are significant differences. For instance, the criminal trial judge retains jurisdiction over the defendant during the period of the probation. (Cf. Pen. Code, § 1203.2, subd. (a); 3 Witkin & Epstein, Cal. Criminal Law (2d ed. 1985) Punishment for Crime, §§ 1622, 1695, pp. 1934, 2005, and cases there cited.) Unless otherwise ordered by the Supreme Court, the State Bar Court's jurisdiction over the accused attorney ends when the case is transmitted to the Supreme Court (*In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 83, 85), and it is not regained until and unless a new proceeding is initiated against the attorney by OCTC. Further, unlike disciplinary probation proceedings, the criminal trial court can, on its own motion, initiate a revocation proceeding. (Pen. Code, § 1203.2, subd. (b).) Also, unlike State Bar Court judges, superior court judges appoint and remove the chief probation officer. (Pen. Code, § 1203.6.) We further note that a violation of criminal probation is not a separate criminal offense (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 347-348), whereas a violation of disciplinary probation is a separate discipline offense (Cf. *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113; *In the Matter of Potack*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 535). These are not the only differences between criminal probation and State Bar probation, but they are enough to support the well-established holding that State Bar discipline proceedings, including disciplinary probation revocation proceedings, are sui generis. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 225-226.) We may look to the criminal law for guidance, but it does not control. (*Ibid.*)

5. An example of the court's exercise of its plenary authority is found in the permissible grounds for discipline in attorney conviction proceedings. The statute governing such proceedings, section 6101, authorizes the imposition of discipline only for crimes involving moral turpitude. However, the court, in the exercise of its inherent power to control the practice of law, has also authorized discipline to be imposed under section 6101 if the criminal conduct involves other misconduct warranting discipline not amounting to moral turpitude. (*In re Kelley* (1990) 52 Cal.3d 487, 494-495.)

[3c] In addition, a hearing-judge-supervised probation condition could result in the hearing judge being a percipient witness to an alleged violation of the condition. Either party could then subpoena the hearing judge to testify at a proceeding involving the alleged violation. As a potential witness, the hearing judge would be disqualified from hearing the probation case. (Rule 106, Rules Proc. of State Bar, title II, State Bar Court Proceedings; Code Civ. Proc., § 170.1, subd. (a)(1).) Further, under the terms of such a condition, more than a single hearing judge could be called on to monitor a respondent's probation. Thus, more than one judge could conceivably be disqualified. The disqualification of even a single judge would cause a significant hardship to the State Bar Court, which has only five hearing judges.

[3d] As noted above, we recognize that the Supreme Court could, under the exercise of its plenary authority, disregard the current procedures and authorize the hearing judge to investigate and initiate a probation revocation disciplinary proceeding. However, the only reason articulated by the hearing judge for imposing this condition was that there was a need for a more "hands on approach." Existing probation procedures can accommodate this concern.

[3e] If appropriate, a probation condition can require that a probation monitor referee be appointed to supervise compliance. (Rule 2702, Rules Proc. of State Bar, title III, General Provisions.) If appointed, it would be the duty of the probation monitor referee to meet with and actively supervise respondent's compliance. (*Ibid.*) We see no legal reason why the hearing judge could not fashion a "hands on approach" to monitoring the probation through the use of a probation monitor referee. In addition, there is nothing in the record before us which shows that the Probation Unit could not or would not properly monitor and enforce such a probation condition.

[3f] We also note that, until January 1993, the Probation Unit was part of the State Bar Court and the functions now performed by the Probation Unit and OCTC were performed by court judicial officers. The probation department, as it was known then, was a department of the State Bar Court along with the hearing and review departments. (Former Trans. Rules Proc. of State Bar, rule 101 [eff. Sept. 1, 1989, to Dec. 31, 1992].) Before January 1993, all attorneys placed on disciplinary probation were referred to the probation department, which was charged with the responsibility of monitoring probationers, determining if reasonable cause existed to initiate a disciplinary proceeding for a violation of probation, and initiating the probation revocation proceeding. (Former Trans. Rules Proc. of State Bar, rules 103.1; 610, 613 [eff. Sept. 1, 1989, to Dec. 31, 1992].)

[3g] In March 1990, the State Bar Court Executive Committee determined that the probation department should not remain in the State Bar Court and, after discussions with OCTC, agreed to transfer the probation department to OCTC. (Agenda Item 124, Board of Governors Meeting, December 1992.) The board thereafter amended the rules of procedure to transfer the probation department to OCTC, effective January 1, 1993. (Former Trans. Rules Proc. of State Bar, rules 101, 605 (amended Dec. 5, 1992, and eff. Jan. 1, 1993.)

[3h] The transfer of the probation department to OCTC was based on a policy decision that its functions were best performed by OCTC, not State Bar Court judicial officers. Recommending probation condition number 6(c) to the Supreme Court would place before the court the issue of whether it was appropriate to disregard this policy decision. We find nothing in the record before us that would warrant taking this action especially where, as here, there is no showing that the procedures in place for probation proceedings are not adequate to achieve the goals of attorney disciplinary probation. (See *In the Matter of Marsh*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 299 (listing goals of disciplinary probation).)

[3i] Based on the above, we decline to recommend condition number 6(C) to the Supreme Court. [4a] However, as the hearing judge concluded and as the limited record before us shows, respondent has a substance abuse problem. An appropriate substance abuse condition of probation is therefore warranted. We do not have the entire record before us on summary review and are unable to determine a suitable condition. We therefore must remand this case to the hearing judge.

[4b] Probation conditions are by nature an integrated whole based on the circumstances of the case and designed to achieve the goals of attorney disciplinary probation. The modification of one condition may require the modification of other conditions in order to accomplish this purpose. Further, as the probation conditions are an integral part of the entire discipline recommendation, the modification of a probation condition may require a modification of the entire discipline recommendation. We therefore do not limit the hearing judge on remand to reconsideration of the substance abuse condition alone. He may reconsider the entire discipline recommendation, including the probation conditions.

DISPOSITION

For the foregoing reasons, we remand this case to the hearing department with instructions to delete recommended probation condition number 6(c) and for further proceedings not inconsistent with this opinion.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STANLEY FELDSOTT

A Member of the State Bar.

No. 94-O-19578

Filed October 17, 1997

SUMMARY

Respondent had a valid lien on a portion of his former client's settlement proceeds and refused to endorse the settlement check. The hearing judge determined that respondent's refusal to endorse the check did not violate the Rule of Professional Conduct requiring the prompt payment of client funds on demand, and dismissed the proceeding. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar appealed. The review department affirmed the hearing judge's dismissal of the proceeding, concluding that the Rule of Professional Conduct did not apply because respondent did not have possession of the funds; and that respondent did not violate his fiduciary duty to the former client because respondent had a valid lien and took reasonable and appropriate steps to protect his lien.

COUNSEL FOR PARTIES

For State Bar: Janet S. Hunt

For Respondent: Stanley Feldsott in pro. per.

HEADNOTES

[1 a-g] **194 Statutes Outside State Bar Act**
199 General Issues—Miscellaneous
430.00 Breach of Fiduciary Duty

The relationship between an attorney and client is of the highest order of fiduciary relation. Even where the attorney no longer represents the client, the attorney continues to owe the client a fiduciary duty of utmost good faith and fair dealing with respect to, at least, the subject matter of the attorney's prior representation of the client, including any express lien for attorney's fees. Respondent did not violate this duty by refusing to sign a settlement check which was in the possession of the former client's new attorney, and which was made payable to the former client,

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the former client's new attorney, and respondent. Respondent's fee agreement provided for a lien on any recovery, he perfected his lien as to part of the former client's recovery, he suggested, among other alternatives, that the disputed portion of the recovery be placed in his trust account or, alternatively, in a separate blocked account requiring both his and his former client's signatures, and he took prompt action to judicially resolve the competing claims to the settlement proceeds. Respondent's duty of good faith and fair dealing did not require that he abandon his lawfully perfected lien by endorsing the settlement draft when it was under the client's control, as doing so would have immediately extinguished the lien as to the client's creditors and thereafter subjected the lien to extinguishment if the client spent the money.

[2 a, b] 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Rule of Professional Conduct 4-100(B)(4), requiring a lawyer to promptly deliver to a client on the client's request funds in possession of the lawyer which the client is entitled to receive, did not apply where respondent had no client funds in his possession.

Additional Analysis

Culpability

Not Found

280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

430.05 Breach of Fiduciary Duty

Other

117 Procedure—Dismissal

OPINION

OBRIEN, P.J.:

The State Bar seeks review of a determination by the hearing judge that respondent Stanley Feldsott was not culpable in a single-count charge of violating rule 4-100(B)(4) of the Rules of Professional Conduct,[1] requiring that an attorney promptly pay, as requested by a client, any funds in possession of the attorney that a client is entitled to receive. We affirm the decision of the hearing judge as well as the award of costs to respondent.

1. FACTS AND CONTENTIONS

The facts are not in dispute. John Daniels retained respondent in April 1993 to represent him in litigation against his homeowners' association for whom he had provided services as a consultant (consultant lawsuit). Respondent and Daniels signed a retainer agreement under which respondent was to be paid a flat fee of $2,000 plus 25 percent of any gross recovery. The evidence shows that the agreement was discussed and that Daniels had a copy in his possession for two or three days before signing. Under the terms of the agreement, respondent was granted a lien to attach to any recovery in favor of Daniels, whether by judgment, settlement, or otherwise.

Shortly before trial in the consultant lawsuit, respondent moved the superior court for a continuance of the trial date and for permission to withdraw as attorney for Daniels due to his inability to get along with Daniels and unspecified ethical reasons. The superior court denied both motions, but suggested that the motion to withdraw could be renewed if the existing trial date was later vacated.

On the day of trial, no courtroom was available, and the matter was continued for approximately four months. Thereafter, respondent was substituted out as counsel, and Daniels retained another attorney.

Respondent then filed a notice of lien in the consultant lawsuit in the amount of $5,000. Although respondent had not billed Daniels, his time records indicated that on an hourly basis his fees would have exceeded $9,000.

The consultant lawsuit was settled for $26,500, and a draft for that amount was issued on January 31, 1995, payable to Daniels, respondent, and Daniels's new attorney. The new attorney and Daniels requested that respondent endorse the draft. Respondent indicated that he would accept $2,000 as attorney's fees, and when that was not acceptable to Daniels, respondent suggested alternate methods of handling the matter. He suggested having two checks issued: one for $21,500 to be issued to Daniels and his new attorney; and one for $5,000 to be deposited with the State Bar until the dispute was resolved, or to be deposited in an account requiring both signatures for withdrawal, or deposited in court. He further suggested binding arbitration or placing the money in a blocked account.

Sometime before February 7, 1995, Daniels agreed to $5,000 being placed in a blocked account, but then failed to perform that agreement before its implementation, ostensibly on the grounds that a representative of the California State Bar advised him that he did not have to set aside any of the funds and that respondent was obligated to endorse the draft, although in testimony he admitted the State Bar did not so advise him.

Unknown to respondent, Daniels filed a malpractice suit against respondent on January 11, 1995 (malpractice lawsuit). Respondent first learned of that suit when an amended complaint was served on him in April 1995, following respondent's insistence on not releasing the contested $5,000 to the control of Daniels. Respondent promptly filed a cross-complaint in the malpractice lawsuit seeking the reasonable value of services he had provided to Daniels in the consultant lawsuit.

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1. All further references to "rule" shall be to Rules of Professional Conduct unless otherwise indicated.

The State Bar contends respondent had a duty, under rule 4-100(B)(4), to endorse the draft and deliver it into the possession and control of Daniels. They further contend that respondent's only remedy was to pursue his cross-complaint against Daniels in the malpractice lawsuit.

Respondent argues that his sole purpose in not endorsing the check was to preserve his lien rights and that unless $5,000 from the settlement draft was placed in an account not under the exclusive control of Daniels, he would lose not only his lien rights, but also his chance of ever satisfying any judgment he might obtain against Daniels. He further argues that $5,000 was the minimum he felt he would recover, and he was at all times willing to release the remaining $21,500 to Daniels.

2. DISCUSSION

[1a] It is beyond question that the relationship between an attorney and client is of the highest order of fiduciary relation. (*Cox* v. *Delmas* (1893) 99 Cal. 104, 123.) Even though respondent was no longer Daniels's attorney, respondent continued to owe him a fiduciary duty of utmost good faith and fair dealing with respect to, at least, the subject matter of respondent's prior representation of Daniels, including respondent's express lien for his attorney's fees. (Cf. *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 605, citing *Tri-Growth Centre City, Ltd.* v. *Sildorf, Burdman, Dunigan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1151; see also *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179 ["An attorney's duty to the client can extend beyond the closing of the file."].)

[1b] Section 2881 of the Civil Code provides that a lien may be created by contract. Such a lien may be in favor of an attorney upon a prospective recovery sought by the attorney's client for legal services. (*Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 530; cf. Civ. Code, § 2883.) Respondent's fee agreement with Daniels expressly gave respondent a lien on any recovery Daniels may obtain in the superior court action, whether by judgment, settlement, or otherwise. That lien survived respondent's withdrawal from Daniels's employment to the extent of the reasonable value of the services respondent performed before he withdrew. (*Hansen* v. *Jacobsen* (1986) 186 Cal.App.3d 350, 355-356.) We find nothing in respondent's fee agreement that violated his high order of fidelity to his former client.

[1c] Since respondent was not a party to the consultant lawsuit and could not intervene, the superior court in the consultant lawsuit did not have jurisdiction to award him his attorney's fees. (*Id.* at p. 356.) Therefore, a subsequent, independent action was required to establish the exact amount of respondent's lien and to enforce it. (*Ibid.*)

[1d] Respondent perfected his lien when he gave notice of it to the defendant and Daniels's new attorney while the consultant lawsuit was still pending. Respondent gave formal notice of his lien by filing and serving his notice of lien in the consultant lawsuit even though such formal notice is not required. (*Id.* at p. 358.)

[1e] Moreover, because respondent asserted a lien on only $5,000 of the settlement proceeds in the notice of lien he filed, he effectively released his lien with respect to the remaining $21,500 of the $26,500 settlement proceeds. Accordingly, the defendant in the consultant lawsuit and Daniels's new attorney were free to thereafter immediately pay $21,500 of the settlement proceeds to Daniels without any liability to respondent on his lien. The record does not disclose why the defendant did not pay Daniels the undisputed $21,500 portion of the settlement proceeds and either retain or interplead the disputed $5,000 portion. The record does, however, disclose that the defendant issued a $26,500 settlement draft made jointly payable to respondent, Daniels, and Daniels's new attorney. Respondent suggested that the disputed portion be placed in his trust account or, alternatively, in a separate blocked account requiring both his and Daniels's signatures, among other alternatives. These reasonable suggestions would have allowed the prompt disbursement of the undisputed portion to Daniels and preserved the rights of the parties in the disputed portion until the dispute was resolved. Daniels, however, was intransigent and rejected all of respondent's suggestions.

[1f] Respondent affirmatively demonstrated good faith by asserting and perfecting his lien only on

$5,000 out of the full $26,500 settlement proceeds. His duty of good faith and fair dealing did not require that he abandon his lawfully perfected lien by endorsing the $26,500 settlement draft when it was under Daniels's control. Under Civil Code section 2913, had respondent endorsed the settlement draft when it was under Daniels's control as the State Bar contends he was required to do, respondent's lien would have been immediately extinguished as to Daniels's creditors and thereafter subject to extinguishment if Daniels spent the money. Section 2913 provides that the voluntary restoration of property to its owner by the holder of a lien on the property that is dependent upon possession extinguishes the lien as to (1) the creditors of the owner and (2) anyone thereafter acquiring the property from the owner in good faith for value.

[1g] Finally, respondent promptly took action to judicially resolve the competing claims to the settlement proceeds. Respondent filed a cross-complaint against Daniels in the malpractice lawsuit in which respondent sought the reasonable value of the services he performed in the consultant lawsuit before he withdrew.

[2a] The State Bar has charged respondent with a violation of rule 4-100(B)(4), requiring a lawyer to promptly deliver to a client on the client's request, funds in possession of the lawyer which the client is entitled to receive. Here, in fact, respondent had no funds in his possession. The State Bar relies on *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 521, 522. That case does not consider any interest Kaplan may have had in the proceeds of the check. That check was made payable to the client, successor counsel, and Kaplan. Kaplan refused to endorse the check in spite of repeated efforts to meet Kaplan at a place convenient to him. The holding was that Kaplan had a duty to promptly endorse the check that was under the control of the client and that Kaplan's refusal to endorse the check without justification violated that duty. Kaplan did not assert an interest in the proceeds of that check as justification for his failure to enclose the check.

[2b] The sole issue in the matter before us involves respondent's rights to maintain his lien. *Kaplan* does not address that issue either directly or indirectly. Here there was a dispute not only as to the right to funds, but also as to a right to security in the funds. Under these circumstances, rule 4-100(B)(4) does not apply.

Respondent, having taken reasonable and appropriate steps to protect his lien, is exonerated of the charge before us.

3. CONCLUSION

In conclusion, we affirm the hearing judge's order of dismissal of this proceeding, but modify it to clarify that the dismissal is with prejudice. Because respondent has been exonerated of the single charge against him following a trial on the merits, he may file a motion seeking reimbursement for costs as authorized by Business and Professions Code section 6086.10, subdivision (d). (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 283(a).)

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LEWIS R. WIENER

A Member of the State Bar.

No. 95-O-14361

Filed December 11, 1997

SUMMARY

In this default proceeding, a hearing judge held that respondent failed to perform legal services competently and to adequately communicate with his client in a probate matter. The hearing judge also held that respondent failed to cooperate with the State Bar's investigation of the probate client's complaint against respondent. The hearing judge recommended a one-year period of stayed suspension and an eighteen-month period of probation on conditions including thirty days' actual suspension. (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

The State Bar sought summary review only of the hearing judge's failure to recommend a probation condition requiring respondent to report his compliance with the terms and conditions of his disciplinary probation to the State Bar in writing on a quarterly basis. The review department held that, even though probation reporting is not mandated in all cases in which probation is recommended, it should have been recommended under the circumstances in this case. Accordingly, the review department modified the hearing judge's discipline recommendation to include such a reporting condition.

COUNSEL FOR PARTIES

For State Bar: Andrea T. Wachter

For Respondent: No appearance

HEADNOTES

[1] 130 Procedure—Procedure on Review
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
139 Procedure—Miscellaneous

Because none of the hearing judge's material findings of fact were challenged on review, State Bar's contention that the hearing judge's disciplinary recommendation was incomplete in that it did not contain a probation condition requiring respondent to file quarterly probation reports fell explicitly

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within the purview of the rule of procedure permitting summary review.

[2] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
139 Procedure—Miscellaneous

Even though the review department retains its authority to independently review the full record in summary review proceedings, it gives deference to the litigants' identification of the issues and ordinarily limits the scope of review to those issues. The review department followed this practice in the present proceeding except that it modified the costs provision because of recent statutory changes.

[3 a-c] **172.15 Discipline—Probation Monitor—Not Appointed**
172.19 Discipline—Probation—Other Issues
179 Discipline Conditions—Miscellaneous
1090 Miscellaneous Substantive Issues re Discipline
1099 Substantive Issues re Discipline—Miscellaneous

Disciplinary probation furthers the fundamental purposes of attorney discipline only when attorney probationers are effectively monitored to ensure that they do not engage in further misconduct and are conforming their conduct to the ethical strictures of the profession. Historically, attorney probationers have been monitored to ensure their compliance with these requirements through appointed voluntary probation monitors or through court-ordered self-reporting by the attorney or both. Even though probation monitors have played an important role in monitoring attorneys on probation and were, at one time, appointed in most instances, the use of a probation monitor may not be necessary where only routine, simple, periodic reporting conditions are recommended or are coupled with a rule 955 requirement and/or passage of the Professional Responsibility Examination. Appointment of a probation monitor was not warranted in this case in light of the simple probation conditions recommended and the found misconduct, mitigation, and aggravation.

[4 a-d] **139 Procedure—Miscellaneous**
165 Adequacy of Hearing Decision
172.19 Discipline—Probation—Other Issues
179 Discipline Conditions—Miscellaneous
1090 Miscellaneous Substantive Issues re Discipline
1099 Substantive Issues re Discipline—Miscellaneous

Quarterly probation reporting is important because it requires attorney probationers, four times a year, to reflect upon their prior misconduct and to review their current conduct to ensure that it complies with all of the conditions of their probation. However, quarterly probation reporting is not mandated in all cases in which probation is recommended. When the circumstances in a case establish that quarterly probation reporting is not necessary, the circumstances should be set forth in the court's decision. In this case involving attorney-client misconduct with a recent prior reproval, however, the appropriateness of a quarterly-reporting condition of probation was clear.

Additional Analysis

None

OPINION

NORIAN, J.:

The State Bar, through its Office of the Chief Trial Counsel (OCTC), seeks summary review of a hearing judge's discipline recommendation that respondent Lewis R. Wiener[1] be suspended from the practice of law for one year, that the one-year suspension be stayed, and that respondent be placed on probation for eighteen months on conditions, including thirty days' actual suspension. OCTC contends only that the hearing judge's discipline recommendation is incomplete because it does not include a condition of probation that requires respondent to file quarterly probation reports. We agree and, therefore, modify the hearing judge's discipline recommendation to include a probation condition that requires respondent to file probation reports each quarter throughout his 18 months' probation.

I. PROCEDURAL HISTORY

Respondent did not file an answer to the notice of disciplinary charges filed against him in this matter. Therefore, on the motion of OCTC, the court entered respondent's default in September 1996. As a result of respondent's default, the factual allegations in the notice of disciplinary charges were deemed admitted against him, and he was precluded from participating in this proceeding. (Rules Proc. of State Bar, title II, State Bar Court Proceedings (Rules of Procedure), rule 200(d)(1).)

The hearing judge filed her decision in October 1996. Three days later, respondent filed a motion for relief from default. In November 1996, the hearing judge denied respondent's motion and filed an order correcting clerical errors in her decision.

In her decision the hearing judge held respondent culpable of committing the misconduct charged against him in the notice. In addition, she recommended that respondent be suspended from the practice of law for one year, that the one-year suspension be stayed, and that respondent be placed on probation for eighteen months with conditions, including thirty days' actual suspension.

One of the probation conditions in the hearing judge's discipline recommendation requires respondent to file a declaration certifying that he did not engage in the practice of law during his 30-day period of actual suspension "[w]ithin 30 days of the termination of the actual suspension."[2] However, the hearing judge did not include a probation condition that requires respondent to file probation reports with OCTC's probation unit.

Thereafter, OCTC sought reconsideration in which it requested the hearing judge to add, to her discipline recommendation, a reporting condition that would require respondent to file, on a quarterly basis throughout the term of his 18 months' probation, reports certifying by affidavit or under the penalty of perjury that he had complied with the State Bar Act and the Rules of Professional Conduct of the State Bar during the quarter. The hearing judge denied, without comment, OCTC's motion.

OCTC sought summary review of the hearing judge's discipline recommendation. OCTC filed its request to designate this matter for summary review under rule 308 of the Rules of Procedure in February 1997. We provisionally granted that request in an order filed February 20, 1997. OCTC stated that it did not request oral argument. We agreed that oral argument was not needed, and we took the matter under submission on the record.

II. SUMMARY REVIEW

[1] The very limited contention of OCTC is explicitly approved for summary review by rule 308(a)(2) of the Rules of Procedure when no challenge has been made to the hearing judge's material findings of fact. On review OCTC does not challenge any of the hearing judge's findings of facts. Nor does

1. Respondent was admitted to the practice of law in this state on December 21, 1967, and has been a member of the State Bar since that time.

2. We construe the recommendation as requiring respondent to file his declaration within 30 days *after* the termination of his actual suspension and not merely within 30 days of it.

OCTC challenge any of her culpability, aggravation, and mitigation determinations. Accordingly, the present proceeding is appropriate for summary review, and we adopt our February 20, 1997, order provisionally granting OCTC's request for summary review as our final order.

III. SCOPE OF REVIEW

[2] Even though the review department retains its authority to independently review the full record in summary review proceedings (Rules Proc., rule 308(f)(1)), we give deference to the litigants' identification of the issues and ordinarily limit the scope of review to those issues. (Cf. *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 464.) We follow this practice in the present proceeding except that we modify the costs provision because of recent statutory changes.

IV. HEARING JUDGE'S FINDINGS AND CONCLUSIONS

The hearing judge found that, in a single probate matter, respondent did not take any action from August 1993 through August 1995, failed to appear at a status conference, and failed to file a final accounting and petition for an order of final distribution of the decedent's estate until the superior court issued an order to show cause why respondent should not be held in contempt.[3] Based on those findings, the hearing judge held that respondent recklessly failed to perform competently the legal services for which he was hired in violation of rule 3-110(A) of the Rules of Professional Conduct of the State Bar. The hearing judge further found that respondent violated his duty, under subdivision (m) of section 6068 of the Business and Professions Code,[4] to adequately communicate with the client in the probate matter because respondent did not respond to the client's repeated attempts to contact him between January and April of 1995.

Finally, the hearing judge found that respondent violated his duty, under subdivision (i) of section 6068, to cooperate with a State Bar investigation by not responding to the State Bar's August 1995 letter to him regarding the complaints of the client in the probate matter.

In aggravation, the hearing judge considered respondent's 1990 private reproval. (See Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(i).) In addition, she considered in aggravation respondent's failure to file an answer to the notice of the disciplinary charges in this proceeding and to otherwise participate in this proceeding before his default was entered. (See std. 1.2(b)(vi).) In mitigation, the hearing judge gave respondent limited credit because his misconduct did not cause his client any lasting harm. (See std. 1.2(e)(iii).)

V. FAILURE TO RECOMMEND PROBATION REPORTING REQUIREMENT

We first addressed the origin and use of probation as disciplinary measure almost seven years ago in *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 298-299. In *Marsh* we noted that the first time the Supreme Court placed an attorney on disciplinary probation in a reported opinion was in 1963 in the case of *Di Gaeta* v. *State Bar* (1963) 59 Cal.2d 116, 120. We also noted in *Marsh* that, since 1963, the use of probation in attorney disciplinary proceedings increased with such frequency that "[b]y 1981, after the creation of the State Bar Court, disciplinary cases in which an actual suspension was ordered without probationary conditions were rare." (*In the Matter of Marsh*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 299.)

Here we note that, almost always, probation is imposed on an attorney as a condition of staying the execution of a Supreme Court disciplinary order suspending the attorney from the practice of law. Moreover, once probation is imposed, an attorney has an independent professional duty to comply with the conditions of disciplinary probation. (§6068, subd. (k); Rules Prof. Conduct of State Bar, rule 1-110.)

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3. The hearing judge did not indicate why the superior court issued the order to show cause.

4. Unless otherwise indicated, all future references to sections are to sections of the Business and Professions Code.

[3a] We also note that the use of probation in attorney disciplinary proceedings effectively furthers the fundamental purposes of attorney discipline, including the protection of the public, the courts, and the legal profession, only when the attorneys placed on probation are effectively monitored to ensure (1) that they do not again engage in misconduct and (2) that they are undertaking to conform their conduct to the ethical strictures of the profession. (See generally *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 319 ["The probationary term will enablethe State Bar to carefully monitor Rodgers and ensure that his rehabilitation is well established. (Citation.)"]; *In re Nadrich* (1988) 44 Cal.3d 271, 279 [discipline ordered was "sufficient to insure that petitioner's complete rehabilitation is very well established before he escapes the properly watchful eye of the State Bar"].)

[3b] The effective use of probation in attorney disciplinary proceedings begins with ordering the attorney placed on probation to comply with the State Bar Act, the Rules of Professional Conduct, and other ordered conditions that are individualized to address the specific misconduct found or some underlying and contributing cause of the found misconduct. Historically, attorney probationers have been monitored to ensure their compliance with these requirements through appointed voluntary probation monitors or through court-ordered self-reporting by the attorneys or both.

[3c] Even though probation monitors have played an important role in monitoring attorneys on probation and were, at one time, appointed in most instances, we have held that the "use of a probation monitor may not be necessary where only routine, simple, periodic 'reporting' conditions are recommended or are coupled with a rule 955 requirement and/or passage of the Professional Responsibility Examination." (*In the Matter of Marsh, supra,* 1 Cal. State Bar Ct. Rptr. at p. 300.) In light of the routine, simple probation conditions recommended by the hearing judge in the present proceeding and the found misconduct, mitigation, and aggravation, we agree with the hearing judge's apparent determination that the appointment of a probation monitor to monitor respondent is not essential to the effective use of disciplinary probation in this proceeding.

[4a] However, we disagree with the hearing judge's apparent determination in rejecting OCTC's request for reconsideration that imposing a self-reporting probation condition is not essential to the effective use of probation in this proceeding. Except for requiring respondent to report his compliance with the 30-day actual suspension probation condition to the State Bar, the hearing judge's discipline recommendation does not provide for any self-report by respondent during the 18 months he will be on probation.

[4b] As the Supreme Court instructed in *Ritter* v. *State Bar* (1985) 40 Cal.3d 595, 605, a probation "reporting requirement permits the State Bar to monitor [an attorney probationer's] compliance with professional standards." Moreover, we have held that an attorney probationer's filing of quarterly probation reports is an important step towards the attorney's rehabilitation. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 152; see also *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 705 [reaffirming the holding in *Broderick*].) The lack of a probation condition requiring the respondent to self-report his compliance with the State Bar Act, the Rules of Professional Conduct of the State Bar, and the other ordered conditions to the State Bar under penalty of perjury and on a quarterly basis would be inconsistent with that holding.

[4c] At a minimum, quarterly probation reporting is an important step towards an attorney probationer's rehabilitation because it requires the attorney, four times a year, to review and reflect upon his professional conduct in light of the minimum professional standards that are set forth in the State Bar Act and the Rules of Professional Conduct of the State Bar. In addition, it requires the attorney to review his conduct to ensure that he complies with all of the conditions of his disciplinary probation.

[4d] Accordingly, we shall modify the hearing judge's discipline recommendation to include a quarterly reporting condition of probation. Nevertheless, we do not construe a quarterly reporting condition of probation to be mandated in all cases in which probation is recommended. If the circumstances in a particular case establish that probation reports are

unnecessary to effectively further the goals of attorney discipline, those circumstances should be set forth in the hearing judge's decision. In this case involving attorney-client misconduct with a recent prior reproval, however, the appropriateness of a quarterly-reporting condition of probation is clear.

VI. CONCLUSION

We modify the hearing judge's discipline recommendation to include the following probation condition:

Respondent shall report, in writing, to the Probation Unit of the State Bar in Los Angeles no later than January 10, April 10, July 10, and October 10 of each year or part thereof in which he is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit his first report no later than the second reporting date after the beginning of his probation. In each report, respondent shall state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury as follows:

(a) in his first report, whether he has complied with all the provisions of the State Bar Act, Rules of Professional Conduct, and other terms and conditions of the probation since the start of his probation; and

(b) in each subsequent report, whether he has complied with all the provisions of the State Bar Act, Rules of Professional Conduct, and other terms and conditions of his probation during the period.

Furthermore, during the last 20 days of his probation, respondent shall submit a final report covering any period of his probation that is not covered by the last quarterly report required under this probation condition. In his final report, respondent shall certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury.

Furthermore, in light of statutory changes made after the hearing judge filed her decision, we modify her recommendation that the State Bar be awarded its costs to provide that the costs awarded be payable in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997) in lieu of adding them to respondent's annual membership fee.

Other than as modified by this opinion, the hearing judge's decision remains the final decision of the State Bar Court under rule 220(a) of the Rules of Procedure. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 696.)

We concur:

OBRIEN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SANDRA SUE SAWYER

A Member of the State Bar.

No. 95-C-12630

Filed December 16, 1997

SUMMARY

Respondent pleaded guilty to and was convicted on a misdemeanor charge of being an accessory after the fact in connection with the submission of false information to a federally insured bank for the purpose of inducing it to loan money to respondent for the purchase of a farm, a crime involving moral turpitude. A hearing judge recommended that respondent be placed on five years' stayed suspension and five years' probation on conditions including a three-year period of actual suspension with credit given for the time respondent had been on interim suspension. (Hon. Michael D. Marcus, Hearing Judge.)

Respondent sought review challenging certain findings of the hearing judge and contending that the maximum period of actual suspension should not exceed one year. The review department rejected all but one of respondent's challenges to the hearing judge's findings. However, the review department agreed with respondent's contention that the hearing judge's discipline recommendation was excessive. Accordingly, the review department decreased the recommended discipline to three years' stayed suspension and three years' probation on conditions including an eighteen-month period of actual suspension.

COUNSEL FOR PARTIES

For State Bar: Janet S. Hunt

For Respondent: David A. Clare

HEADNOTES

[1 a-c] 1691 Conviction Cases—Record in Criminal Proceeding
1699 Conviction Cases—Miscellaneous Issues

Even though the criminal plea agreement on which respondent was convicted dealt with only one of the multiple criminal counts initially filed against him, the State Bar Court's inquiry was not

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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.

limited to the conviction on that one count to determine the appropriate discipline, but included review of all the surrounding circumstances.

[2] **1519 Conviction Matters—Nature of Conviction—Other**
1521 Conviction Matters—Moral Turpitude—Per Se

Respondent's misdemeanor conviction of being an accessory after the fact in connection with the submission of false information to a federally insured bank for the purpose of inducing it to loan money to respondent for the purchase of a farm (18 U.S.C. §1014) involved moral turpitude per se.

[3] **130 Procedure—Procedure on Review**
135.70 Procedure—Revised Rules of Procedure—Review/Delegated Powers
159 Evidence—Miscellaneous
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous

The rule requiring the review department to give great weight to the hearing judge's findings of fact that resolve issues pertaining to the credibility of the witnesses, which rule is premised on the hearing judge's ability to see the witnesses' demeanor and conduct during trial, is not applicable when a witness's testimony is present only through a written transcript of the witness's deposition. Thus, in such a case, the review department may independently evaluate the credibility of the witness's deposition testimony without giving great weight to the hearing judge's findings.

[4] **162.90 Quantum of Proof—Miscellaneous**
169 Standard of Proof or Review—Miscellaneous
715.50 Mitigation—Good Faith—Declined to Find
1699 Conviction Cases—Miscellaneous Issues

In a conviction referral proceeding involving respondent's misdemeanor conviction of being an accessory after the fact in connection with the submission of false information to a federally insured bank for the purpose of inducing it to loan money to respondent for the purchase of a farm (18 U.S.C. §1014), respondent's contention that, at the time she obtained the loan, she fully expected the farm to succeed and to repay the loan in full might avoid a finding in aggravation, but did not entitle her to any mitigating credit. Respondent was not entitled to any credit for merely intending to do that which she contracted to do.

[5 a-c] **1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply**

In a conviction referral proceeding involving respondent's misdemeanor conviction of being an accessory after the fact in connection with the submission of false information to a federally insured bank for the purpose of inducing it to loan money to respondent for the purchase of a farm (18 U.S.C. §1014), which conviction involved moral turpitude per se, the State Bar proved that respondent's federal income tax returns represented by the copies of the first page of a number of prior federal income tax forms that were submitted to the bank in connection with respondent's loan application were never filed with the I.R.S, but did not prove that the figures on the submitted pages were false. Accordingly, the review department recommended only an 18-month period of actual suspension even though the applicable standard of Standards for Attorney Sanctions for Professional Misconduct provides for disbarment or a minimum of two years' actual suspension.

[6] **1020 Probation Conditions**
1029 Other Probation Conditions
1099 Substantive Issues re Discipline—Miscellaneous

In view of the serious nature of respondent's misdemeanor conviction of being an accessory after the fact in connection with the submission of false information to a federally insured bank for the purpose of inducing it to loan money to respondent for the purchase of a farm (18 U.S.C. §1014), review department added a quarterly reporting probation condition to its discipline recommendation.

Additional Analysis

Aggravation

Found

588.10 Aggravation—Harm—Generally—Found

Mitigation

Found

710.10 Mitigation—No Prior Record—Found

Discipline

1024 Ethics Exam/School
1091 Substantive Issues re Discipline—Proportionality
1613.09 Stayed Suspension—3 Years
1615.07 Actual Suspension—18 Months
1616.50 Relationship of Actual to Interim Suspension—Full Credit
1617.09 Probation—3 Years

OPINION

OBRIEN, P.J.:

I. INTRODUCTION

Respondent Sandra Sue Sawyer pleaded guilty to a misdemeanor charge of being an accessory after the fact in violation of 18 United States Code section 3, in connection with the submission of a loan application containing false statements in violation of the substantive crime prohibiting false or fraudulent statements in banking transactions as set forth in 18 United States Code section 1014. This court concluded that the crime to which respondent pleaded guilty involved moral turpitude per se. Under the mandate of Business and Professions Code section 6102, subdivision (a),[1] we placed respondent on interim suspension effective on or about October 17, 1995, where she remains. Further, we referred the matter to the hearing department for a determination of the discipline respondent should receive for that misconduct.

The hearing department recommended that respondent be suspended from the practice of law 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 condition, inter alia, that she be actually suspended from practice for a period of three years with credit given for the period that she has been on interim suspension.

Respondent seeks review, challenging certain findings of the hearing judge and contending that, even if the findings she challenges on review are sustained, the maximum period of actual suspension should not exceed one year. The State Bar contends that actual suspension for a period of three years is within the appropriate range of discipline for respondent's misconduct and urges us to affirm the hearing judge's determination.

Following our independent review of the conviction and the facts and circumstances surrounding the misconduct leading to the conviction, we conclude that the recommended discipline is too harsh and recommend that respondent be placed on a probationary-stayed suspension for a period of three years, conditioned upon her actual suspension from the practice of law for a period of 18 months with credit for the period of interim suspension served by respondent. In view of the fact that interim suspension has exceeded the period of actual suspension recommended, we shall order the termination of interim suspension forthwith.

II. FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION

Respondent was admitted to the practice of law in California in January 1971. In 1986 respondent was involved in various investments and was introduced to Robert Burlingame, a person with experience in the operation of pig farms. Burlingame was also in the business of bringing investors, lenders and pig farm operators together for the development and operation of pig farms. As a part of her interest in investing in such an operation in the State of Texas, respondent gave to Burlingame her financial statement and the first page of what she represented to be her federal income tax form 1040 for each of the years 1982 through 1985.[2] In fact, the tax returns represented by the pages given to Burlingame had never been filed with the Internal Revenue Service (I.R.S.); nor had respondent filed any returns for the years represented. Respondent testified she had obtained an extension for filing for the years 1982 through 1985.

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1. All references to "section" are to the Business and Professions Code unless otherwise indicated.

2. The hearing judge found that respondent had given the complete tax returns for the years mentioned to Burlingame, who in turn ultimately gave them to FirsTier Bank. The records in FirsTier Bank's files show only the first page, and in his deposition Burlingame testified he did not recall how many pages of the returns there were. (Other than his deposition in the federal case, Burlingame did not testify in either the State Bar Court proceeding or in the original trial in the federal court.) We determine that there is an absence of clear and convincing evidence of delivery of anything other than the first page each return.

Respondent further testified that she told Burlingame that the tax returns in question had not been filed. The hearing judge did not find this testimony to be credible, and we accept that determination of credibility. (Rule 305(a), Rules Proc. of State Bar, title II, State Bar Court Proceedings;[3] *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 774.) The record is clear that respondent authorized Burlingame to submit the documents she delivered to him to a prospective lending bank in connection with a Texas feeder hog farm. That loan did not materialize, and that project was abandoned. There followed discussions between respondent and Burlingame concerning the purchase of a grain storage facility in Kansas. Respondent authorized Burlingame to utilize the prior financial information provided in connection with obtaining a loan from another bank to finance the purchase of that grain storage facility. That loan did not materialize, and that project was abandoned.

Next, during 1987, Burlingame introduced respondent to James Flynn and others regarding the purchase of a turkey farm in Nebraska. Respondent flew to Nebraska for a meeting concerning that farm and, thereafter, authorized Burlingame to give the same financial documents in his possession to Flynn for the purpose of seeking financing for the turkey farm. During this same period, respondent also authorized Burlingame to use the same financial material for the purpose of obtaining financing for a hog feeding business from a bank in Bellevue, Nebraska. The banker in Bellevue congratulated respondent on her financial statement, and the parties apparently entered into the hog feeding business.

Flynn presented to the FirsTier Bank of Lincoln, Nebraska, (FirsTier) a proposal for the purchase of a hatching facility and its conversion to a turkey feeding farm. Included in that proposal was a proposed agreement with Swift/Eckrich, Inc. (Swift contract) for the purchase of the entire output of the turkey farm for a period of three years that would assure income over expenses in an amount sufficient to service the loan requested in the amount of $365,000. It was proposed that the loan be made to a corporation controlled by respondent, that the loan be secured by the turkey farm and equipment, and that respondent act as guarantor of the loan. Included with the material submitted to FirsTier in an effort to obtain the loan was the financial material originally provided Burlingame by respondent, consisting of her financial statement and the first pages of the 1982 through 1985 federal income tax forms.

FirsTier's "Loan Presentation Memorandum" presented to the loan committee by bank officials contained under the heading "*FAVORABLE FACTORS*" reference to the Swift contract, the anticipated cash flow from that agreement, and the experience of Flynn in the management of "turkey operation." Under "*UNFAVORABLE FACTORS*" is the following entry: "Lack of available knowledge concerning [respondent]. Financials are sketchy and unsigned with a major portion of assets being illiquid and considerably overvalue."

At the bank's request, respondent met with bank officials and submitted a current financial statement reflecting a net worth of approximately $12 million. The loan was funded, and the turkey farm was improved and placed in operation. A line of credit for operating capital was also authorized by FirsTier in the amount of $150,000, of which $75,000 was drawn from the bank.

The turkey operation progressed for approximately one year until Swift cancelled the contract under a provision that authorized them to do so in the event they closed the packing plant receiving the turkeys from this farm. Following several months of operation after the cancellation of the Swift contract, respondent contacted the bank and informed it that she could not continue the operation or make the payments on the loan. The bank foreclosed and took over the turkey farm.

Following the default by respondent's corporation and respondent, Burlingame called the bank and informed it for the first time that the tax returns

3. All references to "rule" are to these Rules of Procedure unless otherwise indicated.

represented in the material submitted to the bank had not been filed.[4] FirsTier notified the F.B.I., and the indictment of respondent followed.

[1a] Respondent was initially charged in federal court with making a materially false statement to FirsTier by representing that she had reported adjusted gross income to the I.R.S. of $315,191 for 1982; $245,718 for 1983; $277,507 for 1984; and $235,707 for 1985 when, in fact, she had not reported that income to the I.R.S. No evidence was introduced in either the federal court or the State Bar Court showing the actual income of respondent during those years; nor was any evidence introduced showing respondent's actual net worth at the time she submitted her financial statement to FirsTier.

[1b] Following a mistrial in the federal case because of the government's failure to disclose in discovery a vital document, respondent pleaded guilty to a misdemeanor charge of being an accessory after the fact, in violation of 18 United States Code section 3, of a predicate charge of submitting a false statement for the purpose of inducing a federally insured bank to make a loan. In March 1994 the federal court placed respondent on probation for a period of three years and ordered that she make restitution to FirsTier Bank in the sum of $50,000. In December 1995 the federal court granted early termination of respondent's probation as she had complied with all conditions. [2] In referring this matter to the hearing department to determine the discipline warranted by the conviction and the circumstances surrounding the misconduct, this court concluded that the offense involved moral turpitude per se, relying in part on *In re Lindgren* (1979) 25 Cal.3d 65.

III. DISCUSSION

Respondent attacks certain findings of the hearing judge and further attacks the discipline recommended by the hearing judge as excessive, even assuming the correctness of the findings included in the decision. We initially deal with the attacks on the findings of the hearing judge, followed by our review of the recommended discipline. Except as indicated, we adopt the findings of the hearing judge.

[1c] While we note that the plea agreement dealt with only the false representation that the tax returns had been filed with the I.R.S., our inquiry is not limited by that conviction. We must also look to the circumstances surrounding the misconduct leading to that conviction to determine the appropriate discipline. (See, e.g., *In re Carr* (1988) 46 Cal.3d 1089, 1090-1091.)

[3] Respondent argues that the evidence demonstrates that respondent did not authorize the delivery of any portion of what appeared to be her tax returns to FirsTier and that the deposition testimony of Burlingame ought not to be believed. The hearing judge determined that the deposition testimony of Burlingame was credible and that certain portions of respondent's testimony lacked credibility. We accept the hearing judge's determination of credibility as it relates to respondent. (Rule 305(a).) This is based on the hearing judge's ability to see the demeanor and conduct of the witness during the trial. (See, generally, 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 360, pg. 411.) The rationale for such a rule is eliminated when the sole source of testimony in the hearing department is a written record of the witness's deposition. Under these circumstances, this court may make its separate evaluation of credibility without giving great weight to the hearing judge's findings. Nonetheless, we, like the hearing judge, find little reason to discount the testimony of Burlingame, even though he testified that he wished that he had never met respondent.

Accepting Burlingame's testimony as credible, we find that he did not testify to having, in his possession, anything other than the first pages of respondent's purported tax returns. We further agree with the hearing judge that respondent's claim that she not only did not authorize the delivery of the tax papers to FirsTier, but did not know that they had been delivered, to be disingenuous. As the record shows, there is little question that respondent was a

4. It is unexplained how Burlingame knew the returns had not been filed.

relatively sophisticated investor, and in that capacity, she knew that documents had been submitted to the bank for the purpose of inducing them to consider a loan on the turkey farm. The only source of those documents was through Burlingame, through whom she had dealt with several banks. At least, she was put on inquiry as to what documents had been delivered to FirsTier for the purposes of inducing a loan. No such inquiry was made of FirsTier Bank; nor was there a disclosure given by respondent to the bank.

Respondent next argues that in seeking the loan from FirsTier she was acting in good faith, and based on the Swift contract, she had every reason to believe that the operation of the turkey farm was sound and that the loan would be repaid. This argument misses the point. The bank was entitled to rely on each and every document provided and the accuracy of such documents. There can be little doubt that when one presents financial information written on the first page of the federal income tax form from prior years, the recipient may properly assume it represents figures filed with the I.R.S. unless a disclaimer is clearly made.

[4] Respondent challenges the decision of the hearing judge because it does not give her credit for the fact that she entered into a loan agreement for the turkey farm with the full expectation of the success of the operation and full expectation of paying the loan in full. This position again misses the point. Respondent was convicted of aiding in the commission of the predicate charge of providing false information to FirsTier Bank. That false information was, in effect, that the tax returns represented by the pages delivered to the bank had been filed. That charge was established when the first page of the unfiled tax returns were given to the bank without a proper disclaimer. The content of those documents was not in issue in the federal case, and no evidence was introduced by the State Bar in this proceeding to show whether the documents properly stated respondent's income. While respondent's intention to fully perform the terms of the loan agreement may avoid a finding of aggravation, she is not entitled to credit for intending to do what she contracted to do.

Lastly, respondent argues that the hearing judge erred in assuming the figures presented in the financial statements given to FirsTier Bank were false. The figures provided by respondent did create an image of a person with substantial financial means. The hearing judge stated, "Respondent never did anything to dispel that illusion." We agree with respondent that the record does not demonstrate by clear and convincing evidence that the image of a person with substantial financial means was an illusion. No evidence was introduced in either the federal trial or in the hearing department demonstrating the income of respondent during the years 1982 to 1985 or contradicting the financial statement showing a net worth of $12 million.

We acknowledge that subsequent events, including respondent's bankruptcy, cast doubt on the figures. But this doubt does not rise to the level of clear and convincing evidence.

IV. DISCIPLINE

We agree with the hearing judge that respondent's 16 years of discipline-free practice prior to her commission of the act that led to her misdemeanor conviction is entitled to mitigating weight. (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e).)

We also agree with the finding that the misconduct of respondent significantly harmed FirsTier Bank. (Std. 1.2(iv).) The bank's loan went into default, and even though the record shows that respondent made court-ordered restitution to the bank in the sum of $50,000, the bank was harmed. While the bank's representative testified that the primary basis for the loan was the Swift contract that apparently assured the success of the project for the life of that agreement, he further testified that respondent's personal financial condition as a guarantor was a secondary consideration in their granting the loan.

We start our discipline analysis at the same point as the hearing judge. Standard 3.2 provides that conviction of an attorney of a crime involving moral turpitude shall result in disbarment absent "the most compelling mitigating circumstances," in which case, "the discipline shall not be less than a two-year actual

suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances." The Supreme Court has criticized standard 3.2 for its failure to take into account the time an attorney has been on interim suspension. (*In re Young* (1989) 49 Cal.3d 257, 268, fn. 13.) The court points out that while the standards are instructive, they are merely guidelines and are not required to be followed talismatically. (*Id.* at p. 268.)

We find no published California discipline case arising out of a violation of 18 United States Code section 1014 or being an accessory after the fact to such a charge. Our search does, however, reveal a number of discipline offenses arising out of similar charges.

In *In re Chernik* (1989) 49 Cal.3d 467, the respondent was convicted of conspiracy to defraud the United States by impeding the lawful functions of the I.R.S. The respondent participated in a scheme involving the backdating of documents allocating partnership losses to clients. The federal court imposed a sentence of one year and one day, which had been served, and a $10,000 fine. The Supreme Court determined that the facts and circumstances surrounding the crime involved moral turpitude. Noting that Chernik had an unblemished record of practice for 20 years, but that the misconduct occurred in the practice of law,the Supreme Court adopted the State Bar Court's recommendation of a one year period of actual suspension.

A similar discipline of one year's actual suspension was imposed in *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103. There, Chadwick suffered a single misdemeanor conviction for insider trading and related misconduct. Chadwick shared nonpublic information with an associate, and as a result, they profited by purchasing options in a corporation before another corporation attempted to take it over. At a Securities and Exchange Commission (SEC) investigation, Chadwick lied under oath. Shortly thereafter, Chadwick called the SEC and advised it that he had lied. The federal court required Chadwick to disgorge the profits from the transactions and fined him $10,000. The Supreme Court determined that the conviction involved moral turpitude and that Chadwick was culpable of two other acts of moral turpitude, including his lying to the SEC. The Supreme Court awarded significant mitigation for candor with the SEC as well as the State Bar. In addition, it court awarded mitigation for the recognition of wrongdoing, the absence of misconduct for the seven years between the misconduct and the date of the Supreme Court's opinion, and the absence of prior discipline in eight years' of practice.

In *In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, the respondent pleaded guilty to making and subscribing to false income tax returns for three consecutive years, a crime involving moral turpitude. Several mitigating circumstances were found, including physical changes involving an amputation, psychological problems at or about the time of the misconduct, remorse, and an absence of other misconduct. It appears that discipline was set at approximately seven months, the period that respondent had been on interim suspension.

Finally, we look to *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297. While in law school with a wife and nine children, Lybbert applied for and obtained welfare benefits by filing 15 monthly declarations that falsely failed to reveal that he received modest income for part time work as a law clerk. Lybbert pleaded guilty to a misdemeanor charge of violating Welfare and Institutions Code section 10980, subdivision (c), a crime involving moral turpitude. Mitigation included Lybbert's cooperation and remorse along with the fact that he was the sole supporter of his wife and nine children while in law school. He was actually suspended for two years and until he establish rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii), with credit given for his time on interim suspension.

[5a] We find the offense before us not unlike those in the cited cases. We note that respondent provided or permitted to be provided the first page of the four tax forms to at least three different banks. In the matter before us, there is less mitigation than in any of the referenced cases in that respondent lacks remorse and continues to assert that her misconduct was minimal in spite of her plea of guilty. On the other hand, there is no clear and convincing evidence

that the contents of herfinancial statements were false, only that she effectively misrepresented the status condition of her tax returns. In *Chernik* the offense involved the back dating of documents for the tax benefit of clients and was in the practice of law. Chernik had a much longer unblemished record than did respondent. There the discipline was one year actual suspension. In *Chadwick* there were three separate acts of moral turpitude followed by candor with the SEC and the State Bar. Chadwick had less time of blemish-free practice than did respondent. Chadwick received one year actual suspension.

[5b] We view the conduct in *Moriarty* as less egregious than that before us, and far more mitigative. We consider *Lybbert* to be more egregious than the matter at bar, considering the filing of 15 separate declarations falsely failing to disclose income, but with more mitigation.

[5c] Giving consideration to the fact that respondent was placed on interim suspension commencing October 12, 1995, a period in excess of two years, we conclude that additional actual suspension is not necessary for the protection of the public. In light of our recommendation for less than two years of actual suspension, we conclude that respondent need not make an additional showing of rehabilitation, present fitness to practice, and present learning in the law in accordance with standard 1.4(c)(ii). **[6]** In addition, in view of the serious nature of the misconduct, we deem it appropriate to add a quarterly reporting condition of probation. (See *In the Matter of Weiner* (Review Dept. December 11, 1997, 95-O-14361) ___ Cal. State Bar Ct. Rptr. ___ [typed opn. p. 9].) Finally, we delete the hearing judge's recommendation that respondent be ordered to comply with rule 955 of the California Rules of Court because respondent was ordered to comply with that rule when she was interimly suspended, and there is no evidence that she has practiced law since that time.

IV. RECOMMENDATION

We recommend that respondent be suspended for a period of three years, that execution of the suspension be stayed, and that respondent be placed on probation for a period of three years on the following conditions:

1. During the first 18 months of said period of probation, respondent shall be actually suspended from the practice of law, with credit given for the period of time respondent has been interimly suspended.

2. Respondent shall comply with the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar of California, and all the terms and conditions of her probation.

3. 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.

4. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, title III, General Provisions, rule 3201.)

5. Respondent must report, in writing, to the State Bar's Probation Unit in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act,

Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

6. Subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Unit of the Office of Trials which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation.

7. The period of probation shall commence as of 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 three (3) years shall be satisfied and the suspension shall be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one (1) year after the effective date of the Supreme Court order in this matter, and that she furnish satisfactory proof of such passage to the Probation Unit within that time period.[5]

V. COSTS

It is further recommended that costs be awarded to the State Bar in accordance with the provisions of Business and Professions Code section 6086.10 and that such cost be payable in accordance with Business and Professions Code §6140.7 (as amended effective January 1, 1997).

VI. ORDER

For the reasons expressed in this opinion and pursuant to the authority of Business and Professions Code section 6102, subdivision (a) and rule 951(a) of the California Rules of Court, it is ordered that the interim suspension of respondent be terminated. This termination order is effective immediately.

We concur:

NORIAN, J.
STOVITZ, J.

5. Ordinarily, we would recommend that respondent be given the full period of her 18 months' actual suspension to take and pass the professional responsibility examination in accordance with *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8. But we do not do so in this instance because, after respondent is given credit for the time she has been on interim suspension, her 18 months' actual suspension will be satisfied.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

William Robert Anderson

A Member of the State Bar.

No. 89-O-11498

Filed November 6, 1997

SUMMARY

In representing a client involved in a civil lawsuit, respondent made 116 statements that impugned the integrity and honesty of the judges on the court in which the client's matter was pending. The hearing judge's held that respondent violated his statutory duty to maintain the respect due the courts and judicial officers when he made 100 of those statements. The hearing judge's discipline recommendation included a two-year period of stayed suspension, a one-year period of probation, and a sixty-day period of actual suspension. (Hon. David S. Wesley, Hearing Judge.)

Respondent appealed. The review department held that, under the First Amendment guarantee of free speech, an attorney cannot be disciplined for violating his statutory duty to maintain the respect due the courts and judicial officers by making a disparaging out-of-court statement in a civil proceeding that impugns the honesty or integrity of a court or judicial officer unless (1) the statement is false and (2) the attorney knew that it was false when he made it or made it with reckless disregard for its truth or falsity. The review department further held that the State Bar bears the burden of proving the falsity of any such statements. The State Bar did not proffer any evidence regarding the falsity of respondent's disparaging statements in this proceeding because the hearing judge made an erroneous pre-trial ruling relieving the State Bar of its burden to prove falsity. Thus, the review department remanded the matter to the hearing department to allow the State Bar the opportunity to prove that respondent's disparaging statements were false.

COUNSEL FOR PARTIES

For State Bar: Allen L. Blumenthal

For Respondent: William R. Anderson, 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-d] **193 Constitutional–Issues**
199 General Issues–Miscellaneous
204.90 Culpability–General Substantive Issues

Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment. However, because attorneys are officers of the court with a special responsibility to protect the administration of justice, reasonable speech restrictions may be imposed on them. To survive judicial scrutiny such a restriction must (1) further an important or substantial governmental interest unrelated to the suppression of expression and (2) be no greater than is necessary or essential to the protection of that important or substantial governmental interest.

[2 a-e] **161 Duty to Present Evidence**
169 Standard of Proof or Review–Miscellaneous
193 Constitutional Issues
199 General Issues–Miscellaneous
204.90 Culpability–General Substantive Issues
213.20 State Bar Act–Section 6068(b)
401 Common Law/Other Violations in General
490 Miscellaneous Misconduct

An attorney may be disciplined for making a false statement that attacks the honesty, motivation, integrity, or competence of a judicial officer without violating the attorney's First Amendment guarantee of free speech so long as the attorney knew the statement was false when he made it or made it with a reckless disregard for its truth or falsity. Truth is an absolute defense. The State Bar has the burden of proving the falsity of the statement. The issue of whether a false statement was made with reckless disregard for its truth or falsity is governed by an objective standard under which the court must determine what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.

[3 a-c] **130 Procedure–Procedure on Review**
139 Procedure–Miscellaneous
161 Duty to Present Evidence
169 Standard of Proof or Review–Miscellaneous
193 Constitutional Issues
199 General Issues–Miscellaneous
213.20 State Bar Act–Section 6068(b)

An essential element to establishing an attorney's violation of his statutory duty to maintain the respect due the courts and judicial officers by making a statement that impugns the honesty or integrity of a court or judicial officer is the falsity of the disparaging statement. Even though the State Bar has the burden of proving the essential element of falsity, it did not proffer any evidence to establish the falsity of the respondent's disparaging statements regarding various judicial officers because the hearing judge made a erroneous pre-trial ruling relieving the State Bar of its burden to prove falsity. Therefore, the review department remanded the matter to the hearing department to allow the State Bar an opportunity to prove that respondent's statements were false.

[4 a, b]	193	**Constitutional Issues**
	199	**General Issues–Miscellaneous**
	213.20	**State Bar Act–Section 6068(b)**
	401	**Common Law/Other Violations in General**
	490	**Miscellaneous Misconduct**

An attorney's statement impugning the honesty or integrity of a court or judicial officer is not disciplinable if it constitutes rhetorical hyperbole, or uses language only in a loose, figurative sense, or if it is not capable of being proved true or false. The statement is not disciplinable unless it implies or is based upon a false assertion of fact

ADDITIONAL ANALYSIS

Culpability

Not Found

213.25 Section 6068(b)
213.65 Section 6068(f)

OPINION

NORIAN, J.:

Respondent William Robert Anderson seeks review of a hearing judge's decision finding that he violated his statutory duty under Business and Professions Code section 6068, subdivision (b)[1] to maintain the respect due to the courts and judicial officers by repeatedly making statements in pleadings and letters that impugned the honesty and integrity of numerous trial and appellate court judges. The hearing judge recommended that respondent be suspended from the practice of law for two years, that execution of that suspension be stayed, and that respondent be placed on probation for one year subject to various conditions, including a sixty-day period of actual suspension.

Respondent acknowledges that he made the alleged statements but asserts on review, as he did in the hearing department, that the statements are truthful and are protected by the First Amendment guarantee of free speech.

There is no question that respondent's statements impugned the integrity and honesty of numerous judges. However, the disposition of this case turns upon the burden of proof in State Bar disciplinary proceedings and, specifically, upon the question of whether respondent bears the burden of proving the truthfulness of his accusations or, conversely, whether the State Bar, through its Office of the Chief Trial Counsel (OCTC), bears the burden of proving their falsity.

We hold that an attorney may be disciplined for making false statements that impugn the honesty or integrity of the court if those statements either are knowingly false or are made with reckless disregard for their truth or falsity. We further hold that OCTC bears the burden of proving the falsity of those statements.

In this case, OCTC failed to introduce any evidence regarding the falsity of respondent's statements. However, in a pre-trial evidentiary ruling, the hearing judge erroneously held that OCTC did not bear the burden of proving that respondent's statements were false. Because the hearing judge's ruling improperly relieved OCTC of its burden of proof, we remand this matter to the hearing department for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

The notice to show cause in this proceeding was filed on December 22, 1992. A first amended notice to show cause was subsequently filed on July 13, 1993. Respondent filed timely answers to both notices.

The first amended notice charged respondent with violations of Business and Professions Code section 6068, subdivisions (b) and (f)[2] as a result of 116 separate statements he made in pleadings and documents. These statements impugned the integrity and honesty of the Orange County Superior Court and others.

The hearing judge filed an initial decision on March 24, 1995, and a modified decision on April 27, 1995. The judge found respondent culpable of violating section 6068, subdivision (b), but not section 6068, subdivision (f). Respondent sought review by this court.

II. FACTS

We have independently reviewed the record (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207) and adopt the hearing judge's findings of fact, which we summarize below.

Respondent was admitted to practice law in California in 1972. He began practicing law in Orange County in 1981.

1. Unless otherwise specified, all future references to "section" shall be to the Business and Professions Code.

2. Section 6068, subdivision (b) provides that it is the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers."

Section 6068, subdivision (f) provides, as relevant here, that it is the duty of an attorney "[t]o abstain from all offensive personality . . . ."

Michael and Gale Sansone managed and operated the Irvine Health Center (Center), which they jointly leased with others, including Daniel Sigler. The term of the Center's lease extended from March 1983 until April 1988.

Attorney Jeffrey Walsworth, a friend of Sigler, set up both Kokua Management, Inc., (Kokua) for the Sansones and a professional chiropractic corporation for Michael Sansone. From the latter half of 1983, the Sansones managed the Center through Kokua.

In January 1985, Sigler moved his office out of the Center. The Sansones asserted that Sigler's move breached the terms of the joint lease.

In May 1985, Walsworth filed an action in Orange County Superior Court on behalf of Sigler (the Sigler action) against Gale Sansone and Kokua. Walsworth later added Michael Sansone as a defendant. Respondent represented the Sansones and Kokua.

During the disciplinary proceeding, respondent claimed to have filed a motion in the Sigler action to disqualify Walsworth on the ground that Walsworth had formerly represented the Sansones and Kokua and that the court had denied his motion. Neither the motion nor the court's ruling was offered in evidence in this proceeding.

Respondent also contended during this disciplinary proceeding that Walsworth's complaint and amended complaint in the Sigler action contained many lies and that Walsworth committed perjury by verifying those complaints.

On numerous occasions, the Orange County Superior Court imposed monetary sanctions, which totaled more than $4,500, against respondent and his clients. Respondent argued that Walsworth improperly influenced the court to impose these sanctions in order to "punish" respondent and his clients for their accusations against Walsworth and the court.

During the late 1980's, respondent represented the Sansones and Kokua in various proceedings related to the Sigler action. In July 1987, for example, respondent filed an action (the Sansone action) on their behalf for breach of contract against others involved in the lease of the Center.

In 1988, Walsworth filed motions to disqualify respondent from representing the Sansones and Kokua in the Sigler and Sansone actions. Respondent opposed the motions on the grounds that they were frivolous and were supported by perjurious declarations. The Orange County Superior Court granted both motions.

In May 1989, a federal bankruptcy court issued a memorandum opinion in an adversarial proceeding filed by Gale Sansone. The bankruptcy court awarded her compensatory and punitive damages against Walsworth in the total amount of $35,594.42. Further, the bankruptcy court found that Walsworth had filed cross-complaints in the Sansone action in disrespect for the law and in bad faith and that Walsworth had directly perjured himself at trial in the bankruptcy matter by falsely denying his prior attempt to extort money from Sansone. The bankruptcy court's opinion made no finding regarding the conduct of either the Orange County Superior Court or any of its judicial officers.

In the disciplinary proceeding, respondent asserted that the bankruptcy court's findings about Walsworth substantiated his contention that Walsworth committed perjury earlier by verifying the complaints in the Sigler action.

Respondent made a total of 116 derogatory statements about the Orange County Superior Court and its judicial officers in 17 pleadings and other documents written between 1987 and 1990. During this entire period of time, respondent was representing the Sansones and Kokua in various actions. As the hearing judge found, and as OCTC acknowledges, 16 of these statements were privileged in that they were contained in unpublished letters to the Presiding Judges of the Orange County Superior Court complaining about the alleged misconduct of Orange County judges and commissioners.

The remaining 100 statements formed the basis for the hearing judge's determinations regarding culpability. A declaration that respondent executed in August 1988 reflects the nature of

these statements.[3] According to this declaration, the Orange County Superior Court (1) "repeatedly indicated [its refusal to] recognize and obey the laws of the State of California and the canons of the Code of Judicial Conduct"; (2) knew that Walsworth had "committed the felony of perjury"; (3) "knowingly aid[ed] Walsworth . . . in avoiding arrest, trial, conviction, and punishment"; (4) used sanctions to punish "the litigants and attorneys [who revealed] such crimes"; and (5) "on many occasions . . . became an accessory to such felonies . . . ."

Respondent repeated the same, or essentially similar, statements in many documents and pleadings filed in other actions.

During the disciplinary proceeding, respondent was the only witness called by either OCTC or respondent. The only documentary evidence introduced by the State Bar was the pleadings and documents in which respondent made his allegations and derogatory statements. Respondent acknowledged having written these pleadings and affirmatively testified that, in his view, each of the statements was true based upon the facts as he knew them at the time the statements were made. Respondent conceded, however, that many of his statements rested upon information he had received from other persons and that he had no personal knowledge about the truth of such information.

The pleadings and documents written by respondent made both general references to the Orange County Superior Court and specific references to particular judges. Each of the pleadings and documents set forth specific facts, incidents, or judicial rulings that respondent claimed supported his conclusion that some of the judges of the Orange County Superior Court had acted "corruptly and unethically." While respondent often made broad general references in these pleadings to the Orange County Superior Court, viewing each of the pleadings in its entirety, it does not appear that respondent was claiming that each and every judge of the Orange County Superior Court was corrupt or improperly protecting Walsworth. In fact, at least two of the pleadings filed by respondent specifically stated that respondent believed that some Orange County judges were honest and would act with integrity.[4] (State Bar exhibits 12 and 13.)

3. The declaration supported a motion which Michael Sansone made in propria persona to disqualify Walsworth in the Sigler action.

4. In the context of his various letters and pleadings, respondent's essential claim appears to be that Walsworth had sufficient influence over a number of the judges of the Orange County Superior Court to ensure that only those judges who were willing to protect Walsworth and to harm respondent's clients were assigned to the Sansones' various actions.

For example, in a July 8, 1988, letter to the presiding judge of the Orange County Superior Court, respondent gave examples of the alleged misconduct of a specific superior court judge and also made general allegations about Walsworth's control over "the court" and its alleged willingness to allow itself to be used by Walsworth. Nevertheless, it is clear that respondent's allegations were not directed at every judge on the court because he also stated as follows: "What the court has done to [the Sansones] is what has convinced them that the court is totally corrupt. I think that is unfortunate. I cannot, though, think of any Orange County Superior Court judge whom I could recommend to them as a judge with integrity. I know that they exist. It is just that I do not know whom I could recommend to them." (State Bar exhibit 5, at p. 2.)

More specifically, in a March 7, 1989, letter to one of the superior court judges who had presided over a portion of at least one of the Sansones' actions, respondent again made references to the allegedly corrupt rulings of specific judges and made general statements regarding the willingness of the Orange County Superior Court to "continue its long established practice of protecting . . . Walsworth" and the inability of the Sansones to receive a fair trial. However, respondent did not accuse every judge on the Orange County bench of corruption or misconduct, but alleged that only corrupt judges were assigned to the Sansones' actions, stating: "I know that there must be some honest judges on the bench in the Orange County Superior Court. The problem is that I do not know who they are. The Sansones and I suspect very strongly that whichever judge is assigned any case involving Walsworth will be chosen because of a willingness to continue the court's long established practice of protecting Walsworth and other members of the court." (State Bar exhibit 12, at p. 6.) Likewise, respondent further asserted in his letter that "I do not think that all judges on the Orange County Superior Court should be investigated. I do know that most of those with whom I have had contact should be." (State Bar exhibit 12, at p. 7.)

Finally, in a declaration executed on August 15, 1988, respondent again acknowledged that there are honest judges on the Orange County Superior Court but that those who are in control of the Sansones' actions would continue to protect Walsworth, stating: "While I am certain that there are many fine judges on this court who would unquestionably act with integrity, I do not know who they are. I do not know who to trust on this court. And, I do greatly fear that those who are in control of these various matters will maintain, as they have in the past, unlawful and unethical control over them so as to continue the long established practice of protecting Walsworth and his associates from the consequences of their criminal conduct." (State Bar exhibit 13, at p. 32.)

III. DISCUSSION

A. Section 6068, Subdivision (b)

Throughout this proceeding, respondent has asserted that his statements about the Orange County Superior Court and others are true and that his statements are protected by the First Amendment. Respondent has also consistently argued throughout this proceeding that OCTC bears the burden of proving his statements are false.

At a status conference conducted on October 8, 1993, the hearing judge indicated that he did not know whether the truth or falsity of the alleged statements was relevant in determining respondent's culpability. In response, deputy trial counsel for OCTC argued that the truth or falsity of the statements is irrelevant for purposes of culpability and that OCTC does not bear the burden of proving the falsity of respondent's statements.

The parties also subsequently submitted written briefs on the issue at the request of the hearing judge. In its Pre-Trial Brief filed on November 5, 1993, OCTC repeated its argument that the truth or falsity of the allegations made by respondent was irrelevant. (OCTC's Pre-Trial Brief, pp. 35-36.)

Thereafter, in a pre-trial evidentiary order filed December 13, 1993, the hearing judge concluded that OCTC did not have the burden of proving the falsity of any of the derogatory statements made by respondent because, on their face, the statements impugned the integrity and honesty of the Orange County Superior Court. Citing the California Supreme Court's opinions in *Lebbos v. State Bar* (1991) 53 Cal.3d 37 (*Lebbos*) and *Ramirez v. State Bar* (1980) 28 Cal.3d 402 (*Ramirez*), as well as several cases from other jurisdictions, the hearing judge concluded that respondent had the burden of showing either the truthfulness of the statements or, alternatively, that he had a reasonable factual basis for the statements at the time he made them and that they were, therefore, not made in reckless disregard for the truth.

No evidence was introduced by OCTC to show that any of the statements made by respondent were false. In his modified decision filed April 27, 1995, the hearing judge reiterated his conclusion that OCTC did not have the burden of proving the falsity of respondent's statements and that respondent bore the burden of proving their truthfulness or, alternatively, his reasonable factual basis for them.

The hearing judge did not find any of the respondent's statements to be false. Rather, the judge found that respondent had failed to affirmatively establish that the statements were true or that he had a reasonable basis in fact to support them. As a result, the hearing judge concluded that respondent had violated section 6068, subdivision (b).

However, on May 30, 1995, 33 days after the hearing judge filed his modified decision, the Ninth Circuit Court of Appeals filed its opinion in *Standing Committee v. Yagman* (9th Cir. 1995) 55 F.3d 1430 (*Yagman*). In that case, the Ninth Circuit reached the opposite conclusion on the burden of proof issue from that reached by the hearing judge in this case. As explained below, we agree with the Ninth Circuit and, therefore, hold that the hearing judge erred both in his pre-trial order and in his modified decision by concluding that OCTC did not bear the burden of proving that respondent's statements were false.

[1a] Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment. First Amendment protection survives even when an attorney violates an ethical rule that he or she swore to obey when admitted to the practice of law. (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1054.)

[1b] Like all other citizens, attorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice. (*In re R.M.J.* (1982) 455 U.S. 191, 199; *Konigsberg v. State Bar* (1957) 353 U.S. 252, 273; *Hirschkop v. Snead* (4th Cir. 1979) 594 F.2d 356, 366.)

[1c] However, attorneys occupy a special status and perform an essential function in the administration of justice. Because attorneys are officers of the court with a special responsibility to protect the administration of justice, courts have recognized the need for the imposition of reasonable speech restrictions upon them. (*Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792.)

[1d] A restriction on free speech can survive judicial scrutiny under the First Amendment only if two fundamental conditions are satisfied. First, the limitation must further an important or substantial governmental interest unrelated to the suppression of expression. Second, the restriction must be no greater than is necessary or essential to the protection of the particular governmental interest involved. (*Procunier v. Martinez* (1974) 416 U.S. 396, 413; *Hirschkop v. Snead, supra*, 594 F.2d at p. 363.)

The fundamental state interest in assuring a fair trial has been held to justify restrictions upon attorney comments during pending criminal proceedings where there is a substantial like-lihood that the attorney's comments will have a materially prejudicial effect or will interfere with the defendant's right to a fair trial. (*Gentile v. State Bar of Nevada, supra*, 501 U.S. at pp. 1075-1076; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 361-363; *Estes v. State of Texas* (1965) 381 U.S. 532, 540; *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 624 (fn. 7); *Younger v. Smith* (1973) 30 Cal.App.3d 138, 161-164;.)

Our judicial system also requires that litigants in civil cases be assured the right to a fair trial. (*Hirschkop v. Snead, supra*, 594 F.2d at p. 373; see also *Cox v. State of Louisiana* (1965) 379 U.S. 559, 583 (conc. opn. of Black, J.).) Nevertheless, at least two federal circuit courts have held that limitations on First Amendment rights are not necessary to ensure the right to a fair trial in civil cases. (*Hirschkop v. Snead, supra*, 594 F.2d at pp. 373-374; *Chicago Council of Lawyers v. Bauer* (7th Cir. 1975) 522 F.2d 242, 258-259; see also *Bernard v. Gulf Oil Co.* (5th Cir. 1980) 619 F.2d 459, 474; *Shadid v. Jackson* (E.D. Tex. 1981) 521 F.Supp. 85, 87; *In re Hinds* (N.J. 1982) 449 A.2d 483, 499-500.)

The statements which are the subject of this proceeding were made by respondent in pleadings and documents filed in pending civil, rather than criminal, cases. However, even if restrictions can properly be imposed upon an attorney's comments in a pending civil action, respondent was not charged in the notice to show cause with any interference with the administration of justice. Likewise, there is no evidence in the record of this proceeding either that there was a substantial likelihood that respondent's comments had a materially prejudicial effect upon any of the pending civil actions or that they otherwise interfered with the litigants' right to a fair trial.

Notwithstanding the foregoing, criticism by an attorney which amounts to an attack on the honesty, motivation, integrity, or competence of a judge who has the responsibility to administer the law may still be disciplinable under certain circumstances. (*State ex rel. Oklahoma Bar Assn. v. Porter* (Okla. 1988) 766 P.2d 958, 965; cf. *U.S. Dist. Court for E.D. of Wash. v. Sandlin* (9th Cir. 1993) 12 F.3d 861, 866.)

The identification of dishonest judges and their prompt removal from office promotes a justified public confidence in the judicial system. However, indiscriminate accusations of dishonesty or corruption do not help eliminate such judges from the system. Instead, baseless accusations seriously impair the functioning of the judicial system because few litigants or members of the public can separate accurate from spurious claims of judicial misconduct. (*Matter of Palmisano* (7th Cir. 1995) 70 F.3d 483, 487.)

[2a] Neither a false statement made knowingly nor a false statement made with reckless disregard of the truth enjoys constitutional protection because there is no constitutional value in such false statements of fact. (*Garrison v. State of Louisiana* (1964) 379 U.S. 64, 75; *Ramirez, supra*, 28 Cal.3d at p. 411; see also *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 776.)

[2b] Rules of professional conduct "that prohibit false statements impugning the integrity of judges . . . are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. [Citations.]" (*Yagman, supra*, 55 F.3d at p. 1437; see also *In re Disciplinary Action Against Graham* (Minn. 1990) 453 N.W.2d 313, 322; *State ex rel. Oklahoma Bar Assn. v. Porter, supra*, 766 P.2d at p. 969.) Therefore, when a personal attack is made upon a judge or other court official, such speech is not protected if it consists of false statements made knowingly or with a reckless disregard of the truth. (*Ramirez, supra*, 28 Cal.3d at p. 411; *Matter of Palmisano, supra*, 70 F.3d at p. 487;

Idaho State Bar v. Topp (Idaho 1996) 925 P.2d 1113, 1116; *State ex rel. Oklahoma Bar Assn. v. Porter, supra*, 766 P.2d at p. 969; *Comm. on Legal Ethics of W. Va. v. Farber* (W.Va. 1991) 408 S.E.2d 274, 285.)

[2c] A statement by an attorney that impugns the honesty or integrity of a judge may not be punished unless that statement is false. Truth is an absolute defense.[5] (*Yagman, supra*, 55 F.3d at p. 1438.) An examination of the disciplinary cases involving attorneys' comments upon the honesty and integrity of judges fully supports this conclusion.

In *Yagman, supra*, the Ninth Circuit considered the discipline imposed upon attorney Yagman for derogatory statements made about a federal district judge. Yagman asserted that the judge had a penchant for sanctioning Jewish lawyers, that the judge had imposed sanctions against Yagman and two other Jewish lawyers, and that these sanctions were evidence of anti-semitism. Yagman also told a newspaper reporter that the judge had been "drunk on the bench." (*Id.*, at p. 1434.) Finally, Yagman submitted an evaluation of the judge to the publisher of the Almanac of the Federal Judiciary in which he described the judge as, among other things, "ignorant, dishonest, ill-tempered, and a bully." He also referred to the judge as a "substandard human." (*Id.*, at p. 1434, fn. 4.)

The Ninth Circuit held that Yagman's description of the judge for the Almanac of the Federal Judiciary constituted "rhetorical hyperbole, incapable of being proved true or false." (*Id.*, at p. 1440.) According to the court, Yagman's assertion that the judge's sanctions of Jewish lawyers were evidence of anti-semitism conveyed Yagman's personal belief that the judge was anti-semitic. Such a statement of opinion could "be the basis for sanctions only if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false. [Citations.]" (*Id.*, at pp. 1438-1439.) Further, the court held that Yagman's assertion that the judge had been "drunk on the bench" was a factual statement for which Yagman could be disciplined if evidence showed that the allegation was untrue. (*Id.*, at p. 1441.) Since no evidence was introduced to demonstrate that any of the statements made by Yagman were false, the Ninth Circuit reversed the decision of the district court imposing discipline on Yagman. (*Id.*, at pp. 1441-1442.)

In *Idaho State Bar v. Topp, supra*, 925 P.2d 1113, the attorney was accused of improperly impugning the integrity of a judge by suggesting to the media that the judge's denial of a county's request for "judicial confirmation" of a proposed multi-million dollar county expenditure "was motivated by political concerns." (*Id.*, at p. 1114.) The Idaho State Bar acknowledged that actual falsity was an essential element of its case. (*Id.*, at p. 1116, fn. 2.) The Idaho Supreme Court concluded that the state bar had established the falsity of Topp's statements because the parties stipulated that, if called to testify, the judge would testify that his decision in the judicial confirmation proceeding was not politically motivated. Since this stipulated testimony was not controverted, the court concluded that it was sufficient to support the conclusion that Topp's statement was false. (*Id.*, at p. 1116.) Determining that Topp had been "'objectively reckless' in making that statement to the media," the court publicly reprimanded him. (*Id.*, at p. 1117.)

In *State ex rel. Oklahoma Bar Assn. v. Porter, supra*, 766 P.2d 958, an attorney commented to the media that the trial judge who had presided over the criminal trial of his client "'showed all the signs of being a racist.'" The attorney also stated that he had never tried a case before that judge in which he felt that he had received an impartial trial. As a result of these comments, the attorney was accused of engaging in conduct that was prejudicial to the administration of justice and that adversely reflected upon his fitness to practice law. (*Id.*, at pp. 960-961.)

5. Although addressing the issue of falsity in the context of defamation law, the analysis of the United States Supreme Court, as expressed in *Old Dominion Br. No. 496, Nat. Ass'n, Letter Car. v. Austin* (1974) 418 U.S. 264, 283-284, is applicable in the disciplinary context as well: "Mr. Justice Clark put it quite bluntly: 'the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.' [Citation.] Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. [Citation.]"

In analyzing its own prior caselaw, the Oklahoma Supreme Court noted that it has always looked at the nature of the allegations made by the attorney and that it "has carefully avoided censuring attorneys in the absence of a showing of falsity." (*Id.*, at p. 962.) Concluding that the record contained no evidence showing the attorney's statements to be false and that, therefore, the statements were protected by the First Amendment, the court stated: "The record is devoid of any attempt to show that the statements complained of are false. In the absence of a showing of falsity the statement must be held to be speech on vital issues of self government protected by the First Amendment. . . . [D]iscipline . . . is not warranted by virtue of the absence of any showing of falsity." (*Id.*, at p. 969.)

In *Matter of Palmisano, supra*, 70 F.3d at p. 486; *In re Disciplinary Action Against Graham, supra*, 453 N.W.2d at pp. 318-319; *Matter of Holtzman* (N.Y. 1991) 577 N.E.2d 30, 32-33; and *Comm. on Legal Ethics of W. Va. v. Farber, supra*, 408 S.E.2d at pp. 277, 283-285, statements impugning the honesty and integrity of the courts or judicial officers were expressly found to be false.

The California Supreme Court's opinions in *Ramirez, supra*, 28 Cal.3d 402, and *Lebbos v. State Bar* (1991) 53 Cal.3d 37, are by no means inconsistent with the conclusion that a statement impugning the honesty or integrity of a judge is not disciplinable unless it is false.

In *Ramirez*, the former State Bar disciplinary board found that an attorney had violated Business and Professions Code section 6068, subdivisions (b), (d), and (f) by "'*falsely* maligning'" a panel of justices of the Court of Appeal. (*Ramirez, supra*, 28 Cal.3d at p. 404, emphasis added.) Although the Supreme Court discussed the attorney's failure to conduct any investigation prior to making his allegations and that he had, therefore, acted in reckless disregard for the truth or falsity of his claims, the court accepted the disciplinary board's conclusion that the attorney's statements were false. Addressing the attorney's contention that his statements were protected by the First Amendment, the Supreme Court stated (*Ramirez, supra*, 28 Cal.3d at p. 411): "The United States Supreme Court, in addressing First Amendment protections of *false* statements made with reckless disregard for the truth, stated that '[c]alculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality . . . ." *Chaplinsky v. New Hampshire* [1942] 315 U.S. 568 . . . . Hence the *knowingly false* statement and the *false* statement made with reckless disregard of the truth, do not enjoy constitutional protection.' (*Garrison v. Louisiana* (1964) 379 U.S. 64, 75 . . . .) As has been demonstrated, petitioner's several demeaning statements have been made with reckless disregard of the truth." (*Ramirez, supra*, 28 Cal.3d at p. 411, all emphases added.)

In *Lebbos*, both the State Bar Court hearing panel and the Review Department specifically found many of Lebbos's statements to be false. Lebbos did not dispute the factual findings of either the hearing panel or the Review Department. (*Lebbos, supra*, 53 Cal.3d at p. 44.) The hearing panel found that Lebbos made knowingly false statements in an effort to disqualify a judge (*id.*, at p. 42) and that she "wilfully, deceitfully and recklessly" indulged in a series of offensive statements against judges and others and made a number of false statements about them (*id.*, at pp. 42-43). The Supreme Court also cited the hearing panel's finding that Lebbos had engaged in a "'constant barrage of calumny[,] deceit[,] and harassment'" and noted that, in recommending disbarment, the hearing panel found that Lebbos had engaged in multiple acts of moral turpitude, including falsehoods and alterations to court documents. (*Id.*, at pp. 43-44.)

Moreover, in light of other misconduct warranting disbarment, the Supreme Court found it unnecessary to address Lebbos's First Amendment claims, stating: "Accordingly, we need not examine the fine points of whether counsel has the right to refer to a judge as 'swine' and 'asshole' when speaking to court personnel in the course of their duties, or delve into the interesting question whether petitioner indulged in a reckless, defamatory falsehood in programming her telephone answering machine to inform all callers that opposing counsel were subject to grand jury investigation for fraud or in communicating her view to a judge of the

superior court that another judge 'deliberately set out to bankrupt me out of spite.'" (*Id.*, at p. 45.)

In light of the fact that Lebbos did not dispute any of the hearing panel's findings that Lebbos had made false and deceitful statements about judges, coupled with the Supreme Court's conclusion that it was unnecessary to specifically address her First Amendment claims, there is nothing in *Lebbos* to support the conclusion that an attorney can be disciplined for statements that are not shown to be false.

[2d] Finally, we hold that OCTC bears the burden of proving falsity. (Cf. *Yagman, supra*, 55 F.3d at p. 1438; *Idaho State Bar v. Topp, supra*, 925 P.2d at p. 1116; *State ex rel. Oklahoma Bar Assn. v. Porter, supra*, 766 P.2d at p. 969.) This holding is entirely consistent with the principle that, in attorney disciplinary matters, OCTC bears the burden of proving culpability by clear and convincing evidence. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 213; *McCray v. State Bar* (1985) 38 Cal.3d 257, 263; *Hildebrand v. State Bar* (1941) 18 Cal.2d 816, 834; *Golden v. State Bar* (1931) 213 Cal. 237, 247.)

[3a] OCTC failed to sustain its burden of proof in this proceeding. The record is completely devoid of any attempt to show that the statements made by respondent are false. The only documentary evidence introduced by OCTC were the pleadings and documents which contained the derogatory statements. In addition, respondent was the only witness to testify at trial; and he repeatedly asserted that all of his statements were true. Even though the hearing judge rejected respondent's testimony on this point, his rejection of respondent's testimony "'does not create affirmative evidence to the contrary of that which is discarded.' [Citation.]" (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343; accord *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

[3b] Both in his testimony at trial and in at least two of the pleadings that are the subject of this proceeding, respondent acknowledged that he did not believe that each and every judge of the Orange County Superior Court was corrupt or dishonest. Although respondent often made general references to the Orange County Superior Court bench in making his allegations of judicial corruption and unethical conduct, those general references are insufficient by themselves to establish culpability. In the context of the pleadings and documents, each of which sets forth the specific facts and incidents supporting respondent's claims, there is not clear and convincing evidence that respondent intended his references in these pleadings and documents to refer to each and every judge of the Orange County Superior Court.

In summary, there is no evidence in the record to demonstrate that any of respondent's statements are false. A finding of culpability for violation of section 6068, subdivision (b) is not warranted by virtue of the absence of any showing of falsity.

[3c] However, in light of the fact that the hearing judge's pre-trial order erroneously relieved OCTC of its burden of proof in this matter, we conclude that it is appropriate to remand this matter to the hearing department to allow OCTC an opportunity to prove that respondent's statements were false.[6]

[4a] Upon remand, the hearing department should initially address whether some or all of the statements and allegations made by respondent constitute "rhetorical hyperbole" or statements that use language in a "loose, figurative sense." Such statements cannot form the basis for imposition of discipline. (*Yagman, supra*, 55 F.3d at p. 1438; see also, *Old Dominion Br. No. 496, Nat. Ass'n, Letter Car. v. Austin, supra*, 418 U.S. at p. 284.)

6. In determining to remand this proceeding to the hearing department, this court does not reach the question of whether the hearing judge's erroneous ruling was invited by OCTC. (See *People v. Lang* (1989) 49 Cal.3d 991, 1031-1032; *Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121; *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.)

[4b] Similarly, the hearing department should also initially address whether the statements and allegations made by respondent constitute solely a statement of opinion or, conversely, whether they are statements that are capable of being proved true or false. Statements that are not capable of being proved true or false cannot support the imposition of discipline. Likewise, statements of opinion are not disciplinable unless they imply or are based upon a false assertion of fact. (*Yagman, supra,* 55 F.3d at p. 1438-1440; see also, *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18-19.)

In the event that OCTC thereafter sustains its burden of demonstrating that one or more of respondent's statements impugning the honesty and integrity of the Orange County Superior Court or its judicial officers were false, OCTC must thereafter prove that the statements were knowingly false or were made with reckless disregard for their truth or falsity.

[2e] The determination of whether statements were made with reckless disregard for their truth or falsity is "governed by an objective standard, pursuant to which the court must determine 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.' (*U.S. Dist. Court for E.D. of Wash. v. Sandlin* (9th Cir. 1993 12 F.3d 861, 867.) The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made. [*Ibid.*]" (*Yagman*, supra, 55 F.3d at p. 1437.)

B. Section 6068, Subdivision (f)

Based on the statements and allegations made in pleadings and other documents, respondent was also charged in the first amended notice to show cause with violations of section 6068, subdivision (f), which requires abstention "from all offensive personality . . . ." The hearing judge declined to find respondent culpable of violating section 6068, subdivision (f) on the grounds that those charges appeared duplicative of the section 6068, subdivision (b) charges and that OCTC had failed to specify how and why they were not duplicative.

In *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, 1119 (*Wunsch*), decided more than a year after the hearing judge filed his modified decision, the Ninth Circuit held that section 6068, subdivision (f) is unconstitutionally vague. Because the term "'offensive personality' could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients' interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute." (*Id.*, at p. 1119.) In its capacity as an intervenor in *Wunsch*, the State Bar alternatively argued that (a) section 6068, subdivision (f) had been narrowly construed to apply only to conduct that adversely affects the administration of justice (*id.*, at p. 1117) and (b) that the State Bar had adopted an enforcement policy on October 5, 1995, limiting its enforcement of section 6068, subdivision (f) to conduct that adversely affects the administration of justice (*id.*, at p. 1118).

The Ninth Circuit rejected the State Bar's first argument, concluding that no California state law decisions specifically discuss the scope of section 6068, subdivision (f) or explicitly limit its application. (*Ibid.*) Additionally, the Ninth Circuit was unpersuaded by the State Bar's newly-adopted enforcement policy because there was no showing that the policy represents "an authoritative and binding construction of section 6068(f) rather than a mere enforcement strategy . . . ." (*Ibid.*)

The Board of Governors of the State Bar ultimately determined not to seek en banc review of the Ninth Circuit's opinion in *Wunsch* or to file a petition for writ of certiorari in the United States Supreme Court. Moreover, OCTC subsequently moved to dismiss section 6068, subdivision (f) charges in virtually all of its pending cases.

As indicated above, there is no evidence in the record of this proceeding that the statements which impugned the honesty and integrity of the Orange County Superior Court and its judges and which were made by respondent in various pleadings filed in pending civil actions adversely affected the administration of justice or denied the litigants a fair trial in those cases. Thus, under the State

Bar's own enforcement policy, respondent's conduct has not been shown to violate section 6068, subdivision (f).

Additionally, in light of OCTC's dismissal of section 6068, subdivision (f) charges in other pending proceedings, the failure to also dismiss those charges in this case could give rise to an implication of discriminatory enforcement. (*Id.*, at p. 1119; citing *Gentile v. State Bar of Nevada, supra*, 501 U.S. at p. 1051.)

Therefore, we dismiss with prejudice the section 6068, subdivision (f) charges against respondent.

IV. DISPOSITION

This matter is remanded to the hearing department for further proceedings consistent with this opinion.

We concur:

OBRIEN, P. J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Stephen Yagman

A Member of the State Bar

Nos. 91-O-03890, 92-O-20254, 93-O-18769, 93-O-19984

Opinion filed December 31, 1997

Modification order filed March 12, 1998

SUMMARY

The hearing judge concluded that respondent was culpable on one count of failure to pay out client funds promptly, on two counts of failure to render an appropriate accounting, and on two counts of commingling client and personal funds in a trust account. The judge recommended a three-year stayed suspension and three-year probation, conditioned on a nine-month actual suspension. (Hon. Ellen R. Peck, Hearing Judge)

Both parties requested review. Respondent disputed the hearing judge's conclusions of culpability. The State Bar supported these conclusions and sought additional conclusions of culpability.

The review department determined that respondent was culpable of failing to communicate a written settlement offer to his clients, failing to pay out client funds promptly, failing in two matters to render an appropriate accounting, commingling client and personal funds in a trust account, and misappropriating client funds. Also, the review department concluded that respondent committed acts involving moral turpitude by entering into an illegal fee agreement and collecting an unconscionable fee. The review department recommended a three-year stayed suspension and three-year probation, conditioned on actual suspension for one year and until respondent makes restitution and, if the period of actual suspension exceeds two years, until respondent proves rehabilitation, present fitness to practice, and present learning and ability in the general law.

COUNSEL FOR PARTIES

For State Bar:	Russell G. Weiner, Nancy J. Watson
For Respondent:	Susan L. Margolis, Arthur L. Margolis, Gary L. Bostwick, Stephen Yagman

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] 275.30 Rule 3-510 (former 5-105)

An attorney must promptly communicate a written offer of settlement to the client regardless of whether the offer is significant or binding under contract law.

[2] 290.00 Rule 4-200 [former 2-107]

In civil rights litigation, an attorney may enter into an agreement for a contingent fee and a court-awarded fee if the agreement complies with the law governing attorney's fees in civil rights litigation to meet the requirement against entering into an illegal fee agreement.

[3] 290.00 Rule 4-200 [former 2-107]

A fee agreement in federal civil rights litigation is illegal to the extent that it seeks to avoid the requirement of submitting the attorney's right to collect a contingent fee over and above a court-ordered statutory fee to the district court to measure whether the fees are reasonable.

[4 a-c] 221.00 State Bar Act–Section 6106

The conduct of an attorney representing plaintiffs in federal civil rights litigations involved moral turpitude where the attorney wrote a retainer agreement designed to avoid the effect of the supervision of the district court, knowingly failed to reveal the agreement in applying to the court for a statutory fee, and took a contingent fee on top of what the court considered reasonable compensation without disclosing this taking to the court.

Additional Analysis

Culpability

Found

221.11 Section 6106–Deliberate Dishonesty/Fraud
275.31 Rule 3-510 [former 5-105]
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

213.25 Section 6068(b)
213.65 Section 6068(f)
253.05 Rule 1-400(C) [former 2-101(B)]
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
271.05 Rule 3-200 (former 2-110)
290.05 Rule 4-200 [former 2-107]

Aggravation

Found

511 Prior Record
521 Multiple Acts
582.10 Aggravation–Harm to Client–Found

Mitigation

Found

735.10	Mitigation–Candor–Bar–Found
740.10	Mitigation–Good Character–Found
791	Mitigation–Other–Found

OPINION

OBRIEN, P.J.:

I. INTRODUCTION

Both the State Bar and respondent Stephen Yagman seek review of the hearing judge's decision. The First Amended Notice of Disciplinary Charges contained 18 counts. Respondent was found culpable on five counts, including failure to promptly pay out client funds in violation of rule 4-100(B)(4) of the Rules of Professional Conduct of the State Bar[1] (count two); two counts of failure to render an appropriate accounting in violation of rule 4-100(B)(3) (counts five and eight); and two counts of commingling of client and personal funds in a trust account in violation of rule 4-100(A) (counts seven and twelve).[2] Respondent seeks review of each of these counts.

On the other hand, the State Bar challenges the hearing judge's failure to find culpability in the charge of failure to communicate a written settlement offer to clients in violation of rule 3-510 (count one); collection of an illegal or unconscionable fee and misappropriation of client funds in taking those fees in violation of rule 4-200(A) (count nine); advancement of a position not warranted by existing law in violation of rule 3-200(B) (count ten); failure to act competently in the "Motion for Approval/Allocation of Fees" in violation of rule 3-110(A) (count eleven). In addition, the State Bar challenges the hearing judge's failure to find that the commingling of client and personal funds found in count twelve also involved misappropriation and that the acts alleged in counts one, seven, nine, ten and twelve involved moral turpitude in violation of Business and Professions Code section 6106[3] (count thirteen).

Count three was dismissed by the hearing judge as duplicative of count two. The State Bar does not challenge this determination; and following our independent review, we agree. Count four was dismissed as duplicative of count five, and absent challenge to that ruling and upon independent review, we concur. Count six was dismissed for failure of proof; and following independent review, we agree.

Two counts involving charges of solicitation in violation of rule 1-400(B) and rule 1-400(C) (counts fourteen and fifteen) were dismissed on a motion of the State Bar and are not further considered.

In two counts respondent was charged with making serious derogatory out-of-court statements concerning a judge of the United States District Court for the Central District of California. One of those counts charged respondent with failing to maintain respect for a court in violation of section 6068, subdivision (b) (count sixteen). The other count charged him with engaging in offensive personality in violation of section 6068, subdivision (f) (count seventeen).

The subject matter of count sixteen was in part the factual basis for *Standing Committee v. Yagman* (9th Cir. 1995) 55 F.3d 1430. Based upon a motion of the State Bar and concurred in by respondent, the hearing judge dismissed count sixteen without prejudice. No evidence was introduced on that count, and we do not further consider it. The subdivision of section 6068 charged in count seventeen, subdivision (f) (engaging in offensive personality), was held to be unconstitutionally vague in *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110. Based upon *Wunsch* and with the agreement of the parties, the hearing judge dismissed count seventeen without prejudice in the interests of justice. We agree.

Count eighteen involved a matter unrelated to the balance of the charges and arose as the result of delay in obtaining a guardian's signature on a release. The hearing judge determined there was a failure of proof of culpability. We have reviewed that charge

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1. Unless otherwise indicated, reference to "rule" shall refer to these Rules of Professional Conduct.

2. The decision does not contain an explicit culpability conclusion regarding the rule 4-100(A) charges. Nevertheless, the discussion of culpability convinces us that culpability was found on these counts.

3. Unless otherwise indicated reference to "section" shall refer to the Business and Professions Code.

de novo, note that the State Bar does not challenge that ruling, and agree with the determination of the hearing judge.

The hearing judge recommended three years probation on condition that respondent be suspended for the first nine months. Both parties challenge the discipline recommended by the hearing judge.

Except as indicated in this opinion, we accept the hearing judge's findings of fact. On de novo review, we determined that respondent failed to communicate a written settlement offer to his clients in violation of rule 3-510 (count one); failed to promptly pay to clients funds to which they were entitled in violation of rule 4-100(B)(4) (count two); failed in two matters to render an appropriate accounting in violation of rule 4-100(B)(3) (counts five and eight); commingled funds in violation of rule 4-100(A) (count seven); and misappropriated funds in violation of rule 4-100(A) (count twelve).

In addition, we determined that respondent entered into an illegal fee agreement and collected an unconscionable fee in violation of rule 4-100(A) as charged in count nine and that both of those acts involved moral turpitude in violation of section 6106 as charged in count thirteen. Because our culpability determinations in counts nine and thirteen were based on the same facts, we shall dismiss count nine. In count thirteen, respondent was also charged with moral turpitude for the acts committed in counts one, seven, ten and twelve, but we did not find that moral turpitude was involved in any of the acts under those counts.

We shall recommend that respondent be placed on a three-year period of stayed suspension and that he also be actually suspended from the practice of law for one year as a condition of a three- year period of probation.

II. THE GOMEZ CASE

A. Background

All of the charges remaining in this matter arise out of respondent's conduct in representing all the plaintiffs before and following trial of a case entitled *Gomez v. Gates* in the United States District Court for the Central District of California.

The *Gomez* matter arose out the shooting of four robbery suspects by members of the Los Angeles Police Department following a robbery of a McDonald's restaurant. The action was brought against the City of Los Angeles (City), individual officers, and others on behalf of the one surviving robbery suspect and the heirs of the other robbery suspects who were all killed in the shooting as a civil rights action under 42 United States Code section 1983 (the Civil Rights Act).

After trial, verdicts were returned in favor of each of the plaintiffs. As the result of these verdicts, judgments totaling $44,000 were entered in favor of plaintiffs on or about April 6, 1992, and demand warrants were issued by the City on or about May 27, 1992, in the total amount of $44,489.42. The $44,489.42 represented the total amount of the judgments plus interest from the date of entry of judgment. Each of the five plaintiffs received judgments of $8,695.45 with the exception of Elizabeth Burgos, who received $9,707.52. The warrants were all delivered to respondent, and he deposited them in his trust account on June 12, 1992.

At the time of the receipt of funds by respondent, there was pending or expected respondent's application for attorney's fees and costs under 42 United States Code section 1988. There was also pending for trial the matter of *Trevino v. Gates*, a companion case to the *Gomez* matter. It was apparently agreed among the parties to *Trevino* that the judgment in *Gomez* resulted in a binding determination of controlling issues in the *Trevino* matter.

B. Count One - failure to communicate an offer in violation of rule 3-510

Following the entry of judgment in the *Gomez* case and by letter dated June 5, 1992, respondent wrote the city attorney stating, inter alia, "[w]e would be willing to recommend to our clients that both [*Gomez v. Gates* and *Trevino v. Gates*] be settled for a total of $1.2 million." At that time, all parties knew that the award to the plaintiffs in *Gomez* was fixed and likely to be the same in *Trevino* and that the

issue remaining was attorney's fees for the two cases under the civil rights act. On June 11, 1992, the city attorney wrote back to respondent, stating: "[t]his office is prepared to recommend to the City Council that all claims in both cases be settled for a total sum of $500,000. A counter-offer is hereby made to plaintiffs in that amount, contingent upon approval from the City Council."

The city attorney's office had the letter delivered to respondent's office by messenger rather than using the U.S. mail because it wanted evidence that the letter had been delivered. There had been a history of respondent claiming non-receipt of documents sent in the mail. A secretary in the city attorney's office gave the letter to a messenger. The messenger delivered the letter to the receptionist in respondent's office. Respondent had instructed his staff neither to sign for deliveries other than Federal Express and UPS nor to give delivery personnel their names.

The messenger, being unable to obtain a signed receipt, made a written note of the physical features of the receptionist on duty when he delivered the letter. The State Bar called as a witness a former receptionist for respondent's office who fit that description and was on duty at the time of the delivery, but she did not recall the delivery of the letter in question.

Respondent denies the receipt of the city attorney's letter. There was detailed testimony concerning the manner in which the receptionists in respondent's office handled mail and other messages. The hearing judge found that respondent's testimony that he did not receive the letter was not credible. We agree with the hearing judge that there is clear and convincing evidence that the letter was delivered to respondent's office.

It is true that there is no evidence that respondent actually read the response of the city attorney settlement. However, respondent had, not accidentally, created an environment in his office that made proof of delivery of documents difficult. Employees, to whom delivery personnel had access, were instructed not to sign for deliveries, and not to give their name. Delivery personnel had no access to anyone other than the receptionist. Clear and convincing evidence shows that the city attorney's letter of June 11, 1992, was delivered to respondent's office. Having made such a finding, we charge respondent with knowledge of the contents of that letter for the purposes of count one. (Cf. *Baca v. State Bar* (1990) 52 Cal.3d 294, 302 [concerning notice of entry of default].)

It is undisputed that respondent failed to communicate the contents of that letter to his clients.[4] Nevertheless, respondent argued that, even if he had received the city attorney's letter of June 11, he would not have been required to communicate it to his clients because it was not an "offer" within the meaning of rule 3-510. That rule requires a lawyer to promptly communicate "[a]ll amounts, terms, and conditions of any written offer of settlement made to the client . . . ." Almost identical language appears in section 6103.5, subdivision (a).

Respondent further claimed that the letter of June 11 was sent solely to create a wedge between his clients and him, because it was made after the $44,000 judgment in favor of the clients in the *Gomez* matter, it was highly likely that a similar judgment would be awarded in the *Trevino* matter, there was a pending application for attorney's fees in the *Gomez* matter alone for over $900,000, and there was an expected application for attorney's fees in *Trevino*. We decline to address the question of motivation of an adverse party in making a proposal or recommendation for settlement.[5] Here, respondent sent a letter offering to recommend a settlement at $1,200,000 to his clients. That letter fostered a response recommending a settlement at $500,000. At issue is the clear public policy favoring settlements.

4. The record does not reveal whether the city attorney communicated respondent's letter of June 5, 1992, to his client.

5. Nor do we deal with the question of whether an attorney violates ethical duties in making a settlement offer conditioned on the waiver of fees in civil rights cases. (42 U.S.C. § 1988.) We do note, however, that our research reveals no case holding that a single sum offer, including attorney's fees, results in an ethical violation.

(*Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal.App.3d 678, 693; *People v. Crow* (1994) 28 Cal.App.4th 440, 449.)

Respondent argues that the letter from the City, as well as his own letter to the City, could not be considered an offer in that there was nothing to accept. The "offer" was merely a proposal to make a recommendation to the city council, which it could accept or reject. It cannot be argued that either of the letters was an offer within any concept of contract law. Regardless of the willingness of the recipient of either of the letters to agree, that agreement was conditioned on the further act of the "offeror," who was in a position to thereafter unilaterally frustrate the reaching of an agreement proposed by that party. (Cf. *City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930-931.)

We find no cases defining the term "offer" as used in either rule 3-510 or section 6103.5. In different contexts the word "offer" has different meanings. For example, "[t]he term 'offer' has a different and far broader meaning in securities law than in contract law (citations)." (*Hocking v. Dubois* (9th Cir.1989) 885 F.2d 1449, 1457-1458; see also *S.E.C. v. Thomas D. Kienlen Corp.* (D.Ore. 1991) 755 F.Supp. 936, 940.) In *People v. Ferguson* (1980) 90 Ill.App.3d 416 [413 N.E.2d 135], the criminal defendant was convicted of murder following a bench trial. The defendant contended in a post-trial motion, which was denied by the trial court, that he was denied his constitutional right to plead guilty because his counsel failed to communicate to him an oral "offer" by the state to plead guilty to the lesser included offense of voluntary manslaughter and to accept a reduced amount of penitentiary time. On appeal, the dispositive issue was whether the communication between the state's attorney and the defendant's attorney "rose to the dignity of an 'offer,' as claimed by defendant, or whether such indefiniteness permeated the State's communication as to reduce it to an 'off--hand remark' which need not have been relayed to defendant as claimed by the State." (*Id.* at p. 136.) The "offer" by the state's attorney was in word or effect: "'Will your client take penitentiary time [the exact term of years could not be recalled] on a plea of guilty to voluntary manslaughter?'" (*Ibid.*)

The appellate court in *Ferguson* held that the defendant's constitutional rights had been violated by his attorney's failure to communicate the state's plea offer to him. (*Id.* at pp. 137-138.) In so holding, it explicitly rejected the trial court's conclusion that the state's plea offer had to first be approved by it before it could be considered a valid plea offer that had to be communicated to the defendant. (*Ibid.*) Moreover, it noted that the application of contract principles to "plea offers" was fraught with problems. (*Id.* at p. 137.) While we realize that the court in *Ferguson* was primarily concerned with the constitutional question involved in the defense attorney's failure to communicate the plea offer to his client, we conclude that the application of contract principles to "civil settlement offers" is also problematic.

To construe rule 3-510's requirement that an attorney communicate to his client "any offer of settlement," we must first consider an attorney's "common law" fiduciary duties to his clients and his duty to communicate under rule 3-500.

At common law a fiduciary owes his beneficiary a duty of full and frank disclosure of all relevant information relating to affairs of the relationship. (See, generally, Rest. 2d Agency §381.) Because the attorney-client relationship is a fiduciary relationship of the very highest character in which the attorney is the fiduciary and the client is the beneficiary, there can be no question but that an attorney owes his client this duty of full and frank disclosure. (See, generally, e.g. *Lewis v. State Bar* (1973) 9 Cal.3d 704, 713.) However, we are not concerned with and do not address the scope or extent of that duty because, for disciplinary purposes, in this context, it has been "defined" by rule 3-500. Rule 3-500 provides that an attorney "shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information."

The official discussion of rule 3-500 states that "[r]ule 3-500 is not intended to change a member's [fiduciary] duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be *disciplined* for failing to communicate insignificant or irrelevant information." (Emphasis

added.) Thus, under rule 3-500, an attorney has no duty to communicate either a written or oral offer of settlement to his client unless it is a significant offer. Stated conversely, an attorney has a duty, under rule 3-500, to communicate to his client all significant offers of settlement regardless of whether they are written or oral. It is in light of that duty that we must construe the requirements of rule 3-510 with respect to *written* offers of settlement. We construe rule 3-510 in a manner that is consistent with rule 3-500.

[1a] Rule 3-510 requires an attorney to promptly communicate to his client *all* written offers of settlement regardless of whether they are significant.[6] Rule 3-510 was not promulgated to bind parties to proffered settlement agreements or to set standards for reaching such binding agreements. Whether an offer of settlement is a binding offer under contract law does not control an attorney's obligation under rule 3-510. We conclude that a purpose of rule 3-510 is to require attorneys to advise their clients of written proposals or recommendations of opposing counsel for settlement. Therefore, we hold that, under rule 3-510, an attorney must promptly communicate *all* written offers of settlement regardless of whether they are binding offers under contract law.

[1b] In summary, it is our view that in a civil litigated matter, rule 3-510 requires a written communication from opposing counsel containing a clear statement that its author will or has recommended settlement on specified terms and conditions be communicated to the receiving attorney's client or clients. We conclude that rule 3-510 does not require that there be an offer in a contract law sense.

We note the position taken by Mark Rosenbaum, an experienced litigator in the field of civil rights, who was one of respondent's witnesses in the discipline phase of the hearing below. Attorney Rosenbaum testified that he did not consider the letter from the city attorney to be an offer. His position was that, if respondent or his clients had agreed to the $500,000 settlement offer, it would have merely educated the City as to what the plaintiffs would accept as a settlement, without permitting respondent to obtain any like information about the position of the City.

We acknowledge that risk, but note that, for any settlement discussion to occur, one of the parties to the dispute must make a proposal, whether binding or not. Attorneys are usually in the best position to evaluate the reasonable settlement value of a matter in litigation. An attorney's recommendation, while not controlling, must be considered as a significant event in the course of litigation. An opposing attorney's recommendation for settlement is of significance to the client, and is required to be conveyed to the client. The cause of action belongs to the client, not the attorney. It must ultimately be the client's decision whether to settle or accept the risks of continued litigation. Notwithstanding the clients' assignment, to respondent, of their claim for attorney's fees under the civil rights act in the *Gomez* case, it was the clients who were entitled to waive, settle, or negotiate that claim. (Cf. *Evans v. Jeff D.* (1986) 475 U.S. 717, 730-732.)

We conclude that in failing to notify his clients of the settlement recommended by the city attorney, respondent wilfully violated rule 3-510. The attorney's right to fees arises out of the contractual relationship between the plaintiffs and attorney. The consequence is that the client must be the final decision maker, albeit with the advice of the attorney.

Here, the clients purportedly assigned their right to recover attorney's fees to respondent. The State Bar has not challenged and we are not concerned with the enforceability of that assignment.

We further determine that the portion of the retainer agreement relating to the purported assignment of the right to recover attorney's fees has not been shown by clear and convincing evidence to have

6. Of course, "[a]ny oral offers of settlement made to the client in a civil matter should also be communicated if they are 'significant' for the purposes of rule 3-500." (Official Discussion, rule 3-510.)

been unfair or unreasonable.[7] We bear in mind the result in *Evans v. Jeff D., supra*, 475 U.S. 717, where impecunious clients requested injunctive relief only, and defendants offered full relief in exchange for a waiver of attorney's fees. We also note that Congress intended that the statutory entitlement to attorney's fees would enable indigent clients to obtain competent counsel. (See, generally, *Venegas v. Mitchell* (1990) 495 U.S. 82, 86.) We decline to erect a disciplinary barrier to the assignment of that statutory entitlement, at least, when it is made in accordance with rule 3-300.

On the other hand, it is the attorney's duty to advise the client regarding any written or significant oral settlement offers, including a settlement of attorney's fees in civil rights actions. The attorney's protection comes in the form of the original contract with the client. Where, as here, the attorney has adequately protected him or herself in the original agreement, the recommendation would include the effect of the contractual provisions of the engagement agreement on the client.

In the matter before us, the plaintiffs had contractually agreed in the engagement letter not to accept any settlement that included a waiver of their statutory entitlement to recover attorney's fees without the written consent of respondent. That agreement further spelled out the effect on settlement proceeds as a consequence of any such settlement. With this background an attorney has the means of persuading the clients not to accept an unfair settlement.

C. Counts nine, ten, eleven and thirteen[8] - an illegal or unconscionable fee in violation of rule 4-200(A), taking a position not warranted by existing law in violation of rule 3-200(B), failing to act competently in violation of rule 3-110(A), and moral turpitude in violation of section 6106

Respondent first met with four of his five clients in the *Gomez* matter and the two referring attorneys at his offices in February of 1990. The fifth client was incarcerated. The clients were all primarily Spanish speakers, and some spoke nearly no English. Respondent spoke some Spanish. The referring attorneys, Edwardo Figaredo and George Almodovar, were both bilingual. Some portions of the conversation and terms of the retainer agreement were translated into Spanish. That agreement provides that respondent is entitled to a 45 percent contingent fee based on the gross recovery, that any court-awarded attorney's fees shall be the exclusive property of respondent, and that no credit for court-awarded fees shall be given on respondent's right to a contingent fee.

The agreement further provides that the client will not agree to any settlement that includes a waiver of attorney's fees without respondent's consent and that, in the event of such a settlement, respondent is entitled to his hourly rate times the number of hours devoted to the matter plus 45 percent of the balance of such settlement. The agreement explicitly acknowledges that it is for "*very high risk litigation*," that respondent may receive a greater portion of the recovery than the clients, and that the clients are responsible for all costs incurred in the litigation. (Original italics.)

The last paragraph of the agreement states: "In the event a court orders that the attorneys be limited in their fee to either the contingency amount or the court-awarded attorney's fees, then whichever amount is not allowed by the court shall be contributed by clients to a perpetual costs account maintained by attorneys to finance costs in other civil rights cases."

7. Because the assignment of the right to recover attorney's fees from the clients to respondent purports to transfer a present interest to respondent, the assignment comes within the purview of rule 3-300, requiring that it be fair and reasonable, that its terms be fully disclosed in writing, and that the clients be advised in writing that they are entitled to the advice of an independent attorney.

In the matter before us, the clients arrived at respondent's office with their then counsel, Edwardo Figaredo and George Almodovar, each of whom participated in the review and discussion of the retainer agreement. As a consequence, we determine that the clients had the benefit of independent counsel at the time they made the assignment.

8. These counts are taken out of order to permit the later discussion of the events involving the handling of client funds in a single portion of the opinion.

As indicated *ante*, the demand warrants issued in favor of plaintiffs in the amount of $44,489.42 were deposited in respondent's trust account on June 12, 1992. On July 31 a $8,706 check representing court-awarded recoverable costs was deposited in respondent's general account. The actual costs expended by respondent exceeded $28,000.

As the result of a fee application in the *Gomez* case under 28 United States Code section 1988, the district court awarded plaintiffs $378,175 as attorney's fees on July 31, 1992. In the order granting the statutory award of attorney's fees the court stated, "The court doubts that any lawyer in the greater Los Angeles area, other than plaintiffs' lead counsel, would or could have represented them in this case, and devoted the time, effort and skill which it took to produce the verdict."

At no place in that application did respondent disclose the nature of his employment agreement with the plaintiffs, nor did the court inquire about that agreement.

In early November 1992, the City paid the $378,175 attorney's fees award, and it was deposited in respondent's trust account. Respondent deducted his 45 percent contingent fee from the gross verdicts totaling $44,000 and then deducted the balance of the unrecovered costs from the client's remaining 55 percent of the gross verdicts. On January 13, 1993, respondent sent to the referring attorney Figaredo a disbursement sheet along with distribution checks to each plaintiff, in the sum of $810, each representing respondent's calculations of their individual net recovery.

Following this distribution, the clients complained that respondent had been paid twice, once in court-awarded attorney's fees and once by the 45 percent contingent fees he deducted from their gross recovery. This resulted in respondent filing a motion before the District court awarding the statutory fees entitled "Motion for Allocation/Approval of Attorneys' Fees." Respondent's clients were notified of the hearing and advised of their right to have independent counsel. Several of respondent's clients appeared. At this hearing, for the first time, respondent disclosed to the court that he had a contingent fee agreement with his clients, but did not provide the court with a copy of that agreement. The court acknowledged that it had not known that respondent was contractually entitled to a portion of the plaintiffs' recovery as fees and that its $378,175 attorney's fees award did not take into account that the plaintiffs also had to pay a portion of their recovery to respondent.

In that motion respondent argued that he was entitled to recover both the court-awarded fees as well as the contingent fees called for in the retainer agreement. Although respondent cited no cases directly, he did attach a copy of findings of fact and conclusions of law from an earlier civil rights action before a different federal district court judge that made a careful analysis of the then law governing an attorney's right to both court-awarded statutory attorney's fees and agreed fees under a retainer agreement in civil rights cases. These prior district court findings and conclusions predated *Venegas v. Mitchell*, *supra*, 495 U.S. 82 and *Venegas v. Skaggs* (9th Cir. 1989) 867 F.2d 527, both of which were decided before the fee application in the *Gomez* matter.

The district court hearing the *Gomez* case declined to determine if respondent was entitled to both the awarded statutory fees and the contingent fees under the retainer agreement or to make any order as to respondent's rights or obligations. The court only noted that, had it known of the fact that respondent was going to collect a contingent fee, it would have reduced the amount of the statutory attorney's fees award by an equivalent amount.

Following the argument on the Motions for Approval\Allocation of Fees, respondent returned $20,000 to the city attorney. That sum represented respondent's best estimate of the amount by which the court indicated it would have reduced the statutory attorney's fee award had it known of respondent's collection of a contingent fee. That sum included interest for the time respondent had held the money. After a lapse of some time, those funds were returned to respondent by the city attorney, and they are now held in the trust account of respondent's counsel in this present proceeding.

The State Bar argues that respondent collected an illegal or unconscionable fee in violation of rule 4-200(A), asserting that federal law does not allow an attorney for a civil rights plaintiff to collect both the full amount of court-awarded fees under 42 United States Code section 1988 and the full amount of an agreed upon contingent fee. The State Bar further asserts that respondent took a position not warranted under existing law, in violation of rule 3-200(B), by failing to assert his obligation to return the contingent fee in his Motion for Approval/Allocation of Fees. In addition, in connection with the fees, the State Bar asserts that respondent failed to act competently in the Motion for Approval/Allocation of Fees by not advising the district court of controlling case law and by not advocating a position in the best interests of his clients in that motion, all in violation of rule 3-110(A). Finally, the State Bar contends that respondent's collection of the alleged illegal or unconscionable fees involved moral turpitude in violation of section 6106.

We consider these claims below.

1. Counts nine and thirteen - taking of an illegal or unconscionable fee in violation of rule 4-200(A) and acts involving moral turpitude in violation of section 6106

Congress anticipated that the primary source of attorney's fees in actions under the civil rights act would be those awarded by the court to successful plaintiffs under the provisions of 42 United States Code section 1988. The Supreme Court concluded that Congress enacted section 1988 in order to "promot[e] respect for civil rights. . . . by adding fee awards to the arsenal of remedies available [to a plaintiff] to combat violations of civil rights." (*Evans v. Jeff D., supra*, 475 U.S. at pp. 731-732.) A contingent fee in excess of statutory award of attorney's fees is permitted, but is subject to review by the district court. (*Hamner v. Rios* (9th Cir. 1985) 769 F.2d 1404, 1409.) The excess over any awarded statutory fees is the obligation of the plaintiff, not the defendant in the civil rights action, but that obligation is under the supervision of the court to avoid unreasonable results against the plaintiff. (*Ibid.*)

As pointed out by the State Bar, the Ninth Circuit in *Venegas v. Skaggs, supra*, 867 F.2d at p. 534, fn.7 (original italics), stated that "[t]he plaintiff's attorneys are not entitled to *both* the statutory award and the full amount of the contingent fee." We note that, in *Venegas*, the Ninth Circuit was dealing with a case in which the contingent fee was much larger than the statutory fees, which is the converse of the matter before us. The *Venegas* court was concerned with "windfall recoveries" by plaintiffs' attorneys. Thus, we construe the quoted language as holding that attorneys are not entitled, as a matter of right, to both a statutory award and a contingent fee. Thus, the issue of when an attorney may legally collect both a statutory award and a contingent fee remains under the discretion and supervision of the court, as enunciated in *Hamner v. Rios, supra*, 769 F.2d at p. 1409.

We also note that the United States Supreme Court stated in its *Venegas* opinion that it has "never held that [42 U.S.C. section 1988] constrains the freedom of the civil rights plaintiff to become contractually and personally bound to pay an attorney a percentage of the recovery, if any, even though such a fee is larger than the statutory fee that the defendant must pay to plaintiff." (*Venegas v. Mitchell, supra*, 495 U.S. at pp. 87-88.) The Supreme Court further noted that the agreement between the plaintiff in a civil rights action and the plaintiff's attorney will have no impact on the obligation of the unsuccessful defendant to pay any statutory attorney's fees awarded to the plaintiff. (*Id.* at 89-90.)

[2] In light of the authorities considered, we conclude that, in civil rights litigation, it does not contravene rule 4-200(A) per se for an attorney to enter into a fee agreement with a client that provides for the attorney to recover a fee based on a percentage of the award to the client and any court-awarded attorney's fees. We find no case that prohibits such a practice. However, the agreement must comply with the case and statutory law governing attorney's fees in civil rights litigation to meet the requirement of rule 4-200 that an attorney not enter into an illegal fee agreement.

The State Bar argues that, under *Sullivan v. Crown Paper Board Co.* (3d Cir.1983) 719 F.2d 667, respondent was entitled to no more than the contingent fee or the statutory fee, whichever was greater. While *Sullivan* is quoted with approval in

Hamner v. Rios, *supra*, 769 F.2d at 1409, we read *Hamner* as holding only that the total fees approved by the court must be reasonable. We reject the argument that a retainer agreement violates rule 4-200 solely because it provides that an attorney may receive both a contingent fee and a statutory fee. We have found no Ninth Circuit case holding such an agreement illegal, and *Hamner* does not preclude such an agreement in our view.

As we have discussed, *Hamner v. Rios*, *supra*, 769 F.2d at 1409, noted "that a court is empowered to supervise fee awards under contingent fee agreements to avoid unreasonable results." The court goes on to note "a court has discretion not to award the difference between the statutory amount and the sum provided in the contingent agreement." (*Ibid.*; see also *Jenkins v. McCoy* (S.D.W. Va. 1995) 882 F.Supp 549, 554.) We read this as a requirement that, in the event an attorney seeks a contingent fee award pursuant to contract over and above court-awarded statutory fees, that agreement must be submitted to the court to determine whether the results are reasonable, at least in the Ninth Circuit.

We read the retainer agreement in the matter before us as not only failing to acknowledge the requirements of *Hamner*, but designed to deliberately avoid the requirements that the contingent fee over and above statutorily awarded fees be subject to a determination by the court that the fee is reasonable. The retainer agreement contractually bars the client from receiving credit for contingent fees by virtue of statutory fees awarded respondent. It includes a provision purporting to require the clients to make a contribution equal to the disallowed amount to respondent's "perpetual costs account" in the event the court denies respondent both statutory fees and contingent fees. The agreement contains a provision that "[i]n no event may the client recover more than 55% of any amount awarded by a jury, or by way of settlement."

The agreement, on its face, provides clear and convincing evidence that the fee agreement respondent prepared and used in this matter purported to give respondent rights to fees that exceeded either statutory or case law authorizing fees to attorneys in civil rights cases.

[3] To the extent the retainer agreement seeks to avoid the effect of the requirement of submitting respondent's right to collect contingent fees over and above court-ordered statutory fees to the district court to measure whether the fees are reasonable, it is illegal and violates rule 4-200. We conclude that respondent is culpable of entering into an illegal fee agreement in violation of rule 4-200.

In the event the district court makes a determination that contractual fees in addition to statutory fees are reasonable, this court, acting as the administrative arm of the California Supreme Court, will give great deference to that determination. It is clear that the district court hearing the matter would be in a far better position to determine the value of the attorney's services rendered than would be this court. In civil rights litigation, the factors to be considered in determining a reasonable fee are substantially identical to the factors set forth in rule 4-200(B).[9] (See *Kichoff v. Flynn* (7th Cir. 1986) 786 F.2d 320, 329.) This reinforces the deference that this court will give to the district court's determination of what constitutes a reasonable attorney's fee in a civil rights action.

However, the ultimate plenary authority for disciplining attorneys in California is vested in the Supreme Court. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 47-48.) As a result, the California Supreme Court, acting in part through this court, retains the ultimate right to determine whether such a retainer agreement or fee is legal and conscionable under rule 4-200.

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9. In summary, the factors set forth in rule 4-200(B) are: (1) the amount of fee in proportion to the value of the services performed; (2) the relative sophistication of the attorney and the client; (3) the novelty and difficulty of the questions involved and the skill required to perform the services; (4) the preclusion of other employment by the attorney; (5) the amount involved and the results obtained; (6) the time limitations imposed; (7) the nature and length of the professional relationship with the client; (8) the experience, reputation, and ability of the attorney; (9) whether the fees are fixed or contingent; (10) time and labor involved; and (11) the informed consent of the client to the fee agreement.

Rule 4-200(B) deals with the factors used to measure whether a fee agreement is unconscionable. It provides that unconscionability shall be determined at the time the agreement is entered into, except where the parties contemplate the fee will be affected by later events. In the matter before us, there can be no question that the right to fees was affected by later events. The result is that the conscionability of the fees in the present case must be measured at the time the fees were awarded and taken. (Rule 4-200(B).)

Based on an application for in excess of $900,000 in attorney's fees, the district court concluded that fees in the amount of $378,175 would represent reasonable compensation to respondent. No disclosure of the contingent fee agreement was made to the court at the time of the application for or the award of fees. When the existence of such an agreement was made to the district court, the judge indicated that had he known of each client's obligation to pay a contingent attorney's fee, he would have reduced the award of statutory fees. This makes clear the district court's view that only $378,175 was a reasonable fee. Nonetheless, respondent took an additional $19,800 as a contingent fee.

We are fully aware that "one purpose of the Civil Rights Attorney's Fees Act of 1976 was to remove financial impediments that might preclude people from asserting their civil rights (citation)." (*Hamner v. Rios*, *supra*, 769 F.2d at 1407.) We see nothing in an award of $378,175 for attorney's fees that would run contrary to that purpose. Looking at the events occurring at the time of judgment and award of attorney's fees, long after the execution of the fee agreement, we are compelled to the conclusion that the taking of the contingent fee in addition to the statutory fee constituted the taking of an unconscionable fee in violation of rule 4-200(A).

Respondent received attorney fees approaching $400,000 after receiving 45 percent of the clients' awards and all of the statutory fees, while the five clients were left with a recovery of slightly in excess of $800 each based on a judgment of roughly $8,700 each, except roughly $9,700 in favor of Burgos. We fully acknowledge that civil rights cases frequently involve fundamental issues of our society, but after giving respondent full credit for a superlative performance in the *Gomez* case, we find that the fee in this case is unconscionable under the factors set forth in rule 4-200(B), particularly in that the amount of the fee outweighs the value of the services in light of the results obtained. We acknowledge that civil rights cases frequently involve substantially more than a monetary award. However, the disproportion between attorney's fees and the recovery remaining for the benefit of the clients in this case compels the conclusion that in taking 45 percent of the total judgment plus the reasonable fees awarded by the court, respondent exceeded the limits of rule 4-200.

[4a] Reviewing respondent's course of conduct throughout his handling of the *Gomez* matter, we find that initially he prepared and presented a retainer agreement designed to thwart the effect of any court order that deprived respondent of the benefits of both his contingent fee agreement and any right he may have to obtain statutory fees under the civil rights act. Respondent, being an acknowledged expert in civil rights matters, knew at the time of the preparation of the retainer agreement that the supervision of all of the fees, including the contracted for fees, was under the control of the district court.

[4b] As we shall determine *post*, there was not clear and convincing evidence of a violation of rule 3-110(A), requiring an attorney to act competently, in respondent's application to the district court for statutory fees. While that would have been the reasonable time to present the court with the fact of the existence of a contingent fee agreement and the terms of that agreement, for disciplinary purposes it was not necessary that the agreement be presented unless respondent intended to rely on its terms for the contingent portion of the fees. As we have determined, respondent knew that the district court had the right to supervise his right to collect the contingent fees. By failing to apprise the district court of the existence of his right to contingent fees, from a disciplinary standpoint he knowingly relinquished the right to those fees. His subsequent taking of those relinquished fees is, in the judgment of this court, a matter involving moral turpitude.

[4c] To put it more plainly, he wrote a retainer agreement designed to avoid the effect of the super-

vision of the district court; in his application for fees, he knowingly failed to reveal that retainer agreement; and after being awarded what the court considered reasonable compensation for his services, he took the contingent fees on top of that reasonable compensation without disclosing that taking to the supervising court. In our judgment, this conduct involved moral turpitude and violated section 6106 as alleged in count thirteen. In making this determination, we rely on the same evidence adduced in connection with the charged violation of rule 4-200 (count nine). We thus find that the charge in count nine is duplicative of the charge in count thirteen and dismiss the former.

2. Count ten - asserting a position not warranted under existing law in violation of rule 3-200(B)

As indicated, the State Bar contends that under existing law respondent was obligated to return the contingent fees he collected to the clients, and that his failure to acknowledge that obligation in his "Motion for Approval/Allocation of Fees" placed respondent in violation of rule 3-200(B), prohibiting an attorney from asserting a claim or defense that is not warranted under existing law, unless a good faith argument can be made for an extension, modification or reversal of existing law.

The State Bar argues that respondent, as an expert in civil rights litigation, was well aware of the law as established by *Venegas v. Mitchell*, *supra*, 495 U.S. 82 and *Venegas v. Skaggs*, *supra*, 867 F.2d 527. Respondent, they contend, sought to have the trial court rely on a district court's findings of facts and conclusions of law that predated both the *Venegas* cases and reach a result in which the plaintiffs' attorney was authorized to receive both contingent fees and statutory fees.

We confess to being concerned with respondent's failure to cite to the court the controlling law in both *Venegas* cases on the issue of attorney's fees in civil rights actions in his "Motion for Approval/Allocation of Fees." However, rule 3-200(B) provides that an attorney "shall not seek, accept, or continue employment" if he or she knows or should know it is for the purpose of asserting an improper claim. In the matter before us, there was no "employment" for an improper purpose. The rule is inapplicable to the charge before us. The purpose of the employment was to present civil rights claims, which was done ably by respondent.

3. Count eleven - intentional, reckless, or repeated failure to act competently in violation of rule 3-110(A)

Rule 3-110(A) provides that an attorney shall not intentionally, recklessly or repeatedly fail to perform legal services with competence. The State Bar asserts that by failing to present the district court with the controlling authorities on attorney's fees in civil rights cases where there is also a contingent fee agreement and that by advocating a position not in the best interest of his clients in the "Motion for Approval/Allocation of Fees," respondent failed to act competently.

The former argument has been addressed in the preceding section of this opinion. It is true that respondent was seeking approval of the fees he had taken in the *Gomez* matter that, in part, deprived the plaintiffs of a portion of the judgment they received. As noted, in the motion, respondent advised the plaintiffs of the nature of the hearing and its date and indicated that they were entitled to employ an attorney to represent them at the hearing for approval of fees. The motion was made because the clients had complained about the fees taken by respondent. It is clear that there was a dispute over fees at the time of the motion. Respondent took prompt action to resolve that dispute, as required. (Cf. *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 561.)

It is clear that, at that hearing, respondent was representing his own interests with regard to the fee dispute. Rule 3-100(A) does not prevent him from doing so under the circumstances here presented. He had given the plaintiffs notice of the hearing and invited them to obtain an attorney to represent them if they wished. We find no clear and convincing evidence of violation of rule 3-110(A), prohibiting an intentional, reckless, or repeated failure to perform with competence.

D. Counts two, five, seven, eight and twelve relating to client's funds, cost reimbursement, and attorney's fees

On or about June 12, 1992, respondent had each of his clients, other than the individual that was incarcerated, endorse the demand warrants from the

City. He advised the clients that the funds would be used to reimburse him for the costs advanced and that he would pay to the clients their share as soon as the court determined the costs to be reimbursed and the attorneys' fees to be awarded. At that time there had been no ruling on either the application for attorney's fees or to recover allowable costs. On that same day, respondent deposited all of the endorsed warrants, in the total sum of $35,793.97 in a client trust account. Again, on that same day, respondent transferred $35,793.97 to a general office account. This was followed on July 13 with an identical sequence for the remaining $8,706 following the endorsement of the remaining draft by the incarcerated client.

On July 20, 1992, costs were awarded against the City in the sum of $8,706, and 11 days later respondent was awarded attorney's fees in the sum of $378,175.

The attorney's fee draft, dated August 26, 1992, was deposited in respondent's trust account on November 6, 1992. The check for allowed costs dated August 27, 1992, was deposited in respondent's general account on November 2, 1992.

According to the civil docket sheet of the district court, the check reimbursing costs was disbursed to respondent August 27, 1992. That check was deposited in respondent's general account on or about November 2, 1992.

Respondent had neither a record nor recollection of when either the cost check or the attorney's fee draft were received in his office. The record is otherwise silent regarding the receipt of those sums.

In November of 1992, one of the referring attorneys contacted respondent to inquire when the clients could expect to receive their share of the recovery. Later in 1992 one of the clients called respondent directly, advised him she had read of the attorney's fee recovery, and inquired as to when they would receive their share.

A settlement disbursement sheet was prepared at respondent's request in late December 1992 by respondent's partner for the benefit of the clients. It showed that respondent advanced costs in *Gomez v. Gates* in the sum of $28,855.67 and the amount of the recovery on the judgment to be $44,000. The true amount of the recovery was $44,489.42. The difference represented interest accrued on the judgment between the time of entry and the time of satisfaction of the judgment. That sheet further showed a deduction from the judgment of $19,800 representing respondent's 45 percent contingent fee, a deduction of $28,855.67, representing costs advanced, and a credit for $8,706 for costs recovered. The sheet then showed a total deduction by respondent for the combination of $19,800 contingent fee and unreimbursed costs of $39,949.67, leaving a balance due clients in the sum of $4,050.33. This was then allocated among the clients in equal portions of $810.66. This allocation was made in spite of the fact that client Burgos had been given a larger judgment than the balance of the clients.

On January 5, 1993, respondent sent to Figaredo the settlement disbursement sheet and check payable to each client in the sum of $810.66 with directions that each client approve and sign the settlement distribution sheet prior to disbursement of the checks. Figaredo forwarded the disbursement sheets to the clients with a request for their approval on or about January 13, 1993. Four of the five clients did not approve of the proposed disbursement. The approving client received his check on or about April 13, 1993, while the nonapproving clients received their checks about April 30, 1993.

A review of respondent's trust account records shows a balance at the beginning of November 1992; then a deposit of $378,175 (representing the attorney's fees awarded in the *Gomez* case); then certain withdrawals from the trust account for the benefit of respondent; and no further deposits in that account from November 1992 through January 1993. Periodic withdrawals were made by respondent between November 1992 and January 1993. There is clear and convincing evidence that a balance slightly in excess of $34,000 from the *Gomez* case remained in the account at the end of January 1993.

It was established without contradiction that respondent did not decide whether to rely on the fee agreement and take his full contingent fee described in that agreement or to waive all or a portion of the

contingent fee until after he saw the settlement distribution sheet on January 5, 1993. He elected to take the full contingent fee that the fee agreement described.

1. Count two - failure to promptly pay out funds in violation of rule 4-100(B)(4)

Respondent received funds that were in satisfaction of his client's judgment in the amount of $44,489.42. The majority of these funds were deposited in respondent's trust account on June 12, 1992. Shortly thereafter, the balance of these funds were deposited in the trust account following the endorsement of the warrant from the City by the incarcerated client.

On July 20, 1992, costs were awarded by the court, and on July 31, the amount of the attorney's fees was fixed. By no later than August 1, the rights of the clients and respondent to their respective portion of the recovery were fixed, accepting the terms of the retainer agreement at face value. The fact that all of the funds had not yet been received does not alter this fact.

As indicated, the record does not disclose the date respondent received either the awarded costs or attorney's fees. We note that, under Trust Account Record Keeping Standards as adopted by the Board of Governors of the State Bar pursuant to rule 4-100 and effective January 1, 1993, an attorney is required to maintain for a period of five years a written ledger for each client for whom funds are held detailing, inter alia, the date, the amount, and source of all funds received on behalf of the client. This respondent failed to do.

On the other hand, we note that respondent was not charged with a failure to maintain proper records of funds held for a client, but rather with a failure to promptly pay out funds that the client is entitled to receive, on the request of the client. The State Bar is required to prove each element of a charge by clear and convincing evidence.

However, the record is clear that respondent had received all of the funds in his various bank accounts not later than November 6, 1992, and that the earliest that any client received any portion of the proceeds was April 16, 1993, while most of the clients received no portion of the proceeds until April 30, 1993. We also note that by the end of 1992 there had been at least two requests or inquiries as to when the clients would receive their share of the proceeds. On this record, we conclude that there is clear and convincing evidence of respondent's violation of rule 4-100(B)(4), requiring an attorney to promptly pay to a client funds the client is entitled to receive, on the request of the client.

2. Counts five and eight - failures to properly account as required by rule 4-100(B)(3)

In count five, respondent is charged with failing to properly account to client Burgos for her share of the judgment. The judgment awarded Burgos a larger sum than the remainder of the plaintiffs; yet in respondent's accounting and distribution of funds, he accounted for and distributed an equal sum to each of the plaintiffs. In count eight, respondent is charged with accounting for only $44,000 of funds awarded to plaintiffs when, in fact, the award, including interest, was $44,489.22.

We note that the attorneys of record in the *Gomez* matter were the professional corporation of Yagman and Yagman. Respondent handled the negotiations and trial of the matter, while the preparation of the accounting was performed by his attorney partner.

Respondent argues that nothing prevented him from delegating his duty to account to another lawyer and that, in any event, the errors in the accounting were nothing more than mere negligence. He then notes that attorneys are not subject to discipline for mere negligence citing numerous Supreme Court and State Bar Court decisions, including *Palomo v. State Bar* (1984) 36 Cal.3d 785.

The principle cited by respondent is, of course, the law. However, we note the well-established difference in conducting the ordinary affairs of a law practice and the handling of and accounting for trust funds by a lawyer into whose possession client funds are delivered. As pointed out in *Palomo*, "attorneys assume a personal obligation of reasonable care to

comply with the critically important rules for the safekeeping and disposition of client funds." (*Id.* at 795.) "Even negligence in misdirecting client funds constitutes misappropriation and warrants discipline. [Citation]." (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 969, fn. 3.)

We concur with the hearing judge that the conduct of respondent in the accounting of funds was neither intentional nor grossly negligent, but warrants discipline under *Guzzetta*.

3. Count seven - commingling in violation of rule 4-100(A)

In count seven, the State Bar argues that the evidence demonstrates that respondent deposited the award for statutory attorney's fees in the total of $378,175 in his trust account no later than November 6, 1992, and that a significant portion of that award remained in the trust account until at least January 29, 1993, in violation of a portion of rule 4-100(A).

Respondent argues that if there was an offense, it was far less serious than urged by the State Bar. He further argues he made no determination regarding the payment of a portion of those fees to the clients until January 5, 1993, when the settlement distribution sheet was completed, that a significant portion of the fees that remained in the account were properly withdrawn during the months of November and December 1992, and that by January 29, 1993, only an amount slightly in excess of $34,000 of the attorney fee award remained in the account. Respondent further contends that any portion of the firm's funds that remained in the account through January 1993 was through inadvertence and not deliberate.

As we have pointed out, the rights of the clients and respondent in the proceeds of the *Gomez* case were fixed no later than August 1, 1992. Respondent's failure to decide whether a portion of the fees that he determined were his were to be given to the clients does not excuse his failure to withdraw from his trust account that portion of the recovery he determined were his. He concluded that all of the court-awarded fees were his. He had a duty to promptly withdraw any undisputed portion of the funds pursuant to rule 4-100(A)(2). That rule requires an attorney to withdraw funds from trust at the earliest reasonable time after the attorney's right to those funds becomes fixed.

We agree with the hearing judge that respondent violated rule 4-100(A) by leaving funds in trust after his right to those funds had become fixed.

4. Count twelve - misappropriation in violation of rule 4-100(A)

In count 12, the State Bar argues that respondent is culpable of misappropriation of client funds in violation of another portion of rule 4-100(A). The State Bar urges three separate incidents of misappropriation: (1) in the *Gomez* matter, the amount received in satisfaction of the judgments was $44,489.22, while respondent only credited the clients with $44,000 of that amount, thereby misappropriating $489.22; (2) by taking 45 percent of the judgment, all of the awarded costs and all of the statutory fees, respondent took more than even his calculations permitted and thereby misappropriated $4,050.33 of the clients' funds;[10] and (3) by sending $20,000 to the city attorney, respondent misappropriated $19,800 (45% of $44,000 - the actual judgment without interest) of clients' funds.

The dates of receipt and distribution of funds by respondent become significant in determining if respondent is culpable of misappropriation, and if so, the extent of that culpability.

As we have noted, respondent received $44,489.22 in satisfaction of the judgment during the months of June and July of 1992. Those funds were immediately transferred to respondent's general

10. Respondent contended clients owed him $48,655.67 ($28,855.67 advanced costs + 45% of $44,000(sic) recovery = $48,655.67). From the satisfaction of judgment, respondent took $44,489.22. On deposit of court-awarded costs in November 1992, respondent deposited into general account the total sum of $8,706. He had thus taken $53,195.22 in satisfaction of a purported $48,655.67 obligation ($53,195.22 - 48,655.67 = $4,050.23).

account. Based upon the costs advanced by respondent in the *Gomez* litigation and assuming the validity of the retainer agreement, respondent was entitled to at least $48,656.67.[11] There was no misappropriation as the result of respondent taking those funds, and respondent was thus owed $4,176.45 if the retainer agreement is assumed to be enforceable.

On November 2, 1992, respondent received and deposited in his general account court-awarded costs in the sum of $8,706. By doing so, respondent misappropriated $4,050.23 of funds belonging to his clients based upon the factors respondent relied upon. ($8,706 - 4,176.45 = $4,050.23.)

Four days later, on November 6, respondent deposited in trust the sum of $378,175, representing the court-awarded attorney's fees. The record is clear that it is this sum from which respondent intended to reconcile his accounting with the clients. The State Bar argues that this is not correct since those fees were awarded as attorney's fees and properly belonged to respondent. We disagree. Those funds were awarded to the clients, and respondent only became entitled to them by operation of his fee agreement. (*Evans v. Jeff D., supra*, 475 U.S. at pp. 730-732.) By his determination that the clients would receive their share of the proceeds of the litigation from the trust account, respondent terminated the misappropriation four days after it occurred. While this does not eliminate the fact of misappropriation, it bears on mitigation. (*Palomo v. State Bar, supra*, 36 cal.3d at p. 796, fn.9.).

On January 13, 1993, respondent forwarded checks to each of his clients for the amount he had determined was due them. Thereafter, he learned that four of the five clients were disputing his right to the contingent fee he had taken in the sum of $19,800. Those funds were retained in trust. Respondent made his motion for allocation of fees, and following the court's comments in response to that motion, forwarded the retained funds, in the sum of $20,000, to the city attorney.

The State Bar argues that, by that act, respondent misappropriated client funds. We agree. However, in doing so, respondent relied on the validity and enforceability of his fee agreement. The essence of the offense is respondent's reliance on the illegal fee agreement. As discussed *ante*, respondent has been found culpable for the use of that fee agreement. We determine that the misappropriation resulting from that reliance should not materially contribute to discipline. In *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1100, the court gave great mitigating weight to the attorneys' honest belief that their actions resulting in misappropriation were authorized by clients. (See also *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332.).

We further note that, to the extent respondent is culpable of misappropriation, the seriousness of the commingling charge (*ante*, II.D.3.) is reduced because a greater portion of the funds remaining in respondent's trust account belonged to the clients rather than respondent.

Respondent did take prompt action to resolve the dispute with his clients by making the motion to allocate fees. The clients were present during that motion. Respondent argued that he would prefer to see the clients receive that portion of the fees the court would not have approved had it known all of the circumstances of the contingent fee agreement. Although the court declined to make an order, it did make clear that it would have reduced the statutory fees by the amount of the contingent fee, had it been made aware of that agreement at the time of the award. In response, respondent effectively reduced the fees by returning $20,000 to the City. The court did not determine whether respondent's contracted for contingent fee was proper or improper.

Thereafter, the City returned the $20,000 to respondent, and it now rests in his attorney's client trust account, presumably awaiting the outcome of this matter.

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11. This includes the 45 percent contingent fee calculated on the actual judgments. Neither the hearing judge nor the parties have sought to apply that percentage to the judgments plus interest accrued to the time of satisfaction. We follow suit.

We summarize our culpability findings as the result of our de novo review. We have found that respondent failed to communicate a written offer to his clients in violation of rule 3-510; failed to promptly pay to his clients funds to which they were entitled in violation of rule 4-100(B)(4); failed in two counts to render an appropriate accounting in violation of rule 4-100(B)(4); commingled and misappropriated funds in violation of rule 4-100(A); and, most seriously, he entered into an illegal fee agreement and collected an unconscionable fee in violation of rule 4-200. The violation of rule 3-510, the misappropriation in violation of rule 4-100(A), and the fee agreement and fee collection violations of rule 4-200 were not found by the hearing judge.

III. DISCIPLINE

The hearing judge found culpability for failure to promptly pay funds to a client in violation of rule 4-100(B)(4), two counts of failure to properly account to clients for funds held, in violation of rule 4-100(B)(3), commingling of client and personal funds in violation of rule 4-100(A) and misappropriation of client funds in violation of rule 4-100(A). Based on these findings, the hearing judge recommended that respondent be suspended from practice for three years, stayed on conditions that he be actually suspended for a period of nine months, along with certain other conditions of probation.

Having urged additional findings of culpability and following a recommendation of 18 months actual suspension to the hearing department, the State Bar now urges actual suspension for a period of two years and until respondent shows his rehabilitation under standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[12] On the other hand, respondent, following argument for fewer findings of culpability, urges an actual suspension of not greater than 90 days. We recognize our independent duty to consider the record and not be bound by the recommendations of the parties. (*In re Morse* (1995) 11 Cal.4th 184, 207.)

This court has made more findings of culpability than did the hearing judge. In addition to adopting each of the hearing judge's culpability determinations, we have determined that respondent is culpable of failing to communicate a settlement offer to his clients, engaging in moral turpitude in the collection of his attorney's fees, entering into an illegal fee agreement, and misappropriation.

A. Aggravation

We look at evidence that shows aggravating circumstances. The record shows that as the result of prior discipline, respondent was placed on probation for two years, including actual suspension from practice for six months by a Supreme Court order filed in January of 1989. (Std. 1.2(b)(i).) The most serious charge in that discipline was that respondent had sought an unconscionable fee by insisting that his contingent fee be measured on a default judgment for $1,000,000 against a foreign defendant when the client wished to accept an offer of $65,000 in settlement of the judgment against respondent's recommendation. The probation in that matter remained in effect until January 1991. Although the discipline was imposed in 1989 the misconduct occurred in 1980. The misconduct, in the matter before us, occurred generally between 18 months and 24 months after the expiration of respondent's prior probation. We note, as did the hearing judge, that the misconduct in that prior matter occurred more than 10 years before the misconduct in this matter before us.

In further aggravation, as found by the hearing judge, respondent committed multiple acts of misconduct, although they occurred in a single action. (Std. 1.2(b)(ii).)

Further, the conduct of respondent caused significant harm to his clients in that he deprived the clients of the major portion of the recovery to which they were entitled for a significant period of time. (Std. 1.2(b)(iv).) As to the portion of the judgment that the clients received, there was a delay of several

12. All references to "standards" shall refer to Standards for Attorney Sanctions for Professional Misconduct.

months. More importantly, however, by taking fees to which he was not entitled, respondent has deprived his clients of their proper share of the judgment for over six years.

B. Mitigation

In mitigation, and as found by the hearing judge, respondent presented compelling evidence of good character through the testimony of a broad spectrum of highly esteemed and respected members of both the federal and state bench and bar. (Std. 1.2(e)(vi).) Relying on *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939-940 the State Bar argues that some of the witnesses appeared unconcerned with the nature and extent of the misconduct and that, therefore, their opinion is entitled to little weight.

We disagree. Overall, the testimony of the character witnesses evidenced a strong knowledge of respondent's activities and conduct in the profession and a reasonable knowledge of the misconduct in the present case. They testified to his substantial contribution in the area of civil rights, his dedication to that cause, and his courage and determination.

In further mitigation, respondent has demonstrated candor in the proceeding before this court. (Std. 1.2 (e)(v).) He has entered into stipulations of fact where appropriate, and vigorously contested areas in which there are factual disputes. Following the determination of culpability, he has accepted responsibility for his misconduct.

We also consider the fact that, promptly on receiving a complaint from his clients regarding the fees taken, he took action to properly resolve the dispute by bringing a motion for allocation and approval of attorney's fees. Following that motion, he refunded a portion of the collected fees to the City in the *Gomez* case, in furtherance of what appeared to have been the position of the district court judge, although he had made no order. On the redelivery of those fees to respondent by the City he placed them in trust, where they are now held, presumably, awaiting a recommendation by this court to the Supreme Court and that court's action as to whether the fees taken by respondent were either illegal or unconscionable under rule 4-200(A).

The record also reflects a remarkably able advocate who, on occasion, refuses to listen to or accept well-reasoned and considered advice from reliable sources when it conflicts with a position held by him. Even the strongest admirers among his character witnesses noted this propensity.

C. Discussion

Respondent has been found culpable, inter alia, of failing to communicate a written offer to clients, charging an unconscionable fee, and entering into an illegal fee agreement, charges that were not found by the hearing department. It is the view of this court that the unconscionable fee and the illegal fee agreement are by far the most serious findings against respondent. Respondent, described by all as an expert in civil rights, had knowledge of the existing law at the time of the filing of his application for statutory attorney's fees. That law placed the supervision of the contingent fee under the discretion of the district court to whom the application for statutory fees was made. As we have determined, absent court approval, the taking of contingent fees, over and above statutory fees, constituted the taking of an unconscionable fee. As we have found, the collection of that fee, after failing to make a full disclosure to the district court, constituted moral turpitude. The absence of a full disclosure permitted respondent to take both statutory court-awarded fees and contingent fees without court supervision. Respondent owed to both his clients and the court a duty to disclose to the court the terms of his fee agreement. By failing to do so, respondent placed himself in a position to unilaterally make a decision to the detriment of his clients and deprived the court of its supervisory function.

We note a disturbing similarity between this portion of the case before us and respondent's charging an unconscionable fee in his prior record of discipline. Along with that, we note that respondent was only recently free of probation from that prior case at the time he committed the offenses now before us. We do note, in respondent's favor, that immediately upon receipt of a complaint from his clients he took reasonable action designed to resolve the dispute.

These factors cause us to determine that significant actual suspension is in order to impress on respondent that advocacy is not the sole role of a lawyer. As we noted in *In the Matter of Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266, 284, citing *Waters v. Bourhis* (1985) 40 Cal.3d 424, 438, fn. 13, an attorney's duty to a client does not end with obtaining a successful recovery. "When an attorney, in his zeal to insure collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client. [Citations.]" (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 448.) The failure of respondent to understand this requirement, even within 18 to 24 months after being released from probation in a similar matter, necessitates significant discipline.

We do not place great disciplinary weight on respondent's failure to inform his clients of the proposal for settlement by the city attorney. The law has been unclear, and from the testimony of the civil rights experts called by respondent, the civil rights segment of the bar consistently followed the practice of respondent. We do note, however, in civil rights cases as well as the balance of the practice of law, the cases are those of the clients and not of the lawyer and proposals of the sort before us in count one must be communicated to clients for their reaction.

We do consider respondent's failure to promptly pay to his clients the portion of the proceeds from the *Gomez* judgment to which they were entitled to be serious misconduct. We note that respondent promptly took action to pay himself from trust funds in which the clients had an interest without paying to the clients their share of the recovery. As we have noted, the rights of respondent and his clients to the proceeds of the *Gomez* case were fixed and the funds received by respondent not later than November 6, 1992, and yet the clients did not receive any funds until April of 1993. (Cf. *In the Matter of Berg* (Review Dept. 1997) 3 State Bar Ct. Rptr. 725, 735.)

In the circumstances of this case, where respondent's misappropriation was the result of either mere negligence or unjustified reliance on his illegal retainer agreement for which significant discipline is in order, we do not find it to necessitate a great increase in discipline. However, we do note that the misappropriation is indicative of poor trust accounting practices, as is the commingling of which respondent has been found culpable. That, in turn, is a matter that is fundamental to the practice of law. (Cf. *Palomo v. State Bar*, *supra*, 36 Cal.3d at p. 795.)

In measuring discipline we look initially at standard 1.3 describing the purpose of attorney discipline. Standard 2.7 deals with offenses involving an agreement to charge or collect an unconscionable fee.[13] That standard provides that an attorney entering into or charging an unconscionable fee for legal services shall result in at least a six-month actual suspension.

Standard 2.3 provides that where an attorney has been found culpable of moral turpitude, actual suspension shall be imposed, depending in part upon the extent to which a client has been injured.

Standard 1.7(a) provides that if an attorney found culpable of misconduct has a prior record of discipline, the discipline imposed shall exceed that of the prior proceeding unless the prior offense was minimal in severity and remote in time. We find neither of these limitations to be true in the matter before us.

However, we do note the standards are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.)

In searching for authority to guide us in measuring discipline in this matter, we find no case controlling. We note similarities to *In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. 266, where respondent was placed on actual suspension for a period of

13. The standard, as written, makes reference to rule 2-107, of the former Rules of Professional Conduct. Rule 2-107 has been replaced by current rule 4-200 that covers the same area, although modified is some respects. We conclude that standards 2.7 applies with equal force to current rule 4-200.

six months. In some respects, that case involved more egregious conduct than that before us. In that matter, Harney refused to return the fees he had improperly collected in violation of the provisions governing fees in medical malpractice cases. Here, as soon as the dispute was brought to his attention, respondent returned the funds to trust and sought court clarification to resolve the dispute. Here, however, we have multiple offenses and serious prior discipline. Both cases involve able lawyers with impressive character testimony.

The State Bar invites consideration of *Boehme v. State Bar* (1988) 47 Cal.3d 448, as a similar case. There the respondent, in practice for 20 years without prior discipline, misappropriated $1,901 of client's money, representing the client's share of proceeds from the settlement of a personal injury case. We note there was a finding of moral turpitude in the misappropriation, and that respondent permitted his counsel to falsely represent that restitution had been made. There, the Supreme Court upheld the hearing judge's recommendation of 18 months actual suspension.

Again, in *Brody v. State Bar* (1974) 11 Cal.3d 347, relied on by the State Bar, there was misappropriation of a substantial amount, continuing over an extended period, that respondent refused to remedy. Respondent was suspended for one year. As we have noted, while there is misappropriation in the matter before us, it is not the ultimate determinative factor.

The gravamen of the case before us is not in the area of misappropriation, but rather in the area of contracting for and collecting unconscionable fees. In our judgment, the discipline ordered in *In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. 266, is more persuasive. However, we note distinctions. The law in the matter before us was not as clear as the law involved in *Harney*. In the matter before us, respondent was culpable of failure to account, commingling, failure to disclose an offer of settlement, and failure to promptly pay to the clients the undisputed portion of their recovery.

As this court stated in *Harney*, "Ultimately, the appropriate degree of discipline to recommend rests on a balanced consideration of all relevant factors. [Citations.]" (*Id.* at 285.)

In the matter before us, respondent has vigorously and ably defended the action, while simultaneously being forthright and candid about the charges. We believe, under all of the circumstances, and especially considering respondent's termination of probation for seeking an unconscionable fee shortly before entering into the agreement here in question, the discipline urged by respondent is far too lenient. We believe the discipline requested by the State Bar to be somewhat more than is indicated, although significant actual suspension is required.

Respondent's advocacy skills are unquestioned. However, it must be made clear that more is needed to practice law in this state. A lawyer must treat clients fairly, honestly, and with candor. The charges of which respondent has been found culpable are as the result of his failure to do so. We conclude that respondent should be actually suspended from the practice of law for a period of one year and until he makes restitution to his clients in the *Gomez* matter as one of the conditions of a three year period of probation. In addition, we conclude that respondent should make restitution to his clients in amounts to that properly allocate the un-reimbursed costs to each client in proportion to their individual judgments (not equally) and refund the $19,800 contingency fee he collected and the $489.32 in interest he received on the their judgment in proportion to their individual judgments. We calculate the amount of restitution owed to each client by: (1) calculating the correct net recovery to be distributed after costs; (2) calculating the each client's share of the net recovery in proportion to their individual judgments; and (3) giving respondent credit for the $810.06 he has already paid them.

The net total amount to be distributed to the clients is $24,339.65 (actual total of all five of the judgments/warrants $44,489.32 less costs advanced by respondent of $28,855.67 plus a credit of $8,706.00 for the cost awarded). Clients Gomez, Moreno, Olivas, and Cruz each received a judgement/warrant in the amount of $8,695.45. And each of their percentage share of the net recovery in proportion to their individual judgements is 19.545 percent (the $8,695.45 individual judgment divided by the $44,489.32 total of all five judgements). Accordingly, their individual shares of the net recovery is $4,757.23

(which is 19.545 percent of the $24,339.65 net recovery). After giving respondent credit for the $810.06 he has already paid each of these clients, he owes each of them $3,947.17 together with interest thereon from and after November 1992 when one of the referring attorney's inquired as to the distribution of clients' share the recovery.

Client Burgos received a judgement/warrant in the amount of $9,707.52. And her percentage share of the net recovery in proportion to her individual judgement is 21.819 percent (her $9,707.52 judgement divided by the $44,489.32 total of all five judgements). Accordingly, her share of the net recovery is $5,310.71 (which is 21.819 percent of the $24,339.65 net recovery). After giving respondent credit for the $810.06 he has already paid Burgos, he owes her $4,500.65 together with interest thereon from and after November 1992.

IV. RECOMMENDATION

We recommend that respondent be suspended from the practice of law for three years, that execution of suspension be stayed and that respondent be placed on probation for three years on the following conditions:

1. Respondent shall be actually suspended from the practice of law in the State of California during the first year of probation and until respondent: (1) makes restitution to Julia Gomez, or the Client Security Fund if it has paid, in the sum of $3,947.17 plus interest thereon at the rate of 10% per annum from December 1, 1992, until paid; (2) makes restitution to Raquel Moreno, or the Client Security Fund if it has paid, in the sum of $3,947.17 plus interest thereon at the rate of 10% per annum from December 1, 1992, until paid; (4) makes restitution to Alfredo Olivas, or the Client Security Fund if it has paid, in the sum of $3,947.17 plus interest thereon at the rate of 10% per annum from December 1, 1992, until paid; (5) makes restitution to Filadephia Cruz, or the Client Security Fund if it has paid, in the sum of $3,947.17 plus interest thereon at the rate of 10% per annum from December 1, 1992, until paid; (6) makes restitution to Elizabeth Burgos, or the Client Security Fund if it has paid, in the sum of $4,500.65 plus interest thereon at the rate of 10% per annum from December 1, 1992, until paid; (7) provides satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles; and (8) if the period of actual suspension exceeds two years, shows proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;

2. Respondent must comply with the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar of California, and terms and conditions of his probation;

3. Respondent must report, in writing, to the Probation Unit of the State Bar in Los Angeles no later than January 10, April 10, July 10, and October 10 of each year or part thereof in which he is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit his first report no later than the second reporting date after the beginning of his probation. In each report, respondent shall state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in his first report, whether he has complied with all provisions of the State Bar Act, Rules of Professional Conduct, and other terms and conditions of the probation since the start of his probation;

(b) in each subsequent report, whether he has complied with all provisions of the State Bar Act, Rules of Professional Conduct, and other terms and conditions of his probation during said period; and

(c) during the last 20 days of his probation; respondent shall submit a final report covering any period of his probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent shall certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

4. Subject to assertion of applicable privileges, respondent must answer fully, promptly and truthfully

any inquiries of the State Bar's Probation Unit that are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms and conditions of probation;

5. In addition to maintaining an official address for State Bar purposes with the State Bar's Membership Records Office as required by section 6002.1 of the Business and Professions Code, respondent must maintain that official address with the State Bar's Probation Unit in Los Angeles. In addition, respondent must maintain with the Probation Unit in Los Angeles a current office address and telephone address or, if respondent does not have an office, a current home address and telephone number. Respondent must promptly, but in no event later than 10 days after a change, report any changes in this information to the Membership Records Office and the Probation Unit.

6. During each calendar quarter in which respondent receives, possesses, or otherwise handles client funds or property in any manner, respondent must submit, with the probation report for that quarter to the State Bar's Probation Unit in Los Angeles, a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) whether respondent has kept and maintained such books or other permanent accounting records in connection with respondent's 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; and

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

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

(c) whether 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; and

(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; and

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

7. Within one (1) year after the effective date of the Supreme Court order in this matter, respondent shall attend the State Bar Ethics School, which is held periodically at the State Bar of California (555 Franklin Street, San Francisco, or 1149 South Hill Street, Los Angeles) and shall take and pass the test given at the end of such session. Respondent understands that this requirement is separate and apart from fulfilling the Minimum Continuing Legal Education ("MCLE") ethics requirement, and he will not receive or claim MCLE credit for attending the State Bar Ethics School;

8. Within one (1) year after the effective date of the Supreme Court order in this matter, respondent shall attend the State Bar Ethics School Client Trust Account Record-Keeping Course, which is held periodically at the State Bar of California (555 Franklin Street, San Francisco, or 1149 South Hill Street, Los Angeles) and shall take and pass the test given at the end of such session. Respondent understands that this requirement is separate and apart from fulfilling the Minimum Continuing Legal Education ("MCLE") ethics requirement, and he will not receive or claim MCLE credit for attending the State Bar Ethics Client Trust Account Record-Keeping Course;

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

10. At the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of three years shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of respondent's actual suspension and to provide satisfactory proof of passage of the examination to the State Bar's Probation Unit in Los Angeles within said period of actual suspension.

We further recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in rule 955(a) and then file the proof of compliance affidavit provided for in rule 955(c) within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court Order in this matter.

Finally, we recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code (as amended effective January 1, 1997).

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Stephen Chamberlain Posthuma

A Member of the State Bar.

No. 95-H-15573

Filed January 29, 1998

SUMMARY

After a trial on the merits, a hearing judge dismissed this proceeding in which the respondent was charged with failing to comply with the conditions attached to a private reproval. The time to comply with the conditions was extended by a prior hearing judge, but not until after the expiration of the original time to comply. Respondent failed to comply with the conditions before the expiration of the extended deadline and the State Bar filed this proceeding. The present hearing judge determined that the extension was invalid because the prior hearing judge lacked jurisdiction to extend the time after the original time had expired. The hearing judge dismissed this proceeding, concluding that the notice of disciplinary charges failed to state a disciplinable offense because it charged respondent with missing only the extended deadline and respondent could not be prosecuted for that offense. (Hon. Michael D. Marcus, Hearing Judge.)

The State Bar sought review. Applying principles of estoppel, the review department held that the order extending the time to comply with the reproval conditions could not be collaterally attacked in the present proceeding and that respondent could be prosecuted for missing the extended deadline. The review department found respondent culpable of failing to comply with the reproval conditions before the expiration of the extended deadline and imposed a public reproval.

COUNSEL FOR PARTIES

For State Bar:	Teresa J. Schmid
For Respondent:	Stephen C. Posthuma, in pro. per.

HEADNOTES

[1 a, b]	**101**	**Procedure–Jurisdiction**
	135	**Procedure–Rules of Procedure**
	135.60	**Procedure–Revised Rules of Procedure–Dispositions and Costs**
	135.70	**Procedure–Revised Rules of Procedure–Review/Delegated Powers**

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.

135.82 Procedure–Revised Rules of Procedure–Probation
139 Procedure–Miscellaneous
173 Discipline–Ethics Exam/Ethics School
179 Discipline Conditions–Miscellaneous
194 Statutes Outside State Bar Act

California Rules of Court, rule 951, which explicitly authorizes the State Bar Court to extend the time within which an attorney must take and pass a professional responsibility examination, applies only when the Supreme Court orders the attorney take and pass such an examination. It does not apply when the State Bar Court orders an attorney to take and pass the examination as a condition attached to a reproval. When the State Bar Court imposes such a condition, its authority to extend the time for the attorney to comply is derived from California Rules of Court, rule 956, which authorizes the State Bar Court to attach conditions to the reprovals that it imposes.

[2] **101 Procedure–Jurisdiction**
135 Procedure–Rules of Procedure
139 Procedure–Miscellaneous
173 Discipline–Ethics Exam/Ethics School
179 Discipline Conditions–Miscellaneous
199 General Issues–Miscellaneous

Even after respondent's private reproval became final, the State Bar Court retained jurisdiction over the conditions attached to it under the Former Transitional Rules of Procedure of the State Bar (now the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings). Thus, when the hearing judge extended the time for respondent to comply with the conditions attached to the reproval after the time to comply had expired, the hearing judge did not act without jurisdiction; but in excess of jurisdiction.

[3 a-e] **101 Procedure–Jurisdiction**
139 Procedure–Miscellaneous
173 Discipline–Ethics Exam/Ethics School
179 Discipline Conditions–Miscellaneous
199 General Issues–Miscellaneous

When a party seeks or consents to a court's action that is in excess of the court's jurisdiction, the party may be estopped to complain of the court's action as long as the court had subject matter jurisdiction. Respondent was estopped from collaterally attacking a final order extending the time in which he was required to comply with conditions attached to a reproval where he consented to the order and where the court had jurisdiction of the subject. The review department concluded that the application of estoppel was in harmony with the primary goals of attorney discipline.

[4 a, b] **139 Procedure–Miscellaneous**
159 Evidence–Miscellaneous
199 General Issues–Miscellaneous
1691 Conviction Cases–Record in Criminal Proceeding
1699 Conviction Cases–Miscellaneous Issues

An attorney's criminal conviction based on a plea of nolo contendere is deemed a conviction for attorney disciplinary purposes and is conclusive proof of the attorney's guilt on each of the essential elements of the offense of which the attorney was convicted. Thus, respondent cannot collaterally attack his conviction in the State Bar Court even though the victim of respondent's crime lost her civil lawsuit against respondent for damages.

[5] **251.10 Rule 1-110 [former 9-101]**
801.41 Standards–Deviation From–Justified
897.90 Standards–Violation of Reproval–Reproval or No Discipline
1099 Substantive Issues re Discipline–Miscellaneous

Even though respondent was culpable of failing to comply with the conditions attached to his private reproval, the review department did not strictly apply the Standard for Attorney Sanctions for Professional Misconduct for such violations which calls for suspension. Instead, the review department imposed a public reproval because of respondent's extensive participation in the proceeding and because respondent acknowledged his obligation to comply with State Bar Court orders.

ADDITIONAL ANALYSIS

Standards
805.10 Effect of Prior Discipline
Discipline
Probation Conditions
1045 Public Reproval–Without Conditions

OPINION

OBRIEN, P.J.:

The State Bar, through its Office of the Chief Trial Counsel (OCTC), seeks review of a hearing judge's post-trial order that dismissed a reproval violation proceeding (*Posthuma II*). The proceeding involved respondent Stephen Chamberlain Posthuma's[1] alleged failure to timely comply with a condition attached to a private reproval imposed on him in August 1993 in State Bar Court case number 91-C-07302 (*Posthuma I*). Respondent's failure to comply was in willful violation of rule 1-110 of the Rules of Professional Conduct of the State Bar (rule 1-110). Rule 1-110 requires attorneys to comply with the conditions attached to any public or private reproval imposed on them by the State Bar Court. Respondent was charged in the current proceeding with violating the reproval condition requiring him to take and pass the California Professional Responsibility Examination (CPRE) within one year of the reproval.[2]

On his own motion, the hearing judge dismissed the proceedings (*Posthuma II*) after trial because he concluded that the notice of disciplinary charges did not state a disciplinable offense. Appellant OCTC raises two points of error on review. OCTC contends that the hearing judge erred in dismissing the proceeding and, second, that the record established that respondent violated rule 1-110 by failing to timely comply with the CPRE reproval condition. OCTC requests that we reverse the hearing judge's dismissal order, hold that respondent violated rule 1-110 as charged, and recommend that respondent be disciplined for that violation.

Upon our independent review, we find that the hearing judge erred as a matter of law in dismissing the proceeding. We also find that the record establishes respondent's culpability of violating rule 1-110. Accordingly, we overturn the hearing judge's dismissal of the proceeding and publicly reprove respondent.

I. FACTUAL FINDINGS

Respondent's August 1993 private reproval with conditions in *Posthuma I* was imposed in accordance with a stipulation of facts and disposition that respondent and OCTC filed. In addition to the CPRE condition, also attached were one years' probation, seventy-five hours' community service, ethics school, and mental health treatment.

Respondent was required to take and pass the CPRE within one year after his reproval. However, respondent did not attempt to take the CPRE before the August 1994 deadline. Nor did he file a motion for an extension of time within 30 days of that deadline as required by rule 618 of the former Transitional Rules of Procedure of the State Bar (effective September 1, 1989, to December 31, 1994) (former Transitional Rules of Procedure).[3] Respondent and OCTC filed a joint motion to modify the reproval conditions in February 1995, which was more than six months after the August 1994 deadline.

1. Respondent was admitted to the practice of law in this state on February 8, 1973, and has been a member of the State Bar since that time.

2. nitially, respondent was also charged with a second count of violating rule 1-110 for allegedly failing to file quarterly reproval probation reports, but that count was dismissed at trial on the motion of OCTC. Neither party complains of that dismissal, and we adopt that disposition, but modify it to reflect that it is with prejudice (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 261(a) ["All orders dismissing a proceeding in whole or in part shall specify whether such dismissal is with or without prejudice."].)

3. Former transitional rule 618 provided: "Upon motion based on good cause, accompanied by affidavit or declaration under penalty of perjury, the Presiding [Judge] of the State Bar Court may grant one extension of time within which a respondent may take and pass the Professional Responsibility Examination, to and including the date of the results of the examination administered first following the motion. Said motion must be made no later than thirty (30) days before the expiration of the term of the condition." By General Order 93-10, effective October 1, 1993, the Presiding Judge delegated her authority to administer reprovals, under rules 615 to 618 of the former Transitional Rules of Procedure, to the hearing department in all proceedings in which no request for review by the review department was filed.

The joint motion requested an extension until August 1995.[4] In the points and authorities memorandum in support of the parties' joint motion, respondent claimed he failed timely to take and pass the CPRE because he lacked time since he was involved "in a very lengthy, complex, and time-consuming civil lawsuit."

In addition, respondent stated, in his declaration in support of the joint motion, executed under penalty of perjury, that "due to a very lengthy civil lawsuit in which I have been named as a defendant, I will not have time to prepare and take the California Professional Responsibility Examination until the completion of that lawsuit. The trial is expected to be completed by March 31, 1995. I have made arrangements to take the April, 1995 California Professional Responsibility Examination. [¶] For my failure to take and pass the California Professional Responsibility Examination, and in an effort to resolve a new State Bar matter for my failure to take the exam, the State Bar and I have agreed, contingent upon the Court's granting of this motion, to extend . . . the period of time in which I must take and pass the California Professional Responsibility Examination one (1) year (to August 24, 1995) . . .."

In March 1995 a hearing judge other than the hearing judge who presided over the present proceeding below (the *Posthuma I* hearing judge) granted the parties' February 1995 joint motion to modify as requested (the March 1995 extension order). However, the *Posthuma I* hearing judge's order did not recite the new deadline for respondent to take and pass the CPRE. Instead, she recited that the parties filed a joint motion in which they sought "to extend the time within which Respondent must take, pass and provided satisfactory proof of passage of the California [Professional] Responsibility Examination to one (1) year" and then ruled that "[f]or all the reasons stated in the joint motion, for good cause shown, the motion is granted. (Citation.)"

Nevertheless, because the parties explicitly requested a one-year extension *to August 24, 1995*, in their joint motion, we hold that the March 1995 extension order extended respondent's CPRE deadline from August 1994 to August 1995. (See, generally, *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 252 ["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"].)

Respondent admits to having prompt knowledge of the *Posthuma I* hearing judge's March 1995 extension order and the new August 1995 deadline. In addition, respondent admits failure to take the CPRE before the August 1995 extended deadline and that he never sought another extension of time. In December 1995 OCTC initiated the present proceeding (*Posthuma II*) against respondent for not taking and passing the CPRE.

In January 1996 respondent filed his answer to the notice of disciplinary charges. In a separate motion, he requested deletion of the CPRE condition from his reproval. In March 1996 the present hearing judge denied respondent's motion to delete. Then, respondent took the CPRE for the first time in August 1996 and passed that examination. This matter went to trial in October 1996. In his decision filed in December 1996, the hearing judge dismissed this proceeding (*Posthuma II*) on his own motion. He concluded that the notice of disciplinary charges did not state a disciplinable offense.

In determining that the notice did not state a disciplinable offense, the hearing judge first collaterally attacked the *Posthuma I* hearing judge's March 1995 extension order and adjudicated it invalid. The hearing judge did so by concluding that respondent's reproval conditions were subject to modification only during the reproval's "existence." For this holding, the hearing judge relied on *In re Daoud* (1976) 16 Cal.3d 879, 882, which found that, under Penal Code section 1203.3, a criminal "probation order may be revoked or modified only during the term of probation."

4. In the joint motion, the parties also sought to have respondent's reproval probation extended for one year until August 1995. We do not address that request in our opinion because it is not relevant to any issue in this proceeding.

The hearing judge concluded that respondent's reproval was in "existence" from August 1993 through August 1994, and that the *Posthuma I* hearing judge, therefore, lost jurisdiction to modify respondent's reproval condition after August 1994. Accordingly, the hearing judge found the *Posthuma I* hearing judge's March 1995 extension order to be invalid since she lacked jurisdiction to rule on the parties' February 1995 joint motion to modify.

Then, the hearing judge concluded that, because the *Posthuma I* hearing judge's March 1995 extension order was invalid, respondent should not be disciplined for failing to take and pass the CPRE by the August 1995 extended deadline. According to the hearing judge, relying on *Daoud*, respondent could only be disciplined for failing to take and pass the CPRE before the expiration of the original deadline of August 1994. Next, the hearing judge construed the notice of disciplinary charges such that respondent was not charged with violating rule 1-110 by failing to take and pass the CPRE by the original August 1994 deadline, but only by failing to take and pass the CPRE by the August 1995 extended deadline. Lastly, the hearing judge dismissed this matter because he concluded that OCTC had not charged respondent, in the notice, with failing to take and pass the CPRE by the original August 1994 deadline.

II. APPELLANT'S POINTS OF ERROR

A. First Point of Error -- Hearing Judge's Order of Dismissal

OCTC contends that the hearing judge erred in dismissing the present proceeding. OCTC asserts a number of various arguments to support its contention. We have considered them, but do not agree. However, OCTC's argument that the *Posthuma I* hearing judge was authorized to extend the time for respondent to take and pass the CPRE under rule 951(b) of the California Rules of Court warrants discussion.

1. Rule 951(b)

[1a] As OCTC notes, rule 951(b) does explicitly authorize the State Bar Court to extend the time within which an attorney must take and pass a professional responsibility examination, to suspend the attorney for failing to take and pass such an examination, and to vacate an attorney's suspension for failing to take and pass such an examination. However, rule 951(b) applies only to CPRE conditions imposed by Supreme Court order.

[1b] With respect to private or public reprovals, the State Bar Court's authority to extend CPRE conditions is derived from rule 956 of the California Rules of Court, which authorizes the State Bar Court to attach conditions to reprovals. The State Bar Court's exercise of that authority was formerly governed by rule 618 of the former Transitional Rules of Procedure and is currently governed by rules 550 through 554 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 271.)

If an attorney fails to comply with a CPRE condition imposed on him by a Supreme Court suspension order, the attorney "will automatically be placed on actual suspension until he does pass the examination . . . ." (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) However, when an attorney fails to comply with a CPRE condition imposed on him by the State Bar Court as a reproval condition, he or she is not subject to automatic actual suspension, but his or her failure is grounds for additional discipline. (Cal. Rules of Court, rule 956(b); rule 1-110.)

2. Lack of Jurisdiction

[2] [3a] The State Bar Court retained, under rules 617 and 618 of the former Transitional Rules of Procedure, continuing jurisdiction over the conditions attached to respondent's reproval in *Posthuma I*. (Cf. *In re Griffin* (1967) 67 Cal.2d 343, 347.) Accordingly, contrary to the hearing judge's conclusion, the *Posthuma I* hearing judge's March 1995 extension order is not invalid (void) for lack of jurisdiction of the subject matter. But because the motion was not filed at least 30 days before the August 1994 deadline as required by former transitional rule 618, the *Posthuma I* hearing judge acted in excess of her jurisdiction when she granted the parties' joint motion

to modify respondent's reproval conditions. (*Ibid.*) Notwithstanding the foregoing, we conclude that it is inappropriate to collaterally attack the *Posthuma I* hearing judge's March 1995 extension order in the present proceeding.

[3b] "When, as here, the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. (Citations.) Whether he shall be estopped depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when 'To hold otherwise would permit the parties to trifle with the courts.' (Citation.)" (*In re Griffin, supra,* 67 Cal.2d at pp. 347-348; see also *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1269.)

[3c] The parties not only agreed to the *Posthuma I* hearing judge's March 1995 extension order, but solicited it in their joint motion to modify respondent's reproval conditions. The only "irregularity" of that extension order is that it granted an untimely motion to modify respondent's reproval conditions.

[3d] Even though the proper method of handling respondent's failure to take and pass the CPRE before the original August 1994 deadline was for OCTC to bring a disciplinary proceeding against respondent for violating rule 1-110 and not to file a joint motion to modify the reproval, we are unaware of any policy, substantive or procedural, that would preclude the application of estoppel to prevent a collateral attack on the *Posthuma I* hearing judge's March 1995 order granting the joint motion to modify in this or any other proceeding. In fact, we conclude that the application of estoppel is in harmony with the primary goals of attorney discipline, which are the protection of the public, the courts, and the legal profession, and the interests of justice (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.3).).

[3e] The primary goals of attorney discipline are best furthered by requiring respondent to uphold his disciplinary agreement with the State Bar to take and pass the CPRE by the August 1995 extended deadline and to account and accept responsibility for his failure to do so. The interests of justice are best furthered by requiring the State Bar to uphold its disciplinary agreement with respondent even though it includes an implicit agreement not to prosecute respondent for his failure to take and pass the CPRE by the original deadline of August 1994.

Accordingly, we reverse the hearing judge's determination that the March 1995 extension order is invalid and hold that, under principles of estoppel, respondent may be disciplined for not taking and passing the CPRE within the one-year extension of time granted to him in that order from August 1994 to August 1995 as alleged in the notice of disciplinary charges. Furthermore, we reverse the hearing judge's order of dismissal and reinstate that charge as it is set forth in the notice.

B. Second Point of Error -- Rule 1-110 Violation

In its second point of error, OCTC contends that the record establishes that respondent failed to timely comply with the CPRE reproval condition in willful violation of rule 1-110. We agree.

Respondent's culpability is established by his admissions that he had actual knowledge that the *Posthuma I* hearing judge granted his and OCTC's February 1995 joint motion to modify his reproval conditions; that the *Posthuma I* hearing judge's March 1995 extension order extended the time for him to take and pass the CPRE only to August 1995 (and not March 1996); that he did not take or pass the CPRE before the August 1995 extended deadline; and that he did not request or obtain a second extension of time to take and pass it.

Respondent states in his appellee's brief that, at the time he and OCTC filed the February 1995 joint motion to modify, he assumed that the time for him to take and pass the CPRE would be extended for one year from the date of court's order granting the

motion (and not from the original deadline of August 1994).[5] Moreover, as respondent admits on that same page, when he learned that the time was, in fact, extended from the original deadline of August 1994 in the March 1995 extension order so that the extension ended in August 1995, he "elected 'not to look a gift horse in the mouth' and fervently hoped that a courtroom would soon be available [so that the civil lawsuit trial could be held]."

Moreover, respondent states in his declaration in support of his January 1996 motion to delete the CPRE reproval condition (which declaration respondent executed under penalty of perjury),[6] that he did not seek an extension of the August 1995 extended deadline because he was required to be out of state during the Summer of 1995 and because he was engaged in the trial of the civil lawsuit.

In light of these facts, we reject respondent's testimony to the effect that he was unaware of the August 1995 extended deadline and believed that the *Posthuma I* hearing judge had, in her March 1995 extension ordered, granted him "permission" to postpone taking the CPRE until after the trial in the civil lawsuit. Similarly, we reject respondent's testimony that he knew about the August 1995 extended deadline at some point in time, but then forgot about it until he reviewed the joint motion in November 1995 (which was more than a month after the trial in the civil lawsuit).

In summary, we hold that respondent knew his requirement to take and pass the CPRE no later than the August 1995 extended deadline. His failure to do so is, therefore, a willful violation of rule 1-110: his duty to comply with the conditions attached to the reproval imposed on him in *Posthuma I.*

III. APPROPRIATE LEVEL OF DISCIPLINE

A. Aggravating Circumstances

There is only one aggravating circumstance, and that is respondent's prior record of discipline. (Std. 1.2(b)(i).) respondent's sole prior record of discipline is the private reproval imposed on him in *Posthuma I.*

[4a] *Posthuma I* was a criminal conviction referral proceeding conducted in accordance with sections 6101 and 6102 of the Business and Professions Code and rule 951(a) of the California Rules of Court. Respondent's criminal conviction involved two counts of violating Penal Code section 243.4, subdivision (d) (misdemeanor sexual battery) and was held at Santa Barbara Municipal Court in February 1992. After respondent entered a plea of nolo contendere, he was convicted and placed on probation for three years.[7] Respondent's conviction after his plea of nolo contendere is deemed a conviction for attorney disciplinary purposes (Bus. & Prof. Code, § 6101, subd. (e)) and is conclusive proof, in the State Bar Court, of his guilt on each of the essential elements of the offense of which he was convicted (Bus. & Prof. Code, § 6101, subd. (a); *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110).

[4b] Accordingly, respondent may not attempt to collaterally attack or "impeach" his conviction in this proceeding. Nor may he attempt to collaterally attack his stipulation, in *Posthuma I*, that his convic-

5. We, of course, reject this statement because, as noted above, both the memorandum of points and authorities and respondent's own declaration in support of the parties' joint motion explicitly requests an one-year extension to August 1995.

6. As noted above the hearing judge denied respondent's motion to delete in March 1996.

7. According to respondent, after he successfully completed his three-year criminal probation, he was permitted to withdraw his nolo contendere plea and the charges against him were dismissed. Those facts, however, do not affect the present proceeding because, in conviction referral proceedings, a conviction is deemed to remain final regardless of whether, after the attorney's successful completion of probation, his conviction is later set aside or he is later permitted to withdraw his plea and the case dismissed under Penal Code section 1203.4 or some similar statute. (Bus. & Prof. Code, § 6102, subd. (c).)

tion involved other misconduct warranting discipline. Therefore, the fact that the jury in the civil lawsuit returned a verdict in favor of respondent on which the superior court entered a take nothing judgement against the plaintiff is immaterial in the present proceeding.

Nonetheless, in considering the moral shortcomings present in the crime of sexual assault in this proceeding, we accept the parties' stipulation in *Posthuma I* that respondent's conviction did not involve moral turpitude on the basis of res judicata.

B. Mitigating Circumstances

There are no mitigating circumstances. We construe respondent's appellee's brief as asserting a claim of good faith mitigation under standard 1.2(e)(2). Respondent correctly notes that the hearing judge (*Posthuma II*) stated in his decision and order dismissing this proceeding that "[r]espondent was acting in good faith in initially not taking the CPRE and ultimately passed the test." We, however, do not concur in that assessment. As noted above, we reject respondent's testimony regarding his claim that he believed that the *Posthuma I* hearing judge extended the time for him to take and pass the CPRE until after the trial in the civil lawsuit and his alternative claim that he forgot about the August 1995 extended deadline until he reviewed the joint motion in November 1995.

Such a belief, even if honestly held, would not be reasonable in light of the specific reference in to August 1995 in respondent's declaration in support of the parties' February 1995 joint motion to modify. (See, generally, *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [to establish good faith mitigation, attorney must prove that her beliefs were both honestly held and reasonable].)

In addition, in such a case, respondent would not be entitled to any good faith mitigation for forgetting the August 1995 extended deadline until November 1995. At most, honestly forgetting the extended deadline might have precluded a finding of bad faith aggravation.

Finally, respondent is not entitled to any mitigation for belatedly taking and passing the CPRE because he did so only after he was aware that the present proceeding had been initiated.

C. Discussion

We begin our discipline analysis by looking to the applicable standards: standards 1.7(a) and 2.9.

1. Standard 1.7(a)

Standard 1.7(a) provides that, if a respondent has a prior record of discipline, the discipline in the present proceeding shall be greater than that imposed in the prior proceeding except in certain circumstances not present here.

2. Standard 2.9

Standard 2.9 provides that an attorney's willful violation of his duty, under former rule 9-101 of the Rules of Professional Conduct of the State Bar (now rule 1-110), to comply with the conditions attached to a reproval imposed on the attorney by the State Bar Court shall result in suspension. The only Supreme Court reported case applying standard 2.9 or otherwise dealing with an attorney's failure to comply with conditions attached to a reproval is *Conroy v. State Bar* (1990) 51 Cal.3d 799.

Attorney J. William Conroy (Conroy) had been previously privately reproved in 1986 for committing three unrelated acts of misconduct. (*Id.* at p. 802.) A condition attached to his reproval required him to take and pass the Professional Responsibility Examination (PRE) within one year after his reproval. (*Ibid.*)

Conroy failed to take and pass the PRE within the one-year deadline. (*Ibid.*) He did, however, take and pass it at the *next* available opportunity, which was approximately two months before the State Bar initiated a second disciplinary proceeding against him. (*Id.* at pp. 802, 803, fn. 4.)

In *Conroy* there were one mitigating circumstance and three aggravating circumstances. The sole mitigating circumstance was the attorney's late

passage of the PRE. (*Id.* at p. 805.) The first aggravating circumstance was Conroy's prior record of discipline, which was the private reproval from which the requirement that he take and pass the PRE arose. (*Ibid.*) The second was Conroy's failure to participate in the State Bar Court proceeding. (*Id.* at pp. 802-803, 805-806.) The third was Conroy's lack of remorse and failure to acknowledge the wrongfulness of his actions. (*Id.* at p. 806.)

In light of the misconduct, the single mitigating circumstance, and the three aggravating circumstances; the Supreme Court imposed a one-year stayed suspension on Conroy and placed him on probation for one year subject to conditions, including a 60-day period of actual suspension. (*Ibid.*) That is appropriate discipline for an attorney's single failure to timely comply with a condition attached to a reproval particularly in light of the fact that the attorney belatedly complied three months after the deadline. However, the present case is distinguishable from *Conroy*. First, respondent has diligently participated in this proceeding, but Conroy failed to do so. Second, respondent's prior record of misconduct did not involve clients, but Conroy's involved three clients.

[5] After independently weighing the present misconduct and the aggravating circumstance and considering the purposes of attorney discipline in light of the distinction we draw between this case and *Conroy*, we conclude that the appropriate level of discipline is a public reproval, which is a greater level of discipline than that which was imposed on him in *Posthuma I* (std. 1.7(a)). We do not apply standard 2.9 strictly and do not recommend any suspension under it because we view it excessive in light of respondent's extensive participation in this proceeding and his acknowledgement, even though begrudgingly, of his obligation to comply with State Bar Court orders. Although the Standards are important guidelines, it is well-established that they are not to be imposed in an inflexible manner. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828; see also *Boehme v. State Bar* (1989) 47 Cal.3d 448, 454.

IV. PUBLIC REPROVAL

IT IS ORDERED that respondent Stephen C. Posthuma be and is hereby publicly reproved for his failure to take and pass the California Professional Responsibility Examination before August 24, 1995. FURTHERMORE, the State Bar is awarded costs in accordance with Business and Professions Code section 6086.10, and respondent is ordered to pay those costs to the State Bar in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997).

I Concur:
STOVITZ, J.

CONCURRING AND DISSENTING OPINION OF NORIAN, J.

I concur with the majority opinion in all respects except as to the appropriate level of discipline. I respectfully dissent as to publicly reproving respondent Stephen C. Posthuma. In my view, short periods of stayed suspension and probation are warranted under standard 2.9 of the Standards for Attorney Sanctions for Professional Misconduct. Standard 2.9 provides that the "[c]ulpability of a member of a wilful violation of rule [1-110], Rules of Professional Conduct, shall result in suspension."

Respondent solicited and stipulated to two State Bar Court orders directing him to take and pass the California Professional Responsibility Examination (CPRE) by a date certain and then willfully and intentionally refused to comply with those orders without any plausible excuse. Contrary to respondent's contention, there is no evidence that he violated either of these orders in "good faith." Respondent's telephone calls to the State Bar's Office of the Chief Trial Counsel weeks after he missed both the original August 1994 and the extended August 1995 deadline do not show that his willful violations of this court's orders were, in the first instance, in good faith.

I agree with the majority's conclusion that the present case is distinguishable from *Conroy v. State Bar* (1990) 51 Cal.3d 799, 806, in which the respondent was actually suspended for 60 days. As the majority correctly notes, that case is distinguishable because Conroy defaulted and had a more extensive prior record of discipline. Because of these distinctions, I conclude that a period of actual suspension is not warranted in this case.

However, neither these distinctions nor respondent's begrudged acknowledgement of his obligation to comply with State Bar Court orders warrants a compelling reason for the majority's departure from the discipline recommended by the standards. "The Supreme Court treats the standards as guidelines for imposing discipline which it is not bound to follow in 'talismanic fashion' (citation), but will generally depart from only when it sees a *compelling* reason for doing so. (Citations.)" (*In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, emphasis added.)

In my view, the appropriate discipline is a 30-day period of stayed suspension and a six-month period of probation for respondent's failure either to take and pass the CPRE before the August 24, 1995, extended deadline or to timely seek and obtain a second extension of time. Respondent's misconduct warrants probationary monitoring to impress upon him the seriousness of failing to obey court orders. I find this level of discipline consistent with standard 2.9 and the goals of attorney discipline.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Paul D. Priamos

A Member of the State Bar

No. 92-O-19280

Filed February 3, 1998

SUMMARY

The hearing judge found that respondent wilfully violated former rule 5-101 of the Rules of Professional Conduct of the State Bar, regarding standards for attorneys engaged in business transactions with a client, and committed acts of moral turpitude by his seven year self-dealing with over $500,000 of investment funds he was asked by his client to handle, which included respondent unilaterally paying himself nearly $450,000 in management and legal fees. The hearing judge recommended disbarment. (Hon. Madge S. Watai, Hearing Judge.)

Respondent sought review, taking issue with the hearing judge's findings of fact, conclusions of law, and discipline recommendation. The State Bar supported the hearing judge's decision and her disbarment recommendation.

The review department adopted the hearing judge's findings and her conclusions. Clear and convincing evidence was presented of most serious and repeated breaches of respondent's fiduciary duties to his client over a seven-year period. Disbarment was called for in order to adequately protect the public.

COUNSEL FOR PARTIES

For State Bar: Russell G. Weiner, Allison R. Platt

For Respondent: Paul D. Priamos

HEADNOTES

[1] **159 Evidence–Miscellaneous**
161 Duty to Present Evidence
162.20 Proof–Respondent's Burden
273.00 Rule 3-300 [former 5-101]
430.00 Breach of Fiduciary Duty

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.

The State Bar proved that respondent used over $500,000 of his client's assets for speculative ventures in which he had a financial or ownership interest without any disclosures of the investments or his interests to the client and without providing any periodic accountings to her. In view of the evidence presented, to defend the charges, it was incumbent on respondent to present adequate, contemporaneous records showing that he had complied with the ethical and fiduciary duties of an attorney. He failed to do so. The lack of minimal formality and recordkeeping by respondent supports the hearing judge's findings and conclusions and erodes respondent's defense.

[2] **273.00 Rule 3-300 [former 5-101]**
Respondent's assertion of a broad power of attorney from his client did not relieve him of the duties of former rule 5-101 of the Rules of Professional Conduct of the State Bar regarding standards for attorneys engaged in business transactions with a client.

[3 a-d] **221.00 State Bar Act–Section 6106**
273.00 Rule 3-300 [former 5-101]
420.00 Misappropriation
Considering that respondent treated a significant amount of his client's money as a ready pool to further his and his wife's forays into championship horse breeding and realty acquisition, there was little difference for moral turpitude purposes between this case and the traditional trust funds wilful misappropriation cases. Moral turpitude has been defined 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. This case meets that definition without doubt.

[4] **621 Aggravation–Lack of Remorse–Found**
Respondent failed to demonstrate an appreciation of his misconduct or insight into his wrongdoing. The review department considered this factor to be most related to its adoption of the hearing judge's recommendation of disbarment, noting that as late as oral argument on review, respondent showed no insight into having learned from his extended period of overreaching of his vulnerable client. The review department concluded that the public was therefore at great risk unless respondent was required to successfully complete a reinstatement proceeding before again being allowed to practice law in this state.

ADDITIONAL ANALYSIS

Culpability
Found
221.19 Section 6106–Other Factual Basis
273.01 Rule 3-300 [former 5-101]
Aggravation
Found
582.10 Harm to Client
Found but Discounted
513.10 Prior Record
Mitigation
Found
710.55 No Prior Record
Found but Discounted
710.33 No Prior Record
725.39 Other Reason
Discipline
1010 Disbarment

OPINION

STOVITZ, J.:

Respondent Paul D. Priamos was admitted to practice law in California in June 1970. Effective in July 1995, for commingling and misappropriating trust funds, the Supreme Court suspended respondent for one year, stayed that suspension and placed him on probation for two years on conditions including four months actual suspension. As we shall discuss, *post*, the facts in the prior discipline arose after those which led the hearing judge to recommend disbarment in this proceeding.

In the present proceeding, the hearing judge found that respondent wilfully violated rule 5-101 of the former Rules of Professional Conduct of the State Bar (former rule 5-101)[1], regarding standards for attorneys engaged in business transactions with a client and committed acts of moral turpitude by his seven year self-dealing with over $500,000 of investment funds he was asked by his client to handle. Respondent knew his client was of fragile mental health, yet he took advantage of her condition to invest in speculative ventures in which he had a financial interest without her knowledge or consent and without any adequate record-keeping. He then failed to render adequate accountings despite his client's requests for them and unilaterally paid himself nearly a total of $450,000 in management and legal fees. Considering the seriousness of the found misconduct and that respondent showed no recognition of the seriousness of his misconduct, the hearing judge recommended disbarment without any weight given to his prior discipline.

Respondent seeks review, taking issue with many of the individual findings of fact made by the hearing judge. He also disputes that he violated ethical standards or committed moral turpitude and claims that disbarment is excessive. The State Bar supports the hearing judge's decision and her disbarment recommendation.

Our independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), leads us to adopt the hearing judge's findings and her conclusions, except as modified in one small way. Despite respondent's attack on the findings and conclusions, they are supported by clear and convincing evidence of most serious and repeated breaches of his fiduciary duties to his client over a seven-year period. Although we do not weigh significantly respondent's prior discipline, we observe that if both prior and present proceedings had come before us as one, a recommendation of disbarment would be called for in order to adequately protect the public. No less protection should be afforded the public because the proceedings occurred separately.

I. STATEMENT OF FACTS

Although respondent disputes a number of isolated, specific findings of fact, the essential facts underlying this proceeding are supported by clear and convincing evidence in the record.

In 1979, respondent represented Mary C. (C.) in a marriage dissolution matter. Respondent negotiated a property settlement agreement for C. recovering substantial assets for her, including almost $750,000 plus her interest in several limited partnerships.

In 1980, C. asked respondent to manage her investments. Her goal was to have adequate resources for her support. She wanted respondent to take care of her investments for life and wanted her investments in certificates of deposit so that she could live off of the interest. Respondent considered C. intelligent, but was also aware that she suffered from manic depressive episodes which resulted in her periodic hospitalization for brief periods of time and her inability to work. In April 1980, during one of these hospitalizations, she signed a general power of attorney which she had asked respondent to draft and bring to her. This power allowed respondent the broadest authority in buying and selling any property for C.

1. The substantial provisions of former rule 5-101 are now found in rule 3-300 of the Rules of Professional Conduct of the State Bar.

Shortly after respondent started to handle C.'s affairs, he disbursed to C. funds as needed for her living expenses. These funds were generally disbursed monthly. Initially, respondent sent C. $1,500 per month. Later he increased the stipend to $3,000 per month. These payments continued until 1988.

In order to handle C.'s funds, respondent opened two accounts: a checking account at a bank and a money market account at a brokerage firm.

We find ample support for the hearing judge's essential finding that, between the period of 1981 and 1988, respondent handled about $2.1 million of C.'s funds. The evidence shows that respondent mishandled about half of this sum. His investments of over $500,000 of C's funds were in speculative ventures in which respondent had a financial interest which he did not disclose to C.; nor did he disclose to her the investments themselves or get her consent to them. Many of the investments were not even held in C.'s name, and respondent never rendered an adequate accounting to her in response to her requests. As will be discussed, respondent also unilaterally paid himself attorney and management fees of about $450,000 from C's funds.

In amounts respondent cannot recall, he invested C.'s funds in two properties known as "Hancock" and "Los Serranos." He invested $3,000 for C. in the Chino Hills Country Club and recovered $2,343 for her. He was unable to locate his files on these investments and C. was unaware that he had made these investments.

In October 1983, respondent invested $27,000 for C. in Hauck Financial Corporation ("Hauck"), in which respondent was an officer and director. This investment represented almost ten percent of the Hauck capital. C. did not know of this investment or consent to it. C. received a Hauck stock certificate for 540 shares. Although respondent testified that he told C. of his own interest in Hauck, the hearing judge found his testimony not credible. As of the time of the hearing below, C. had received no return on this investment, and respondent was unsuccessful in selling her shares, which he claims are worth $300,000.

On March 1, 1984, respondent created a partnership with C. to invest in Tennessee Walking Horses, real estate and other investments on his own behalf. Respondent used the general power of attorney C. earlier signed as authority to sign the partnership agreement on C.'s behalf. The partnership agreement called for an even division of profits and losses, gave respondent the power to make investment decisions and to receive a "reasonable" hourly fee for time spent on partnership affairs. Respondent did not give C. the chance to consult with independent counsel regarding the partnership or investments purchased by respondent for it using C.'s money, although the partnership agreement recited that C. had experienced a difficult adjustment to the dissolution of her marriage and "may not be stable enough to sign documents on her behalf."

Partnership purchases included a horse farm in Tennessee. Title to the partnership's farm was held only in the names of respondent and his wife even though $104,000 of C.'s funds were used in August 1985 for the down payment and extinguishment of a second mortgage on the farm. Respondent issued unsecured promissory notes to C. for this sum promising to repay it in five years with ten percent interest. In about 1988, respondent's wife started dissolution of marriage proceedings, and the horse farm became her property as a result of a property settlement agreement. Respondent testified that his wife sold the farm for $245,000.

In 1985, respondent used $353,875 of C.'s funds to purchase 13 horses for the partnership. He did not include either the partnership's or C.'s name as owner. He allegedly did not include C's name to protect her from liability under federal law concerning protection for horses. The hearing judge considered respondent's reason for not including C.'s name as owner and found it not credible. We agree, noting that respondent did not include either the partnership's or C.'s name as owner on other assets not governed by this federal law.

In July 1984, respondent used $26,000 of C.'s funds to buy undeveloped property in Molokai, Hawaii for the partnership. He also used his own funds for this parcel, but did not disclose to C. this purchase or include either the partnership's or her name in the title. Title was held in the name of respondent and his wife as to a 50 percent interest and in the name of one

Mayers as to the remaining 50 percent. Respondent sold this property in 1990 at a profit, but did not account to either the partnership or C. for it.

In June 1985, respondent bought property in Mina, Nevada for the partnership from his brother using $10,000 of C.'s funds. As with the Molokai property, title did not include either the partnership's or C.'s name but was held only in the name of respondent and his wife. Respondent never disclosed to C. this investment. After respondent's dissolution of marriage, title to the Nevada property was held by respondent and his brother.

Between 1981 and 1988, the only information C. received from respondent about her investments was a handwritten summary list of C.'s assets in response to one request for an asset list. C. became concerned in 1986 about her investments and assets and whether respondent was properly looking after her affairs when she read in a newspaper that her property taxes were delinquent. She asked respondent without success on three occasions in 1986 and 1987 for information on where her money was invested. C. asked her son, Michael, to help get an accounting from respondent. Michael requested an accounting from respondent in September 1986, but he failed to provide it although he told Michael that his mother's funds were held in safe investments such as property and certificates of deposit. Michael continued to press respondent through August 1988 for an accounting without success. At that time, C. and her son were able to get some information about C.'s investments from the accountant who prepared the tax returns for the partnership. C. and her son then learned for the first time of the existence of this partnership and that respondent had invested C.'s moneys in such investments as a horse farm, horses and Hawaii and Nevada land.

In September 1988 C. revoked the power of attorney and hired new counsel. She requested that respondent turn over all of her assets, but he did not do so.

C. filed suit against respondent in July 1989 to compel an accounting, to dissolve the partnership and to recover damages for breach of fiduciary duty and fraud. In September 1990 the civil court issued injunctive relief barring respondent from transferring or encumbering any assets purchased with C.'s funds. C.'s suit was stayed because of respondent's resort to the bankruptcy court for relief. In seeking bankruptcy relief, respondent scheduled C. as an unsecured creditor with a claim of $1 million. In 1995, the Bankruptcy Court issued a judgment that C.'s claim was a non-dischargeable debt. This judgment was issued after respondent failed to satisfy an earlier bankruptcy court order that he pay C. $500,000 by a set schedule of monthly payments. Respondent has not paid the $1 million judgment.

As a result of suing respondent, C. learned that he had paid himself $215,715 in management fees and $233,922 in legal fees from her funds. Notwithstanding respondent's testimony that individual investments for C. had become valuable, she has not realized any of that value, except for the apparent sale of one of the horses. Much of the money designed to support C. is gone. In 1989, respondent returned to C. only $86,000.

II. DISCUSSION

A. Findings and Conclusions

Respondent attacks many of the hearing judge's individual findings. Yet his attack does not succeed in showing that the findings are unsupported by clear and convincing evidence. Respondent admittedly knew that his client's mental health was challenged by manic-depressive incidents, which periodically resulted in her hospitalization. [1] The State Bar proved that respondent used over $500,000 of C.'s assets for speculative ventures in which respondent had a financial or ownership interest without any disclosures of the investment or his interests to C. and without providing any periodic accountings to her. In view of the evidence presented by the State Bar as to the investments respondent made, to defend the charges, it was incumbent on respondent to present adequate, contemporaneous records showing that he had complied with the ethical and fiduciary duties of an attorney. He failed to do so. The lack of minimal formality and recordkeeping by respondent supports the findings and conclusions and also erodes respondent's defense. As early as *Clark v. State Bar* (1952) 39 Cal.2d 161, 174, the Supreme Court

observed the duty of an attorney to keep proper books of account and records of client transactions so that the attorney could produce them and show fair dealing if the attorney's actions were called into question. In fact, "'[t]he failure to keep proper books . . . is in itself a suspicious circumstance.' (citations.)" (*Ibid.*)

Essentially, respondent's defenses were based on his version of events as to why he excluded C.'s name from title to the assets, and why he failed to report to C. his purchases or to provide her with accountings. As to the latter, respondent testified that C. would become very upset with having to deal with papers or sign financial documents. However, C. testified that she trusted respondent so much that she would not become upset when he presented papers for her review, only when others did whom she did not trust. The hearing judge saw and heard respondent testify as well as C., her son and her former husband. She repeatedly found respondent's testimony not to be credible, and we give this determination great weight. (Rules of Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); see also, *Read v. State Bar* (1991) 53 Cal.3d 394, 406.) Moreover, our independent review of the record leads us to agree with the hearing judge's findings for several reasons. As we have noted, respondent excluded C.'s name from many assets, not just from title to horses as to which he claims he was seeking to protect C. under federal law. He also took no steps to contemporaneously record what he was doing with C.'s assets so that if he believed that C. would react abruptly, he would still have objectively-prepared documentation to present to anyone making inquiry on her behalf.

Although respondent argues that he did not violate former rule 5-101, this case presents classic and many wilful violations of that rule. (See, e.g., *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 369-372 [attorney's investment of proceeds of client's personal injury judgment in real estate venture which was first secured, but then became an unsecured loan found not to be fair and reasonable].) Here the violations showed respondent's repeated failure to fairly inform C. of his investments in assets in which he had a financial interest and to give C. the chance to seek independent counsel with regard to them. **[2]** Respondent's assertion of his broad power of attorney from C. does not relieve him of the duties of former rule 5-101. (Cf. *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 759-760.)

[3a] We also adopt the hearing judge's conclusion that respondent's misconduct involved moral turpitude in violation of section 6106. Unlike many of the rule 5-101 cases which involved attorneys acting as trustees of non-clients, C. was respondent's client. He represented her in the very recovery which she wanted him to manage and invest. It is settled that an attorney-client relationship is of the very highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813; *Alkow v. State Bar* (1971) 3 Cal.3d 924, 935-936.)

[3b] Respondent was not required to become expert in investments or financial planning. He could have engaged an expert to assist him or C. in making investments suitable for her. However, once respondent undertook these functions he was held to the standards of conduct as an attorney. (Cf. *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517; *Hunniecutt v. State Bar, supra*, 44 Cal.3d at pp. 370-372.). Moreover, no law or published opinion can excuse respondent from complying with basic fiduciary duties of complete and adequate recordkeeping, security for C., and accountings of assets which are basic to the satisfactory discharge of his fiduciary duties. From the very outset of his investment dealings with C. to his discharge seven years later, respondent ignored his duties. He failed to set forth in writing the nature of risk and investment objectives to pursue for C. and to get her consent to them. He repeatedly exposed C. to an unacceptable degree of risk knowing of her fragile mental state and her need for resources for her care. He repeatedly dealt unilaterally with C.'s property and invested over $500,000 in assets in which he was interested. He repeatedly deflected C.'s requests or her son's for specific information about her investments. He repeatedly failed to afford C. that degree of minimal legal protection for investments which he, as an attorney, knew was essential. Finally, he unilaterally took about $450,000 in legal and management fees.

[3c] At first glance, this case may not appear comparable to the traditional one of wilful misappropriation by an attorney of trust funds which usually

compels a conclusion of moral turpitude. (See, generally, *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37-38.) However, considering that respondent treated a significant amount of C.'s money as a ready pool to further his and his wife's forays into championship horse breeding and realty acquisition, there appears little difference for moral turpitude purposes between this case and the traditional trust funds wilful misappropriation cases.

[3d] Moral turpitude has been defined 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.' (Citation.)" (*In re Higbie* (1972) 6 Cal.3d 562, 569.) This case meets that definition without doubt. We disagree with only one small conclusion of the hearing judge that suggests that respondent committed moral turpitude by obtaining C.'s power of attorney when she was vulnerable. We do not regard the obtaining of the power of attorney per se as evidence of moral turpitude. (Cf. *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 452.) However, respondent did commit moral turpitude by the cavalier way in which he utilized that power to self-deal in C.'s funds.

B. Degree of Discipline

We agree with the limited mitigating weight which the hearing judge gave to respondent's family pressures. Moreover, we observe that those pressures were not present at the outset of respondent's misconduct. We also agree that respondent's record without previous discipline was considered in his earlier disciplinary proceeding, and his prior discipline was mitigated substantially because of it and other mitigation. We also note that since respondent's misconduct started in 1981, only 11 years after his admission to practice law, mitigation from that factor would be limited at best.

We adopt the hearing judge's conclusion that the aggravating circumstances far outweigh any mitigation. Although we do not assign any significant weight to respondent's prior discipline, we note that had both prior discipline, and present proceedings been joined together, disbarment would be appropriate. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619.) The nature of respondent's prior shows that he was disciplined for commingling with his own funds and misappropriating $12,558 in trust funds he received in 1989 as counsel for the representative of a decedent's estate.

[4] We agree with the remaining findings in aggravation by the hearing judge in this proceeding including the serious harm caused by respondent, his indifference to rectification of harm -- he having restored only $86,000 in 1989 -- and, most significantly, that he has failed to demonstrate an appreciation of misconduct or insight into wrongdoing. We consider the latter factor to be most related to our adoption of the hearing judge's recommendation of disbarment. Indeed, as late as oral argument of this review, respondent showed no insight into having learned from his extended period of overreaching of his vulnerable client. We believe that the public is therefore at great risk unless respondent is required to successfully complete a reinstatement proceeding before again being allowed to practice law in this state.

III. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, we adopt the decision of the hearing judge and her recommendation that respondent Paul D. Priamos be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice. We further recommend that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code, as amended effective January 1, 1997.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

John H. Greenwood

A Member of the State Bar

No. 95-O-13943; 95-O-15779 (Consolidated)

Filed April 2, 1998

SUMMARY

In two consolidated original disciplinary proceedings, the hearing judge issued a decision following a default trial recommending an 18-month stayed suspension on conditions of probation, including a 90-day period of actual suspension. Following the filing of the default decision, respondent moved to set aside his default. The hearing judge denied respondent's motion to set aside his default on the issue of culpability, but granted the motion on the issue of discipline. The hearing judge set an additional hearing on discipline, at which respondent testified in mitigation. The hearing judge thereafter issued a new decision which recommended an entirely stayed suspension and probation. The State Bar thereafter sought review.

The Review Department concluded that the hearing judge erred in setting aside respondent's default and in conducting later proceedings in which the actual suspension recommendation was eliminated. The Review Department reversed the hearing judge's order granting, in part, respondent's motion for relief from default and reinstated respondent's default in its entirety.

The Review Department recommended an 18-month stayed suspension with probation for two years on conditions including a 90-day period of actual suspension.

COUNSEL FOR PARTIES

For State Bar: John E. DeCure

For Respondent: No Appearance

HEADNOTES

[1] **107 Procedure–Default/Relief from Default**
125 Procedure–Post-Trial Motions
167 Abuse of Discretion

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.

Even though plenary review is sought, the issue of whether a hearing judge erred in setting aside a default as to the limited issue of the degree of discipline is reviewed under the limited scope of review customarily used for procedural questions, testing whether the hearing judge committed legal error or abuse of discretion.

[2 a-e] **107 Procedure–Default/Relief from Default**
125 Procedure–Post-Trial Motions
135.50 Division V, Defaults and Trials (rules 200-224)

The hearing judge erred in using the State Bar's request to add a quarterly reporting probation condition to conclude that limited relief under rule 203(e)(3)(B), Rules of Procedure of the State Bar, warranted the setting aside of the default on the issue of discipline. Rule 203(e)(2) allows a judge to vacate a default subject to appropriate conditions. Rule 203(e)(3)(B) allows a judge to vacate a default entered after filing of the decision, for limited purposes. There is nothing in rule 203(e) that eliminates the burden the respondent must sustain under rule 203(c), Rules of Procedure of the State Bar. Only after a defaulting respondent has made a sufficient showing for relief under rule 203(c), may a hearing judge set aside a default unconditionally or on appropriate conditions or for a limited purpose under rule 203(e). Since the judge's decision on its face concluded that respondent had not made the required showing under rule 203(c)(2), the judge erred when setting aside respondent's default.

[3] **107 Procedure–Default/Relief from Default**
125 Procedure–Post-Trial Motions
135.50 Division V, Defaults and Trials (rules 200-224)

In a motion for relief from default, general allegations of despondency and depression do not meet decisional law standards for relief, even under the more liberal requirements of rule 202(c)(1), Rules of Procedure of the State Bar.

[4 a-d] **213.90 State Bar Act–Section 6068(i)**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Respondent's two serious instances of reckless failure to perform legal services which resulted in the dismissal of his clients' civil lawsuits, and respondent's failure to cooperate with the State Bar investigations warrants a discipline recommendation of 18-months stayed suspension, two years of probation, and a 90-day actual suspension.

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

Aggravation
Found
582.10 Harm to Client

Mitigation

Declined to Find
710.51 Not in Practice long enough

Discipline
1013.07 Stayed Suspension–18 Months
1015.03 Actual Suspension–3 Months
1017.08 Probation–2 Years

Probation Conditions
1024 Ethics Exam/School

Other
175 Discipline–Rule 955
178.10 Costs–Imposed

OPINION

STOVITZ, J.:

The State Bar's Office of Chief Trial Counsel (State Bar) requests our review of a decision of a hearing judge of the State Bar Court. That decision found respondent John H. Greenwood culpable of professional misconduct in two matters; and after setting aside his default and allowing him to testify in mitigation, recommended that he be placed on suspension, all of which is to be stayed.

The State Bar takes no issue with the hearing judge's findings of culpability. The State Bar's review is limited to urging that the hearing judge erred in setting aside respondent's default, in allowing him to testify to mitigating circumstances, and in not recommending actual suspension as a condition of probation.

Respondent declined to file an appellee's brief; and after notice to the parties and declination of the State Bar to request oral argument, this matter was submitted without argument. We conclude that the hearing judge erred in setting aside respondent's default and in conducting later proceedings in which she eliminated the actual suspension recommendation.

I. STATEMENT OF THE CASE

A. The proceedings prior to setting aside respondent's default

These proceedings started in March and July 1996 with the filing of notices of disciplinary charges (notices) in two separate matters. After proper service of the notices, respondent failed to answer the charges, and his default was entered in each proceeding on July 16, 1996, and September 4, 1996, respectively. The two notices were consolidated for default trial, which was held in October 1996.

B. Culpability and first recommendation of discipline

The hearing judge found respondent culpable in both proceedings. Her findings, in summary, are as follows: In one matter, a Michigan law firm whose client was injured while visiting California hired respondent in October 1992 to represent the client in a California municipal court action seeking damages for the injury. Respondent failed to appear at the April 1993 mandatory status conference in that matter. The client's case was dismissed. Respondent never informed the client or Michigan counsel of the dismissal, despite inquiries and respondent's promises to reply. Respondent also failed to reply to a State Bar investigator's 1995 inquiry concerning this matter. The hearing judge concluded that by failing to appear at the status conference, respondent recklessly failed to perform services in violation of rule 3-110(A) of the Rules of Professional Conduct of the State Bar (Rules of Professional Conduct) and that, by his conduct in not proceeding further, he improperly withdrew from employment in violation of rule 3-700(A)(2) of the Rules of Professional Conduct.[1] The hearing judge also concluded that respondent's failure to reply to the State Bar investigator's inquiry violated Business and Professions Code section 6068, subdivision (i).[2]

In the second proceeding, the hearing judge found respondent culpable of a more serious failure to represent another client who had hired him in 1992 in a superior court civil matter. The hearing judge found that respondent failed to respond to defense discovery requests in 1993, despite receiving several time extensions. Even after being sanctioned by the court, respondent did not reply to the discovery requests; and after granting respondent further opportunities to respond, the superior court dismissed the client's case in June 1994. Four months after the expiration of the five-year period to bring the case to trial, respondent sought relief from the dismissal. In

1. The hearing judge failed to conclude that these two violations were willful. (See rule 1-100, Rules of Professional Conduct). Based on the undisputed facts, we conclude that they were willful.

2. Unless noted otherwise, all references hereafter to sections are to the provisions of the Business and Professions Code. Although the hearing judge failed to find this violation to be willful, we so find.

1995, respondent failed to respond to several client requests for return of her file; and later that year, respondent failed to reply to a State Bar investigator's 1995 inquiry concerning this matter. The hearing judge concluded that respondent recklessly failed to perform services in violation of rule 3-110(A) of the Rules of Professional Conduct; failed to appropriately communicate with his client in violation of section 6068, subdivision (m); and violated a court order to comply with discovery in violation of sections 6068 subdivision (b) and 6103. Also, the hearing judge determined that respondent's failure to return the client's file violated rule 3-700(D) of the Rules of Professional Conduct; and that his failure to reply to the State Bar investigator's inquiry violated section 6068, subdivision (i).[3]

Finding no mitigating circumstances and several aggravating circumstances including harm to the clients whose actions were lost by respondent's effective abandonment of them, the hearing judge recommended respondent's suspension for eighteen months, stayed on conditions of probation including a 90-day actual suspension.

C. Post-culpability proceedings and revised disciplinary recommendation

The hearing judge filed her decision on October 18, 1996. Thereafter, on October 29, 1996, respondent moved to set aside his default. In a declaration executed under penalty of perjury, respondent admitted that he had been "delinquent" in filing his motion. He had also been despondent over his mother's illness, which led to her death in April 1995. Since then, he had been depressed. Regarding receipt of the notice in the first matter, he "cannot state that [he] did not receive [it]." He became unable to work, became delinquent in his office rent, vacated his office, and did odd jobs and made occasional appearances for other attorneys until April 1996, at which time he entered into an office space arrangement with a new attorney. After changing his address, respondent "received the State Bar Court's papers but his mental condition did not allow [him] to deal with them." Respondent gave no details of his condition, but stated that his receipt of the hearing judge's decision in October 1996 caused him to realize that he was sick and needed help.

On November 1, 1996, the State Bar moved for reconsideration of the October 18, 1996, decision on the sole ground that the recommended conditions of probation failed to require respondent's quarterly reporting of his compliance with the probation terms. Thereafter, on November 13, 1996, the State Bar filed an opposition to respondent's application to set aside the default arguing that respondent's motion was untimely, failed to show good cause for relief, and failed to comply with procedural rules.

On November 20, 1997, the hearing judge determined that respondent had not shown good cause to set aside his default on the issue of culpability, but granted the motion to set aside the default on the issue of discipline, noting that the State Bar had sought to have the issue of discipline reconsidered.

The hearing judge set an additional hearing on discipline on February 3, 1997, at which respondent testified. On February 7, 1997, the hearing judge issued a new decision, which recommended an entirely stayed suspension. The present appeal by the State Bar followed. Since respondent did not timely file his brief, he was precluded from appearing on review.

II. DISCUSSION

A. Relief from Default

There is no dispute concerning the findings or conclusions of respondent's culpability. After independent review of the record, we adopt the findings, noting the support for them in the documentary evidence, as well as by respondent's default, which was never set aside on the issue of culpability. (Rule 200(d)(1), Rules Proc. of the State Bar, title II, State Bar Court Proceed- ings;[4] see also §6088.)

3. As in the first matter, we conclude that respondent's violations were willful.

4. Unless noted otherwise, all references hereafter to rules are to the Rules of Procedure of the State Bar.

[1] The first key issue in this review is whether the hearing judge erred in setting aside the default even as to the limited issue of the degree of discipline. Although the State Bar brings this review under rule 301, we review the default issue under the limited scope of review customarily used for procedural questions, testing whether the hearing judge abused her discretion or committed legal error. (See *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214.)

[2a] As to timely motions to set aside defaults under rule 203(c), that rule allows for relief "on the grounds of mistake, inadvertence, surprise or excusable neglect." It also provides that it shall be interpreted just as in civil matters arising under section 473 of the Code of Civil Procedure.

[2b] The State Bar contends that the hearing judge abused her discretion because respondent's showing in support of his untimely motion for relief for default fell short of required proof. The State Bar also contends that the judge erroneously characterized as substantive, the State Bar's request to reconsider the degree of discipline. As we shall discuss, we agree with the State Bar's arguments.

[2c] Respondent did not file his motion to set aside his default within 45 days after entry of default in the later of the two ultimately consolidated matters. Accordingly, respondent was required to comply with the even stricter showing of rule 203 (c)(2). That provision required respondent to prove clearly and convincingly his lack of receipt or knowledge of the charges until after the 45-day period, prompt filing of his motion, and that his failure to timely file his answer to the charges was excused "by compelling circumstances" beyond his control.

[2d] When deciding respondent's motion for relief from default, the hearing judge agreed with the State Bar that respondent "has not met the high burden required" by rule 203(c)(2) and that it was not appropriate to set aside the default on culpability. However, the judge used the State Bar's request to add a quarterly reporting probation condition, to conclude that limited relief under rule 203(e)(3)(B) warranted her setting aside the default on the issue of discipline. In doing so, the judge erred.

[2e] Rule 203(e)(2) allows a judge to vacate a default subject to appropriate conditions. Rule 203(e)(3)(B) allows a judge to vacate a default entered after filing of the decision, for limited purposes. We do not read anything in rule 203(e) as eliminating the burden the respondent must sustain under rule 203(c). To do so, would erase the relief requirements of that rule. Rather, we hold that only *after* a defaulting respondent has made a sufficient showing for relief under rule 203(c), may the hearing judge set aside the default unconditionally or on appropriate conditions or for a limited purpose under rule 203(e). Here, since the judge's decision on its face concluded that respondent had not made the required showing under rule 203(c)(2), the judge erred when setting aside respondent's default. Accordingly, we reverse the hearing judge's order granting, in part, respondent's motion for relief from default and reinstate respondent's default in its entirety.[5] (See, generally, rule 203(d) [proscribing relief from default on the ground that discipline sought by the State Bar exceeds that set forth in the motion for entry of default].)

B. Degree of Discipline

As noted, the State Bar contends that the hearing judge erred by eliminating the requirement of actual suspension from her recommendation. We review this issue by exercising our independent review of the record. (Rule 305 (a); *In re Morse* (1995) 11 Cal.4th 184, 207.)

5. [3] Although the lack of good cause to set aside the default is not in issue, in assessing whether an abuse of discretion or error of law occurred, we have looked to the record and the applicable law. Respondent did not allege that he failed to receive at least one of the notices. His general allegations of despondency and depression, although evoking genuine sympathy, do not meet decisional law standards for relief, even under the more liberal requirements of rule 202(c)(1). (See *In the Matter of Morone, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 214-215 [discussing cases decided under Code of Civ. Proc., §473].)

[4a] Respondent is culpable of two serious instances of reckless failure to perform legal services. In both cases, civil lawsuits which the clients were pursuing were dismissed. As the hearing judge concluded correctly in both matters, respondent "effectively abandoned his clients." This harmed them by loss of their legal rights. In both matters, respondent failed to cooperate with the subsequent State Bar investigations. Although he has no prior record of discipline, his six years of practice prior to the start of misconduct was correctly found by the hearing judge not to be mitigating. The judge did consider somewhat mitigating the testimony on behalf of respondent. However, since we have held that the judge erred by allowing that evidence to be adduced, we do not consider it in our review of the disciplinary recommendation. In our view, respondent's culpability is affected only by aggravating circumstances.

[4b] The hearing judge did not cite any decisional law to support the discipline she recommended. On review, the State Bar does not cite any guiding cases to support its request for greater discipline. Actual suspension has been recommended in similar cases. In *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, the failure in one matter to perform services competently causing the client harm, improper withdrawal from employment while the client was incarcerated, failure to render an accounting of unearned fees and failure to refund them resulted in a one-year stayed suspension and three-year probation, conditioned on a 45-day actual suspension. Aulakh had no prior record of discipline in 20 years of practice, but was found to be very uncooperative during the disciplinary process.

[4c] In *King v. State Bar* (1990) 52 Cal.3d 307, the Supreme Court imposed a 90-day actual suspension as part of a longer, stayed suspension. King has no prior record of discipline but had willfully failed to perform services in two cases, resulting in a large default judgment against one of King's clients.

[4d] In *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 45-46, we reviewed the discipline for cases in which an attorney with no prior record had been found culpable of abandoning a single client and observed that in those cases the discipline ranged from no actual suspension to 90 days actual suspension. (See also *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 466; *In the Matter of Nunez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 196, 206.) Given the misconduct which caused respondent's two clients to lose their legal rights, the 90-day actual suspension first recommended by the hearing judge is warranted.

III. RECOMMENDATION

For the foregoing reasons, we recommend that respondent John H. Greenwood be suspended from the practice of law for a period of 18 months, that execution of that suspension be stayed, and that respondent be placed on probation for a period of 2 years, on the conditions that he be actually suspended for the first 90 days of the period of probation and that he comply with the remaining conditions of probation numbered one through eight on pages seven through ten of the hearing judge's decision filed February 7, 1997. We also recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court's order in this matter. We further recommend that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code, as amended effective January 1, 1997.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Steven Kroff

A Member of the State Bar

No. 94-O-13729, et al.

Filed April 15, 1998

SUMMARY

In this original disciplinary proceeding, respondent was charged with 48 counts of misconduct. The hearing judge found respondent culpable in 26 counts, which included multiple acts of illegal client solicitation, multiple acts of moral turpitude including multiple acts of misrepresentation, two instances of charging or attempting to collect an unconscionable fee, two instances of failing to account to a client, and two instances of failing to pay his client all the settlement funds to which the client was entitled. The hearing judge recommended that respondent be suspended from the practice of law for three years, that said suspension be stayed, and that respondent be placed on probation for four years on conditions including 18 months actual suspension and until he pays restitution. The State Bar sought review of the hearing judge's discipline recommendation. (Hon. Nancy R. Lonsdale, Hearing Judge.)

The review department affirmed most of the hearing judge's factual determinations, made certain other modifications and recommended that respondent be suspended from the practice of law for a period of five years, that execution of said suspension be stayed, and that respondent be placed on probation for five years subject to conditions including three years actual suspension and until respondent pays restitution and until he provides proof of his rehabilitation, fitness to practice, and learning and ability in the general law.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Dal Cerro

For Respondent: Steven Kroff, in pro. per.

HEADNOTES

[1] **253.00 Rule 1-400(C) [former 2-101(B)]**
Even if respondent had received messages to call each prospective client from a "friend" of the prospective client, his solicitation telephone call or calls to each prospective client violated rule 1-400(C) of the Rules of Professional Conduct because none of the prospective clients had requested the "friend" to ask respondent to call them.

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] **220.30 State Bar Act—Section 6104**
A respondent who, without authority, wrote to an insurance carrier claiming that he represented a client is not culpable of violating Business and Professions Code section 6104. Such conduct does not constitute an "appearance" within the meaning of section 6104 which provides for discipline for "[c]orruptly or willfully and without authority appearing as attorney for a party to an action or proceeding."

[3 a-d] **221.00 State Bar Act—Section 6106**
A client may be billed the reasonable cost a firm itself incurs, but no more, for in-house costs such as photocopying, couriers, or meals eaten while working on a client's case. It appears that charging a flat periodic fee or lump sum to cover disbursements is permissible in any particular case if it does not result in an unreasonable amount of compensation and if the client has given informed consent to the arrangement. Respondent's collection of estimated lump sum costs was not an act involving moral turpitude as there was no evidence that costs were excessive or that respondent hid his lump sum costs reimbursement procedures from his client.

[4 a, b] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
Respondent did not disclose the costs sanctions he received from an insurance company in his accounting to his client. In the absence of an express agreement or court order to the contrary, any costs or attorney's fees awarded by a court as sanctions are for the account of the client. Respondent therefore failed to properly account to his client in violation of rule 4-100(B)(3) of the Rules of Professional Conduct.

[5 a, b] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where a client asks an attorney to distribute funds claimed by the client and where the attorney claims an interest in the funds, the attorney violates rule 4-100(B)(4) if he or she does not promptly taken appropriate, substantive steps to resolve the dispute in order to disburse the funds. As respondent effectively took prompt, substantive action to resolve the dispute with his client by participating in the fee arbitration proceeding and by promptly abiding by the arbitrators' award, he did not violate the rule.

[6] **194 Statutes Outside State Bar Act**
199 General Issues—Miscellaneous
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 (former 2-111(A), (5) (different)) (advocate-witness)
The terms judges and judicial officers as used in Business and Professions Code section 6068(d) and rule 5-200(B) of the Rules of Professional Conduct are limited to those individuals who are officers of a state or federal system and who perform judicial functions. Thus, the review department reversed the hearing judge's determination that respondent attempted to mislead judicial officers, in violation of section 6068(d) and rule 5-200(B), when he told an arbitration panel that he had represented his clients previously. The local bar association's arbitration panel was not composed of judges or judicial officers as required under both section 6068(d) and rule 5-200 and the local bar association's arbitration panel was not court-appointed.

[7] **241.00 State Bar Act—Section 6147**
565 Aggravation—Uncharged Violations—Declined to Find
Although respondent never entered into a written contingent fee agreement with his client as required by Business and Professions Code section 6147, the failure to enter into a written contingent fee agreement is not a disciplinable offense. Thus, the review department did not adopt the hearing judge's aggravation determination with respect to this issue.

[8] **221.00 State Bar Act—Section 6106**
691 Aggravation—Other—Found

Respondent's practice of orally authorizing his staff to sign his name to declarations made under the penalty of perjury without disclosing, on the declaration, the fact that they were signing the declaration with respondent's permission or at his direction was misleading and inappropriate and thus was aggravation.

[9 a-d] **511 Aggravation—Prior Record—Found**
805.10 Standards—Effect of Prior Discipline
833.90 Standards—Moral Turpitude—Suspension
1091 Substantive Issues re Discipline—Proportionality
1099 Substantive Issues re Discipline—Miscellaneous

Respondent was found culpable of ten disciplinable acts of moral turpitude (seven acts of misrepresentation, one act of improperly retaining for his own benefit funds out of a medical provider's lien reduction, and one act of attempting to obtain a greater fee than that to which he was entitled by failing to disclose to his client costs he recovered), eight instances of improper solicitation of clients, and two instances of failing to properly account to his client. There were substantial aggravating factors, including a prior record of discipline, but no mitigating circumstances. The review department recommended that respondent be suspended from the practice of law for a period of five years, that execution be stayed, and that respondent be placed on probation for a period of five years on conditions including three years actual suspension and until respondent pays restitution and until he provides proof of his rehabilitation, fitness to practice, and learning and ability in the general law.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.19 Section 6106—Other Factual Basis
243.01 Sections 6150-6154
253.01 Rule 1-400(C) [former 2-101(B)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
290.01 Rule 4-200 (former 2-107)
Not Found
213.15 Section 6068(a)
243.05 Sections 6150-6154
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
Aggravation
Found
531 Pattern
561 Uncharged Violations
586.10 Harm (1.2(b))(iv)) To administration of justice
Mitigation
Declined to Find
715.50 Good Faith
745.50 Remorse/restitution/atonement (1.2(e)(vii))

Standards
- 802.30 Purposes of Sanctions
- 802.61 Appropriate Sanction

Discipline
- 1013.11 Stayed Suspension—5 Years
- 1015.09 Actual Suspension—3 Years
- 1017.11 Probation—5 Years

Probation Conditions
- 1021 Restitution
- 1024 Ethics Exam/School
- 1030 Standard 1.4(c)(ii)

Other
- 175 Discipline—Rule 955
- 178.10 Costs—Imposed

OPINION

OBRIEN, P.J.:

The State Bar seeks review of a hearing judge's recommendation that respondent Steven Kroff[1] be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be placed on probation for four years subject to conditions, including a period of actual suspension of 18 months and until he makes restitution to a former client in the principal sum of $390.55 plus interest. Even though respondent did not file his own request for review as required under rule 301(b) of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings (Rules of Procedure for State Bar Court Proceedings), he also seeks review of the hearing judge's recommendation.

In the notice of disciplinary charges as amended by order filed July 19, 1996, (notice) the State Bar charges respondent with 47 counts of misconduct in 14 different client matters and with one additional count (count number 48) alleging that respondent's misconduct under a number of the first 47 counts establish "a pattern and course of conduct of acts of moral turpitude." The hearing judge held respondent culpable on most of the counts charged under client matters involving Crowell (counts 1-3), Abary (counts 4-8), Pericoli (counts 9, 10 and 13), Otoya (counts 17-25), Muhammad (counts 26-30), Spence (counts 31-33), Robins (counts 34-36), and Ravare (counts 37-39), but on the motion of the State Bar, the hearing judge dismissed each count charged under the client matter involving Morris (counts 40-41) and the third count under the client matter involving Harden (count 42). She also dismissed count number 48, which alleges a pattern of acts involving moral turpitude, as duplicative of other counts. In addition, the hearing judge either explicitly or implicitly dismissed each count charged under the client matters involving Vidal (counts 11-12), Barrueto (counts 14-16), Gordon (count 45), Crutchfield (counts 46-47) and two counts under the client matter involving Harden (counts 43-44) for want of clear and convincing evidence of culpability.

On review the State Bar does not challenge any of the hearing judge's factual findings except with respect to the client matter involving Harden. Furthermore, the State Bar requests that we make an additional determination of aggravation and increase the recommended discipline to disbarment.

Respondent, on the other hand, challenges most of the hearing judge's adverse culpability determinations under the client matters involving Abary, Otoya, and Muhammed. With respect to the client matters involving Crowell, Pericoli, Spence, Robins, and Raware, respondent challenges only the hearing judge's adverse moral turpitude determinations. Finally, respondent contends that the hearing judge's discipline recommendation is appropriate except for the recommended 18 months' actual suspension. Respondent requests that we modify the hearing judge's discipline recommendation to reduce the recommended period of actual suspension to one year.

We affirm the hearing judge's factual determinations, except as indicated, reverse the dismissals of the charged violations of rule 1-400(B) of the Rules of Professional Conduct of the State Bar[2], treat them as charged violations of rule 1-400(C), and make a distinction between those cases in which solicitation was by telephone only and those cases where the solicitation was in person. We reverse the culpability filings under Business and Professions Code section 6068, subdivision (a)[3] charging illegal conduct under section 6152 in those cases where the section 6068, subdivision (a) violations are duplicative of the rule 1-400(C) violations. We make certain other modifications as indicated below and recommend actual suspension for a period of three years and until

1. Respondent was admitted to the practice of law in the State of California on June 28, 1973, and has been a member of the State Bar since that time.

2. Unless otherewise indicated, all future references to rules are to the Rules of Professional Conduct of the State Bar.

3. Unless otherwise indicated, all future references to sections are to sections of the Business and Professions Code.

respondent makes restitution and a showing of rehabilitation, present fitness to practice and ability in the general law.

I. DISMISSALS

Neither party challenges the hearing judge's dismissal on the State Bar's motion of the charges under the client matter involving Morris (counts 40-41), and we adopt that disposition, but modify it to reflect that it is with prejudice. (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 679-680; Rules Proc. for State Bar Court Proceedings, rule 261(a) ["All orders dismissing a proceeding in whole or in part shall specify whether such dismissal is with or without prejudice."].) Moreover, neither party challenges the hearing judge's post-trial dismissal of the charges under the client matters involving Videl (counts 11-12), Barrueto (counts 14-16), Gordon (count 45), and Crutchfield (counts 46-47) for want of clear and convincing evidence of culpability, and after independently reviewing the record, we adopt those dispositions.[4] The dismissal of charges for want of proof after a trial on the merits is always with prejudice.

Finally, neither party challenges the hearing judge's dismissal of count number 48 as duplicative of other counts, and we adopt that disposition, but modify it to reflect that it is with prejudice. (*Ibid.*)

II. FINDINGS OF FACT AND CONCLUSIONS OF CULPABILITY

We adopt the hearing judge's findings of fact and conclusions of culpability as modified below. We first discuss the charges in the Crowell matter, followed by a combined discussion of the Pericoli, Muhammad, Spence and Robins matters. This is followed by separate discussions of the Ravare, Abary, Otoya and Ramsey matters.

A. The Crowell Matter — (Counts 1, 2 and 3)

Roberta Crowell and her two children, Nathan and Sidney, were involved in an automobile accident in April 1994. Thereafter, on April 28, 1994, someone who identified himself as respondent telephoned the Crowell home and left a message on an answering machine asking that Nathan return his telephone call.[5] Ms. Crowell returned the telephone call for Nathan because he was only three years old at the time. When Ms. Crowell returned the call she got respondent's law office and left a message for respondent that she was returning his earlier call to Nathan. When she left her message, Ms. Crowell disclosed the fact that Nathan was only three years old.

Later that same evening, respondent telephoned the Crowells' home, and Mr. Crowell (Ms. Crowell's husband and Nathan's father) answered the phone. Respondent asked to speak to Nathan and inquired about the automobile accident. When Mr. Crowell asked respondent why he thought that they needed an attorney, respondent stated that a friend of the Crowells' had referred the Crowells to him. When Mr. Crowell asked respondent to identify the "friend," respondent refused to do so. Respondent told Mr. Crowell that he would not disclose the identity of the "friend" because it was protected by the attorney-client privilege.

Mr. Crowell, who is also an attorney, then told respondent that the "friend's" name is not protected by the attorney-client privilege and again asked for the "friend's" name. Respondent replied by asking Mr. Crowell if he were an attorney. When Mr. Crowell answered "yes," respondent stated: "Well, then, you can represent yourself," and hung up on Mr. Crowell.

The Crowells had not asked anyone to help them find an attorney. Nor had they had any prior dealings with or knowledge of respondent.

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4. An independent basis for adopting the hearing judge's dismissal of count number 45, which charged a violation of the section 6068, subdivision (f) proscription against engaging in offensive personality, is the Ninth Circuit's conclusion in *United States v. Wunsch* (9th Cir. 1995) 84 F.3d 1110, 1119-1120 that subdivision (f) is unconstitutionally vague.

5. Even though the Crowells' telephone number is not unlisted, it is listed under the pseudonym Roberta Fox. The Crowells' home telephone number was, however, listed on the police report on the automobile accident.

At trial, respondent testified that he called the Crowells' home because he "received that telephone call from either a friend of the Crowell's [sic.], a former client of mine, an acquaintance or a relative. I don't remember, and I don't have any records as to who." But the hearing judge expressly found that "[r]espondent's claim that he was given the Crowells' name and telephone number by a "friend" is incredible and is determined to be a fabrication." We adopt both the hearing judge's credibility determination rejecting respondent's explanation and her finding that respondent's statement to Mr. Crowell was a fabrication. On review, respondent challenges this fabrication finding. We note that we reject respondent's challenge here, but discuss it below with respondent's challenge to five similar findings.

1. Illegal Solicitation — Count 1

Under count one, the hearing judge held that respondent's telephone calls to the Crowells were illegal solicitations for professional employment under section 6152. The hearing judge further held that respondent's illegal solicitations were disciplinable offenses under section 6068, subdivision (a). Subdivision (a) provides that attorneys have a duty "[t]o support the Constitution and laws of the United States and of this state."

It is not clear from the text of section 6152 whether it prohibits telephone solicitations. Section 6152 appears to proscribe only in-person solicitation, whether by an attorney or his agent. (For a discussion of the legislative history of section 6152 and other sections dealing with "runners and cappers," see *Hutchins v. Municipal Court* (1976) 61 Cal.App.3d 77, 85-89.) We, however, do not reach this issue because, as discussed in more detail below under count two, we shall decline to adopt the hearing judge's determination that respondent violated section 6152 and dismiss count one as duplicative of count two.

2. Telephone Solicitation — Count 2

In count two of the notice, the State Bar charges that respondent engaged in improper solicitation by telephone in violation of rule 1-400(B). As the hearing judge correctly notes in her decision, the State Bar's citation to subdivision (B) of rule 1-400 is erroneous. Subdivision (B) is a "definitional" subdivision, which defines the term "solicitation." The State Bar should have cited to subdivision (C) of rule 1-400, which is the applicable "charging" subdivision of rule 1-400. Subdivision (C) proscribes, to the fullest constitutional extent, attorney solicitations for professional employment for pecuniary gain delivered in person or by telephone unless the prospective client is a former or present client or a family member of the attorney.

Because of this citation error, the hearing judge implicitly dismissed count two by declining to hold respondent culpable under it. In our view, the hearing judge erred. "To be sure, the State Bar [Court] cannot impose discipline for any violation not alleged in the original notice to show cause. [Citation.] ... Yet adequate notice requires only that the attorney be fairly apprised of the precise nature of the charges before the proceedings commence. [Citation.]" (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928-929; accord *Sullins v. State Bar* (1975) 15 Cal.3d 609, 618.)

The notice gives respondent full knowledge of the specific conduct alleged to constitute the misconduct (soliciting professional employment from the Crowells over the telephone on April 28, 1994, with respect to their automobile accident). In addition, the notice explicitly charges respondent with engaging in improper telephone solicitation. Moreover, respondent never objected to the citation error; nor has he alleged any prejudice, much less established it.

Without condoning the State Bar's citation error, we conclude that the notice fairly apprises respondent of the precise nature of the charges and that the State Bar's citation error was, therefore, harmless error. (Cf. *Brockway v. State Bar* (1991) 53 Cal.3d 51, 63 [former rule 5-101 violation sustained even though it was not listed by number in the notice]; *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321 [former rule 8-101(A) violation found by the Supreme Court even though it was not listed by number in the notice]; *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 506 [section 6068, subd. (a) violation sustained even though it was not listed by number in the notice].)

Accordingly, we reverse the hearing judge's implicit dismissal of count two and hold that respondent is culpable of willfully engaging in improper telephone solicitation in violation of rule 1-400(C).

Moreover, for the reason discussed under count one, we decline to adopt the hearing judge's determinations that respondent's solicitation of the Crowells was illegal under section 6152 and that respondent, therefore, violated section 6068, subdivision (a). We need not reach that issue because, as we have determined in count one, the identical conduct does constitute a violation of rule 1-400(C). For this reason we dismiss count one. (See, e.g. *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 ["little, if any, purpose is served by duplicative allegations of misconduct"].) We do note that the Supreme Court has held attorneys culpable of improper solicitation in violation of both the Rules of Professional Conduct and section 6152 (see, e.g., *Rose v. State Bar* (1989) 49 Cal.3d 646, 659), but note that in those cases there was both personal and telephonic solicitation.

3. Moral Turpitude — Count 3

Under count three the hearing judge held that respondent committed a violation of the section 6106 proscription of acts involving moral turpitude. We agree with her holding that respondent's false representation to Mr. Crowell that a "friend" of the Crowells' had referred them to respondent was an act involving moral turpitude in violation of section 6106. (See, generally, *Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 ["deceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive for personal gain"].)

B. The Pericoli, Muhammad, Spence, and Robins Matters

In the Pericoli, the Muhammad, the Spence and the Robins matters, the hearing judge found that respondent engaged in virtually the identical misconduct she found in the Crowell matter. With respect to the Muhammad matter, the hearing judge found two additional counts of misconduct, and respondent challenges them both on review. We address those two additional counts and respondent's challenge of them in a separate section below.

With respect to the Muhammad matter, we adopt and incorporate herein by reference each of the hearing judge's findings of fact except for those related to respondent's return of the client's file, which we disregard as immaterial to any charge.[6] With respect to each of the remaining three client matters listed above, we adopt and incorporate herein by reference each of the hearing judge's findings of fact.[7]

In each of these three client matters, respondent telephoned a victim of an automobile accident at home, usually within a week of the accident, and solicited professional employment for pecuniary gain from her or him with respect to the automobile accident. In addition, respondent falsely represented to the victim in each of these client matters that a friend of the victim's had referred him or her to respondent or had asked respondent to call him or her with respect to the automobile accident. When each victim asked respondent to identify the "friend," he refused to do so. And, when pressed to do so by a victim, respondent would tell him or her that he could not disclose the identity of the "friend" because it was protected by the attorney-client privilege or confidentiality. Moreover, none of the victims had asked anyone to help him or her find an attorney. Nor had any of them had any prior knowledge of respondent.

On review respondent challenges the findings in these four client matters that his statements to the victims regarding being referred to them by a "friend" were misrepresentations (or fabrications). In addition,

6. Specifically, we incorporate by reference (1) page 15, line 6 to page 16, line 1 and (2) Page 16, lines 11 to 13 of the hearing judge's decision.

7. Specifically, we incorporate by reference the following sections of the hearing judge's decision:
Pericoli matter: page 7, line 15 to page 8, line 7.
Spence matter: page 17, line 22 to page 18, line 13.
Robins matter: page 19, line 5 to line 20.

respondent challenges the same misrepresentation (fabrication) finding in the Crowell matter. We reject respondent's challenges.

On review respondent restates his testimony that he did not just "cold call" these accident victims, but that he received telephone messages to call them about their accidents. The hearing judge, however, rejected respondent's testimony on the issue. And respondent's iteration of his version of the facts on review does not provide us with a basis to disturb her rejection of his testimony or her findings that respondent's referral statements to the victims were misrepresentations (i.e, fabrications). (*In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 775.)

Moreover, there is convincing circumstantial evidence to support both the hearing judge's rejection of respondent's testimony and her finding of misrepresentation (fabrication). (See, generally, *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033.) Respondent was unable to produce telephone logs, message slips, or any other documentation to support his referral claims. Nor did respondent name even one of the "friends" who contends referred the victims to him. In addition, the testimony of a number of the victims establish that respondent's telephone calls were not just calls responding to referrals, but aggressive solicitation calls.

Moreover, with respect to the Crowell matter, it is simply implausible that someone referred respondent to Nathan Crowell or asked respondent to telephone him. At the time of respondent's call, Nathan was only three years' old, and his father is an attorney. Likewise, it is highly unlikely that someone would have referred respondent; (1) to Pericoli in that matter because, at the time, Pericoli worked for an attorney as a paralegal; (2) to Spence in that matter because Spence works at a personal injury law firm; or (3) Robins in that matter because, at the time, Robins was a student at Boalt Hall School of Law.

[1] Finally, even if respondent had received messages to call each victim from a "friend" of the victim, his solicitation telephone call or calls to each victim violated rule 1-400(C); that is, because none of the victims had requested the "friend" to ask respondent to call them. (Cf. *Geffen v. State Bar* (1975) 14 Cal.3d 843, 853-856.)

Rule 1-400(B) defines prohibited "solicitation" to mean any communication delivered in person or by telephone concerning the availability for professional employment where a significant motive is pecuniary gain.

1. Illegal Solicitation — Counts 9, 26, 31, and 34

As she did in the Crowell matter, the hearing judge held respondent culpable of engaging in illegal solicitation in violation of section 6152 in the Pericoli, Muhammad, Spence and Robins matters. Those illegal solicitations are charged in counts 9, 26, 31 and 34, respectively. The hearing judge further held each of those illegal solicitations to be disciplinable under section 6068, subdivision (a).

For the reasons stated above, we reverse the hearing judge's culpability determinations under counts 9, 26, 31 and 34 and dismiss those counts as duplicative of the counts charging improper telephone solicitation in violation of rule 1-400(C), which are noted below.

2. Telephone Solicitation — Counts 10, 27, 32, and 35

As she did in Crowell matter, the hearing judge implicitly dismissed the improper telephone solicitation charges in the Pericoli, Muhammad, Spence and Robins matters, which were charged in counts 10, 27, 32 and 35, because the State Bar incorrectly cited to rule 1-400(B) instead of rule 1-400(C). For the reasons stated above, we reverse the hearing judge's implicit dismissal of counts 10, 27, 32 and 35 and hold that respondent is culpable of willfully engaging in improper telephone solicitations in violation of rule 1-400(C) under each of them.

3. Moral Turpitude — Counts 13, 29, 33, and 36

As she did in the Crowell matter, the hearing judge held that respondent committed multiple acts involving moral turpitude in violation of section 6106 in client matters involving Pericoli, Muhammad, Spence and Robins. Those violations were charged

in counts 13, 29, 33 and 36. Under each of those counts, we adopt the hearing judge's holding that respondent's misrepresentation to the automobile accident victim that a friend had referred him or her to respondent or had asked respondent to call him or her with respect to the automobile accident was an act involving moral turpitude in violation of section 6106.

4. Additional Misconduct Under the Muhammad Matter — Counts 28 & 30

Salimah Muhammad, an automobile accident victim, was solicited by respondent. Approximately one week after Muhammad signed a fee agreement with respondent, she decided that she did not want respondent to represent her and obtained successor counsel to represent her. The day after Muhammad telephoned respondent's office to terminate respondent's employment, respondent's office sent a letter to an insurance company informing it that respondent represented Muhammad.

The hearing judge held that respondent was grossly negligent in allowing his staff to send the letter to the insurance company the day after Muhammad had terminated his employment and that respondent was, therefore, culpable of violating section 6104's proscription of corruptly or willfully appearing in an action or proceeding as an attorney for a party without authority as charged in count 28. In addition, under count 30, the hearing judge held that respondent failed to adequately supervise his staff and prevent the letter from being sent in violation of rule 3-110(A), which proscribes the intentional, reckless, or repeated failure to perform legal services competently. Respondent challenges both of these violations on review. As to the rule 3-110(A) finding of culpability, we reverse the hearing judge's culpability determination because there is an absence of clear and convincing evidence to establish that respondent was either grossly or repeatedly negligent in supervising his staff. (See, generally, *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795 [an attorney cannot be held responsible for every event that occurs in her office].) Furthermore, because we reverse the hearing judge's culpability determination under it, we dismiss count 30 with prejudice for want of proof.

[2a] We next look to the hearing judge's finding of culpability under section 6104. That section provides for discipline for "[c]orruptly or willfully and without authority appearing as attorney for a party to an action or proceeding." Without authority, respondent wrote to an insurance carrier claiming that he represented Muhammad. The issue is whether such a false representation constitutes "appearing as attorney for a party to an action or proceeding".

[2b] We find little authority on this issue, although this court has dealt with a similar problem. In *In the Matter of Snyder* (Review Dept. 1993) 2 Cal.State Bar Ct. Rptr. 593, Snyder was found culpable of a violation of section 6104 for negotiating with an insurance carrier after his discharge by the client. However, in that case an action had been filed by Snyder on behalf of his client, and Snyder continued to negotiate with the insurance carrier after he had been contacted by the regularly employed replacement lawyer and had been suspended from the practice of law. In *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, we held that an attorney's endorsement of a draft, when he possessed a power of attorney to do so, and the subsequent deposit of the funds from that draft in his trust account does not constitute an unauthorized appearance under section 6104.

[2c] On balance we conclude that the facts of the matter before us do not constitute an "appearance" within the meaning of section 6104. Under different circumstances a false representation of the sort made by respondent to the insurance company in this count may give rise to a charge of moral turpitude under 6106. We reverse the finding of a section 6104 violation and dismiss count 28 with prejudice.

C. The Ravare Matter

On the last Tuesday in February 1995 Rita Ravare was involved in an automobile accident. The following Sunday she received a call at home from respondent saying a friend had referred him to her on the basis that she might need counsel, but refused to identify the friend in spite of Ravare's request. Ravare advised respondent she was unable to leave home because of pain from the accident and that she was under medication. He then urged her to permit him

to come to her home that same day. In spite of her reluctance, Ravare permitted him to come to her home, but called a friend to be present during the visit. On respondent's arrival he presented Ravare with a fee agreement for representation concerning her recent accident. On her refusal to sign the agreement, respondent urged her employment of him. On Ravare's repeated refusal, respondent became angry and told Ravare that she had wasted his time and that she should have told him she was not going to employ him during the telephone call.

1. In-Person Solicitation — Count 37

In count 37 respondent is charged with violating section 6068, subdivision (a), requiring an attorney to support the laws of the state, by soliciting employment from Ravare in-person in violation of section 6152. As we have noted section 6152 clearly deals with in-person solicitation. There can be no question that respondent made an in-person solicitation in the home of Ravare. We agree with the determination of the hearing judge that respondent's claim that he was urged by a friend to call Ravare "is incredible and is determined to be a fabrication." Thus, respondent is culpable of violating Section 6068, subdivision (a) and Section 6152 by improperly soliciting employment from Ravare in-person under count 37.

2. Telephone Solicitation — Count 38

The hearing judge implicitly dismissed the improper telephone solicitation charge in count 38 because the State Bar incorrectly cited to rule 4-100(B). For the same reasons noted above, we again construe the State Bar's citation to rule 4-100(B) as a citation to rule 4-100(C). In addition, we reverse the hearing judge's implicit dismissal of count 38 and conclude that respondent is culpable of violating rule 4-100(C) by improperly soliciting Ravare over the telephone. This telephone solicitation, being a separate act, constitutes a violation of rule 4-100(c), separate and apart from the violation of section 6152.

3. Moral Turpitude — Count 39

We quote with approval and adopt the findings of the hearing judge on count 39. "There is clear and convincing evidence that by soliciting Ms. Ravare at her home while she was on pain medication, by engaging in the misrepresentation that a friend who was a client had asked him to call Ms. Ravare, and by invading the privacy of her home at a time when Ms. Ravare felt vulnerable and hesitant, Respondent engaged in acts of moral turpitude in violation of Business and Professions Code §6106."

D. The Abary Matter

In the Abary matter we adopt the hearing judge's findings of fact as modified and summarized below. In early 1994 Margaret Abary and her neighbor Marc Neri were involved in an automobile accident. Abary was driving the car in which Neri was a passenger. Shortly after the accident, respondent left a message on Abary's answering machine asking her to call him.[8] A few days later, Abary telephoned respondent. During that conversation, respondent told her that he had met with Neri and discussed the accident and that Neri had suggested that Abary might wish to have respondent represent her.

Abary never asked Neri or anyone else to help her find an attorney. Nor had she had any prior dealings with or knowledge of respondent. Nevertheless, she employed respondent and signed a contingent fee agreement with him.

In February 1994 Abary moved to the Philippines. Respondent settled Abary's case for $6,200 in the summer of 1994. He promptly sent her an accounting to her brother's California address. The accounting shows that respondent collected $2,066.67 in attorney's fees, obtained reimbursement for a total of $224.05 in advanced costs, paid a $1,974.37 medical lien for Abary, and paid Abary a net recovery of $1,934.91. The accounting listed the individual

8. We reject respondent's contention that Neri may have telephoned Abary and left the message for her to call respondent because it conflicts with stipulation number 6 in the parties first partial stipulation as to facts filed on August 7, 1996. (See Rules Proc. for State Bar Court Proceedings, rule 131(b) [stipulations of facts are binding on the parties unless vacated by the court].)

costs as Advocate Legal Services $45.68 for records; $73.37 for a police report; $40 for telephone and postage; $35 for copying; and $30 for computer time.

Abary's sister, Corrine Strauser, was handling Abary's affairs while Abary was in the Philippines. After Strauser obtained the accounting, she wrote respondent asking for a further breakdown of the accounting and supporting documentation (i.e., bills) for the $224.05 listed on the accounting. Even though Strauser included a copy of a power of attorney from Abary with her request, respondent would not provide the requested information. He would not accept the power of attorney because it was not notarized and was ambiguous as to its duration. He did, however, tell Strauser that, if she had any questions on the $1,974.37 medical lien he deducted from Abary's settlement proceeds, she should contact either Abary's medical provider, Kaiser Foundation Health Plan, or its collection agency Healthcare Recoveries.

When Strauser contacted Healthcare Recoveries, she learned that Kaiser had reduced its medical lien by one-third from $1,974.37 to $1,316.00 so that Abary would not have to pay the attorney's fees on the $1,974.37 in medical costs she recovered from the other driver. Even though respondent paid Kaiser only $1,322.83,[9] he deducted the full $1,974.37 from Abary's share of settlement proceeds and kept the difference of $651.54. After Strauser questioned him on this, respondent treated Kaiser's $651.54 lien reduction as an additional recovery for Abary. Out of the $651.54, respondent collected a one-third fee of $217.18 and paid the remaining balance of $434.36 to Abary.

Because respondent would not respond to Strauser's request for a further breakdown of and supporting documentation for the $224.05 in advanced costs, Abary wrote respondent from the Philippines in September 1994 directing him to provide the information to Strauser. Respondent admits that he never supplied the information to Strauser, but claims that all the supporting documentation for the advanced costs were in Abary's file, which he personally gave to her in February 1995.

The only supporting document produced at trial showed that respondent paid only $15 for the police report that is listed on the accounting as costing $73.37. According to respondent, the $73.37 figure included the cost of documents in addition to the police report. Finally, respondent admits that the telephone and postage, copying, and computer time deductions were not actual costs, but lump sum estimates that he made based on the "size" of the file.

1. Illegal Solicitation — Count 4

In count four the hearing judge held that respondent engaged in illegal telephone solicitation in his initial telephone conversation with Abary in violation of section 6152, which violation is disciplinable under section 6068, subdivision (a).

The conduct relied on for this finding is identical to that found in count 5, charging telephonic solicitation. For that reason, and based on our reasoning in the prior like charges, we dismiss count 4 with prejudice.

2. Telephone Solicitation — Count 5

Again, the hearing judge implicitly dismissed the improper telephone solicitation charge in count five because the State Bar incorrectly cited to rule 1-400(B) instead of rule 1-400(C). For the reasons stated above, we reverse the hearing judge's implicit dismissal of count five and hold that respondent is culpable of willfully engaging in improper telephone solicitations in violation of rule 1-400(C).

The parties stipulated that, when Abary returned respondent's initial telephone call "[r]espondent told Ms. Abary that he had met with Mr. Neri . . . and that Mr. Neri had suggested that she might wish to have him represent her in relation to any claims she might

9. The record does not disclose why respondent paid Kaiser $1,322.83 after it had reduced its lien to $1,316.00. We disregard the difference as immaterial.

have." Before respondent telephoned and solicited professional employment from Abary, he had a duty to inquire of Neri whether Abary had asked Neri for help in finding an attorney or to have respondent telephone her. (Cf. *Geffen v. State Bar*, *supra*, 14 Cal.3d at p. 856.) It is undisputed that respondent did not so inquire. Accordingly, respondent's solicitation of professional employment from Abary was improper and violated rule 1-400(C).

3. Failure to Account and Pay Out Funds — Count 6

Under count six the hearing judge held that respondent willfully violated (1) his duty, under rule 4-100(B)(3), to properly account to Abary with respect to the $6,200 in settlement proceeds and (2) his duty, under rule 4-100(B)(4), to pay Abary all the settlement funds to which she was entitled. We agree that respondent failed to properly account to Abary in violation of rule 4-100(B)(3) for the reasons stated below and, accordingly, adopt that determination. But, as also noted below, we disagree that respondent failed to pay out funds in violation of rule 4-100(B)(4).

Abary sent respondent a letter in September 1994 requesting that he provide her sister with a further breakdown of and support for the $224.05 in advanced costs. Respondent admits that he did not do so. Even assuming that respondent effectively provided Abary with a further breakdown of and support for the costs when he gave Abary her file with the receipts in it, in February 1995, he is still culpable of violating rule 4-100(B)(3) because he did not make such a further accounting within a reasonable period of time after receiving Abary's request in September 1994. Respondent's unexplained five-month delay in rendering the further accounting was unreasonable, and we adopt the hearing judge's culpability determination for that reason.

We decline to adopt the hearing judge's culpability determination that respondent failed to pay out funds in violation of rule 4-100(B)(4). We have held that a request by a client for payment of funds held by the attorney is an essential element of a rule 4-100(B)(4) violation. (*In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 188.) After looking to Abary's requests to respondent for an accounting, we can find neither an actual nor implied request for delivery of funds, and if that were the case, Abary's request for an accounting could be considered as raising a dispute as to entitlement to the disputed funds, and if that were the case, Abary's request would have required respondent to maintain those funds until the dispute was resolved. (Rule 4-100(A), (2.)

The State Bar has neither pleaded nor proved that Abary ever requested that respondent pay out funds he held for her. Accordingly, we reverse the hearing judge's finding of culpability of the rule 4-100(B)(4) charge in count six and dismiss that charge with prejudice.

4. Unconscionable Fee and Moral Turpitude — Counts 7 & 8

Under counts seven and eight, respectively, the hearing judge held that respondent charged Abary an unconscionable fee in violation of rule 4-200(A) and, thereby, committed acts involving moral turpitude in violation of section 6106. The hearing judge based her holdings on the facts that respondent retained $217.18 out of Kaiser's $651.54 lien reduction, collected estimated and inflated costs, and never refunded the entire amount actually owed to Abary.

Of course, instances of improper billing involving moral turpitude, corruption, or dishonesty violate section 6106. In that regard, we adopt the hearing judge's determination that respondent's improper billing and retention of $217.18 out of Kaiser's lien reduction involved moral turpitude in violation of section 6106 for reasons we shall explain below.

Like the hearing judge, we reject respondent's contention that he was permitted to represent Kaiser and collect attorney's fee from it for making sure that Abary paid Kaiser's medical lien out of the $6,200 recovery she received from the other driver. Respondent contends that he was entitled to collect and retain the entire $651.54 Kaiser lien reduction under the following provision in Abary's fee agreement: "Client agrees that attorney may represent anyone for a separate fee on his recovery of any subrogation interest in client's case based on the reasonable value of medical care provided to client by such person. Client agrees that client is responsible for all of client's medical bills." We disagree.

Even assuming that the language of this provision is a sufficient disclosure to prevent respondent's retention of the lien reduction from being a secret profit in violation of his fiduciary duties to Abary, there remains the serious issue of whether it is fair to Abary. "Attorney fee agreements ... must be fair, reasonable and fully explained to the client. (Citations.)." *Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037.) In that regard, we note that respondent might well have had a pre-existing duty to insure that Abary reimbursed Kaiser. (See, e.g., *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302, 305-307 ["[A]n attorney on notice of a third party's contractual right to funds received on behalf of his client disburses those funds to his clients at his own risk. (Fn. omitted.)"].) If so, it is questionable whether it would be fair to Abary to let respondent profit at Abary's expense merely for doing something he already had a legal duty to do.

In addition, this fee agreement provision creates a conflict of interest between respondent and Abary. The conflict arises from respondent's competing loyalties to Abary and Kaiser. In the present case, the greater Kaiser's lien, the greater rebate respondent would receive in additional "attorney's fees." Thus, respondent would have an interest in Kaiser obtaining the largest lien at the same time Abary has an interest in Kaiser obtaining the lowest lien possible.

Finally, there is no evidence that Kaiser ever employed respondent and agreed to pay him such a fee. In fact, the record shows that Kaiser did not reduce its medical lien to provide respondent with additional attorney's fees, but to share Abary's burden of paying respondent's attorney's fees. That is, Kaiser reduced its lien so that it would bear the one-third contingent fee that Abary had to pay respondent to recover her $1,974.37 medical expenses from the other driver. In sum, respondent misappropriated the $217.18 he retained out of Kaiser's lien reduction as additional attorney's fees. Accordingly, we shall order respondent to make restitution of $217.18.

After considering the requisite factors set forth in rule 4-200(B), we agree with the hearing judge's determination, under count eight, that respondent charged or collected an unconscionable fee in violation of rule 4-200(A). Dollar amounts are not the sole criteria in determining unconscionable fees. Here, respondent did not have the informed consent of the client. (Rule 4-200(B)(11).) We acknowledge that not every instance of improper billing will result in an unconscionable fee under rule 4-200(A). (See, generally, *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 237 ["a disciplinary proceeding is seldom the proper forum for attorney fee disputes"].) However, at a minimum, one seeking fees for reduction of a lien should be required to show the value of the services and the informed consent of the client.

[3a] With respect to the hearing judge's holding that respondent's collection of estimated lump sum costs was an act involving moral turpitude, we are unable to adopt it. As one ethics commentary notes, the "topic of disbursements was . . . addressed in ABA Formal Ethics Opinion 93-379 (1993), which reminded lawyers not to add a surcharge when billing clients for costs and expenses, and to pass along any discounts the lawyer may have given in obtaining the services or products for which the client was billed. *See also* Nassau County (N.Y.) Ethics Opinion 94-25 (1994).

[3b] The ABA ethics committee added that law firms should not try to profit on in-house costs such as photocopying, couriers, or meals eaten while working on a client's case. The client may be billed the reasonable cost the firm itself incurs for these items, but no more. 'Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead [such as the salary of the photocopy machine operator] should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.'

[3c] Whether lawyers ethically may charge a flat periodic fee or lump sum to cover disbursements is a matter of some controversy. It would appear that such an arrangement is permissible in any particular case if it does not result in an unreasonable amount of

compensation and if the client has given informed consent to the arrangement. (Citations.)" (ABA/ BNA Lawyers' Manual on Professional Conduct, Fee Agreements § 41:109.)

[3d] In light of this authority, we are unable to conclude, under the facts of this case, that respondent's collection of estimated lump sum costs reimbursement totaling $105 from Abary resulted in an unconscionable fee or amounted to an act involving moral turpitude. There is no evidence that this $105 was excessive or that respondent hid his lump sum costs reimbursement procedures from Abary.

Whether respondent hid or failed to disclose his estimated lump sum costs procedure to Abary when she signed the fee agreement is a question of fact. (Cf. *Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 715.) Accordingly, like most questions of fact in disciplinary proceedings, the State Bar had the burden to prove that respondent either hid or failed to disclose his cost billing practices to Abary. Respondent testified that he fully explained his fee agreement with Abary. In addition, respondent testified in another client matter to the effect that, when he explains his fee agreements, he explains his estimated costs. Even rejecting respondent's testimony, there is still no clear and convincing evidence that he did not explain and disclose to Abary his estimated lump sum costs reimbursement procedures. Abary did not testify.

Moreover, we note that, in this instance, the State Bar may not rely on Probate Code section 16004 subdivision (c)'s presumption to prove that respondent failed to disclose his lump sum billing practices to Abary. Under section 16004, subdivision (c), it is ordinarily presumed that an attorney breached his or her fiduciary duties to the client in any situation involving a conflict of interest unless the attorney proves the contrary. (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917, 925.) However, the section is not applicable to any agreement by which the member is retained by the client. (*Id.* at p. 917; accord rule 3-300, Official Discussion [restrictions on an attorney's business transactions with a client are "not intended to apply to the agreement by which the [attorney] is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client"].)

E. The Otoya Matter

On review respondent does not challenge any of the hearing judge's factual findings in the Otoya matter. He challenges only her adverse culpability determinations with respect to his use of an estimated lump sum costs calculation, conflict of interest, and the civil court's award of attorney's fees.

We adopt the hearing judge's findings of fact as modified and summarized below. In early 1994, Humberto and Sonia Otoya and their child were involved in an automobile accident. Ms. Otoya sustained injuries. Shortly thereafter, respondent telephoned Ms. Otoya at the Otoya's unlisted telephone number. Ms. Otoya did not understand much of what respondent said because she does not speak English fluently. Accordingly, she told respondent to call back later and speak to her husband.

When respondent called back, he spoke with Mr. Otoya and was able to convince Mr. Otoya to let him come to the Otoya's home and discuss the accident with him. At the first meeting, only Mr. Otoya was at home. He refused to sign anything because he did not understand the documents; this was the first time the Otoyas had dealt with an attorney. Respondent appeared somewhat upset with Mr. Otoya because Mr. Otoya would not sign the documents.

At a second meeting, both Mr. and Ms. Otoya were present as was Sister Gladys Encinas, who is with the Otoyas' church. Sister Gladys is fully bilingual. The Otoyas asked her to meet with them and respondent so that she could explain everything to them in Spanish. Ms. Otoya signed a contingent fee agreement with respondent at this second meeting. Respondent also gave the Otoyas the name of one of his employees who is bi-lingual in case they had questions later.

Apparently, the other driver in the Otoyas' accident was not insured. Accordingly, respondent sought coverage for the Otoyas under the uninsured motorist coverage in the Otoyas' automobile insurance.

The Otoyas' insurer would not voluntarily provide coverage, and respondent was forced to file a suit against it for Ms. Otoya in superior court. Thereafter, respondent filed a motion to compel the insurer to arbitration in Ms. Otoya's lawsuit. The superior court granted the motion and appointed an arbitrator. In addition, it awarded Ms. Otoya $196 in costs (filing fees) and $700 in attorney's fees sanctions against the insurance company. The insurance company paid the sanctions directly to respondent.

Respondent also filed a claim for loss of consortium for Mr. Otoya in the arbitration proceeding. In that proceeding Ms. Otoya was ultimately awarded $9,311 plus costs, but Mr. Otoya was not awarded anything. Respondent sent Ms. Otoya an accounting of the $9,311 award. He first deducted his 40% contingent fee of $3,724.40 and then deducted $891.77 in advanced costs and a $1,688.45 medical lien in favor of Ms. Otoya's medical care provider, Kaiser. Ms. Otoya received a net recovery of $3,006.38. The $891.77 in advanced costs included respondent's estimated lump sum expenses of $270 ($95 for telephone/postage; $105 for copying; $40 for computer time; and $30 for car expense). Respondent did not disclose and pay over to Ms. Otoya the $196 in costs and $700 in attorney's fees sanctions that had previously been awarded to her against her insurance company. Nor did respondent otherwise give Ms. Otoya credit for these amounts.

The Otoyas disputed many of the costs respondent deducted from Ms. Otoya's share of the $9,311 award. In addition, the Otoyas disputed the $1,688.45 medical lien respondent listed on the accounting because Kaiser was not asserting a lien on Ms. Otoya's recovery. Kaiser does not claim a right to reimbursement for its medical services when the patient's recovery is from his or her own's uninsured motorist coverage; it claims a right of reimbursement only when the patient obtains a recovery against a third-party.

Thereafter, respondent voluntarily gave Ms. Otoya credit for the $196 in costs he previously recovered from the insurance company by issuing her a check in that amount. With respect to the questioned medical lien, without checking with Kaiser to determine if the Otoyas' claims were correct, respondent sent Ms. Otoya a $1,125.64 check made payable to Kaiser's billing service. In a letter accompanying this $1,125.64 check, respondent stated that it represented payment of Kaiser's $1,688.45 medical lien less his one-third fee of $562.81 and told Ms. Otoya that she could have Kaiser endorse the check over to her. Kaiser endorsed respondent's $1,125.64 check over to Ms. Otoya.

The hearing judge found that respondent intended to collect more than he was entitled to from Ms. Otoya when he did not disclose the $196 in costs and $700 in attorney's fees sanction in his accounting to Ms. Otoya and when he retained a one-third fee of $562.81 out of Kaiser's alleged lien. We accept the hearing judge's findings.

The Otoyas filed an application for fee arbitration with the local bar association. The arbitrator awarded respondent $3,724.40 in attorney's fees (40% of the $9,311.00 gross recovery) and $621.77 in advanced costs. Respondent did not appeal this award, and he apparently thereafter refunded the remaining monies recovered to Ms. Otoya.

At the fee arbitration hearing, the issue of respondent's solicitation of the Otoyas came up. When asked about his solicitation of the Otoyas, respondent stated that the Otoyas were former clients of his. That statement was false. At trial in the present proceeding, respondent testified that he mistakenly believed that Mr. Otoya was a former client named Mr. Otero. The hearing judge implicitly rejected respondent's testimony when she held that respondent falsely asserted at the arbitration hearing that the Otoyas were former clients with the intent to conceal his improper solicitation.

The hearing judge's finding that respondent falsely asserted that the Otoyas were former clients is amply supported by the circumstantial evidence in the record. It is implausible to believe that Mr. Otoya would have been as reluctant to hire respondent and sign the fee agreement respondent presented to him at their first meeting if Mr. Otoya had, in fact, been a former client of respondent. At a minimum, Mr. Otoya's reluctance to hire respondent and the need for Sister Gladys to explain everything to him put respondent on notice that he had not previously

represented Mr. Otoya. In any event, we accept the hearing judge's rejection of respondent's testimony and adopt her finding that respondent knowingly misrepresented to the arbitration panel that the Otoyas were former clients in an attempt to conceal his improper solicitation of the Otoyas from the arbitration panel.

1. Illegal Solicitation — Count 17

The hearing judge held respondent culpable of engaging in illegal solicitation in violation of section 6152 as charged in count 17 and that respondent's illegal solicitation is disciplinable under section 6068, subdivision (a).

Factually the solicitation was similar to that which occurred in the Ravare matter in that there was both telephonic solicitation and personal solicitation. For the reasons stated in the Ravare matter, we affirm the hearing judge's culpability determinations under count 17 on the basis of respondent's improper in-person solitations of the Otoyas. Respondent's improper telephonic solitations are addressed below.

2. Telephone Solicitation — Count 18

Again, the hearing judge implicitly dismissed the improper telephone solicitation charge in count 18 because the State Bar incorrectly cited to rule 1-400(B) instead of rule 1-400(C). For the reasons stated above, we reverse the hearing judge's implicit dismissal of count 18 and hold that respondent is culpable of willfully engaging in improper telephone solicitations in violation of rule 1-400(C).

3. Failure to Account — Count 19

Under count 19 the hearing judge held that respondent willfully violated his duty, under rule 4-100(B)(3), to properly account to Ms. Otoya with respect to the $9,311 in settlement proceeds. We agree.

[4a] While the record shows that respondent provided Ms. Otoya with an accounting, he did not disclose in it the fact that he had previously collected $196 in costs and $700 in attorney's fee sanctions from the insurance company. Respondent does not contend that his failure to list those items was an oversight, but argues that they were awarded to him personally and that he was, therefore, entitled to keep them without disclosing them to his clients. Respondent's contention, even if honestly held, is unreasonable. At least, in the absence of an express agreement or court order to the contrary, any costs or attorney's fees awarded by a court as sanctions are for the account of the client.

[4b] In sum, we adopt the hearing judge's determination that respondent failed to properly account in violation of rule 4-100(B)(3), but only on the grounds that he did not disclose the $196 in costs. The notice does not charge respondent with failing to disclose or give Ms. Otoya credit for the $700 in attorney's fees. Accordingly, we may only consider respondent's failure to disclose the $700 as an aggravating circumstance.

4. Failure to Pay Out Funds — Count 20

[5a] Under count 20 the hearing judge held that respondent willfully violated his duty, under rule 4-100(B)(4), to pay Ms. Otoya all the settlement funds to which she was entitled. We disagree.

[5b] Even though the Otoyas requested respondent to pay over the funds they claimed he owed them, respondent expressly refused to do so and openly claimed to be entitled to them. We hold that where a client asks an attorney to distribute funds claimed by the client and where the attorney claims an interest in the funds, the attorney violates rule 4-100(B)(4) if he or she does not promptly take appropriate, substantive steps to resolve the dispute in order to disburse the funds. (Cf. *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 560-561.) Here, respondent effectively took prompt, substantive action to resolve the dispute by participating in the fee arbitration proceeding, which the Otoyas requested less than a month after the dispute arose, and by promptly abiding by the arbitrators' award.

In sum, we dismiss count 20 with prejudice.

5. Unconscionable Fee — Count 21

After considering the requisite factors set forth in rule 4-200(B), we agree with the hearing judge's conclusion that respondent attempted to collected an unconscionable fee from Ms. Otoya in violation of rule 4-200(A). Respondent charged more and attempted to collect more than was due him under his fee agreement. At a minimum, this included the $196 in costs awarded as sanctions against the insurance company, and the one-third fee of $562.18 respondent claimed and withheld from Ms. Otoya's $1,688.45 medical expenses after he had already collected a 40% fee on all the recovered proceeds.

6. Moral Turpitude — Count 22

The hearing judge held that respondent committed multiple acts involving moral turpitude. We adopt her holding that respondent's failure to disclose the $196 in costs he collected from the insurance company to Ms. Otoya with the intent to obtain a greater fee than that to which he was entitled involved moral turpitude in violation of section 6106. We independently hold that respondent's "charging" and retention of the $562.81 out of Ms. Otoya's $1,688.45 in medical expenses also involved moral turpitude as alleged in the notice.

We also adopt the hearing judge's holding that respondent's misrepresentation to the arbitration panel that the Otoyas were his former clients involved moral turpitude. Regardless of whether respondent was under oath at the time, his misstatement involved moral turpitude. As we stated above, "deceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive for personal gain." (*Codiga v. State Bar, supra,* 20 Cal.3d at p. 793.)

Moreover, with respect to the State Bar's allegation that respondent committed an act involving moral turpitude when he included a total of $270 estimate lump sum costs in his accounting, we note that the State Bar did not proffer any evidence to establish that the $270 charge was excessive or that respondent failed to disclose his procedure in estimating costs to the Otoyas when Ms. Otoya signed the fee agreement. Accordingly, no act of moral turpitude has been established.

7. Perjury — Count 23

Under count 23 the hearing judge held that respondent's statement to the arbitration panel that the Otoyas were former clients of his involved moral turpitude was perjurious in violation of Penal Code section 118, which is disciplinable under section 6068, subdivision (a). We disagree.

First, "[s]ince early common law, materiality has been considered an 'essential element' of the crime of perjury. (Citations.)" (*People v. Kobrin* (1995) 11 Cal.4th 416, 419.) Materiality requires that the false statement might have been used to affect the proceeding in which it is made. (*Id.* at p. 420.) That is, a false statement is material if it could have probably influenced the outcome of the proceeding. "Moreover, without a requirement of materiality, the crime would be false swearing rather than perjury. (Citation.)" (*Id.* at p. 427.)

The factual dispute in the fee arbitration proceeding involved the appropriateness of respondent's attorney's fees in the Otoya matter. Whether respondent had previously represented the Otoyas is not material to the parties' dispute of the amount of respondent's attorney's fees. Thus, we conclude that respondent's false statement that the Otoyas were former clients could not have plausibly influenced the outcome of that proceeding.

Second, even assuming, arguendo, that respondent's false statement was material, there is no evidence that respondent was under oath at the time.

No transcript of the arbitration hearing was proffered into evidence. The finding of culpability under count 23 is reversed.

8. Misleading Judicial Officers — Counts 24 & 25

[6] Under counts 24 and 25 the hearing judge held that respondent attempted to mislead judicial officers, in violation of section 6068, subdivision (d) and rule 5-200(B), respectively, when he told the arbitration panel that the Otoyas were former clients. We reverse the hearing judge's culpability determination under these two counts and dismiss them with prejudice because the local bar association's

arbitration panel was not composed of judges or judicial officers as required under both section 6068, subdivision (d) and rule 5-200(B). In our view, the terms judges and judicial officers as used in that section and that rule are limited to those individuals who are officers of a state or federal system and who perform judicial functions. This definition is consistent with the California Code of Judicial Ethics' definition of a state judge. Canon 6 of that code states in part that "[a]nyone who is an officer of the state judicial system and who performs judicial functions, including, but not limited to, a magistrate, court commissioner, referee, court-appointed arbitrator, judge of the State Bar Court, temporary judge, or special master, is a judge . . .." Moreover, the local bar association's arbitration panel was not court-appointed.

F. The Ramsey Matter

As noted above, the hearing judge implicitly dismissed all the counts under the Mary Ann Ramsey[10] matter for want of proof. The State Bar seeks review of that dismissal. After independently reviewing the record, we adopt both the hearing judge's findings of fact and conclusion of law under this client matter. Accordingly, we affirm the hearing judge's dismissal of counts 43 and 44, but clarify that it is with prejudice.

III. APPROPRIATE LEVEL OF DISCIPLINE

A. Aggravating Circumstances

We adopt the following aggravating circumstances found by the hearing judge.

1. Prior Record

Respondent has a prior record of discipline. (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (Standards), std. 1.2(b)(i).) In 1987 the Supreme Court placed respondent on three years' stayed suspension, three years' probation, and nine months' actual suspension. Respondent's prior record involved his mishandling of multiple client matters.

In one count respondent's client rejected a settlement offer and respondent directed the client to get a new attorney. Upon being contacted by the replacement lawyer respondent insisted on collecting $821.23 in out of pocket costs before respondent would sign a substitution of attorney form. The replacement attorney obtained a court order for substitution of attorneys and a court order that respondent deliver the client's file to the new attorney. Respondent failed to make a reasonable effort to deliver the file.

In that same matter, respondent obtained a judgment against his former client for $1,071.51, plus costs of $707.27. Respondent fraudulently prepared and submitted a judgment for $1,773.79, plus costs for $707.27, which was erroneously signed by the court. The client's new attorney was required to make a motion to have the erroneous judgment corrected. The misconduct was found to have involved moral turpitude, as well as culpability under rules 2-107(A), 2-111(A)(2) and 7-105(1).

In a second client matter, respondent withdrew without taking reasonable steps to protect the client. Respondent then charged an unconscionable and unearned fee. This was followed by the use of coercion in the effort to collect that fee. Respondent was found to have violated section 6068 and rules 2-107(A), 2-111(A)(2) and 5-102(B)

In a third matter, the client hired respondent in a dissolution action. The matter was being handled by an associate of respondent whose employment by respondent terminated on the eve of the trial of the dissolution action. The client requested that the associate handle the trial. Respondent lied about the availability of the associate and refused to deliver to the client the trial notebook and legal research necessary to properly present her case. He billed and demanded payment of sums not yet due, and served the client with a summons and complaint for those not yet due sums as she waited for her trial to

10. Ms. Ramsey was formerly Mary Ann Hardin.

commence. Respondent's misconduct was found to involve moral turpitude as well as a violation of section 6068 and rules 2-111(A)(2) and 2-107.

In yet another client matter involving a probate matter, the clients came to respondent's office as a result of their friendship with the associate employed in respondent's office. On the termination of the employment of the associate the clients requested that the former associate represent them. Following the substitution of attorneys, respondent filed a motion to have his former clients removed as executors from their daughter's estate and to suspend their powers to act. He was found to have acted with a corrupt motive in violation of rule 4-101 and to have violated section 6068.

In the final client matter in respondent's prior discipline, a client wanted to be represented by the terminated associate. The respondent refused to release the work product developed in representing the client even though he knew he was harming the client's action, in violation of rule 2-111(A)(2).

2. Pattern of Misconduct

In the instant matter, respondent engaged in a pattern of improper telephone solicitation of automobile accident victims in which he made misrepresentations to the prospective clients. (Std. 1.2(b)(ii).) As the hearing judge noted, accident victims are often in pain and under the influence of medications. They deserve their privacy and to be protected from the aggressive solicitation techniques respondent employed. The record in this proceeding shows that respondent engaged in a pattern of improper solicitations from December 1993 through March 1995.

3. Harm to Administration of Justice

Respondent's pattern of telephone solicitation caused significant harm to the administration of justice because it tarnished the reputation of the legal profession, at least in the eyes of those persons solicited. (Std. 1.2(b)(iv).)

4. Uncharged Misconduct

Under limited circumstances, such as those present with respect to the following instances, uncharged misconduct, may be considered as an aggravating circumstance. (Std. 1.2(b)(ii); Std. 1.2(iii); *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.)

In the Otoya matter, respondent represented not only Ms. Otoya with respect to her personal injury claims, but also Mr. Otoya with respect to his loss of consortium claim resulting from Ms. Otoya's injuries. The interests of Ms. Otoya and Mr. Otoya could potentially conflict, but respondent did not obtain the informed written consent of both Ms. Otoya and Mr. Otoya to represent both of them as required under rule 3-310(C)(1). We consider this as some aggravation.

[7] Moreover, as the hearing judge found, respondent never entered into a written contingent fee agreement with Mr. Otoya as required by section 6147. However, his failure to do so is not a disciplinable offense. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280.) Accordingly, we do not adopt the hearing judge's aggravation determination with respect to this issue.

As noted above, we consider respondent's failure to disclose or give Ms. Otoya credit for the $700 in attorney's fees he collected in sanctions from the insurance company as an aggravating circumstance.

[8] Respondent also testified that he would orally authorize his staff to sign his name to declarations made under the penalty of perjury without disclosing, on the declaration, the fact that they were signing the declaration with respondent's permission or at his direction. We agree with the hearing judge that such a practice is misleading and therefore inappropriate. We consider this as aggravation.

5. Lack of Candor

The hearing judge did not make any explicit findings with respect to respondent's candor while

testifying at the disciplinary trial. On review, however, the State Bar seeks a finding that respondent's testimony lacked candor, which is an aggravating circumstance under standard 1.2(b)(vi).

We are reluctant and decline to make such an additional finding in this instance because the State Bar did not allege it in its brief, with supporting references to the record, that it requested such a finding from the hearing judge. (Cf. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 491.)

B. Mitigating Circumstances

The hearing judge rejected respondent's claims for good faith mitigation under standard 1.2(e)(ii) and for mitigation for taking objective steps to correct his manner of handling telephone messages containing referrals under standard 1.2(e)(vii). We adopt the hearing judge's rationale for and rejection of respondent's claims as stated in her decision.

C. Discussion

As noted above, the State Bar contends that the hearing judge's discipline recommendation is insufficient and that disbarment is warranted. Also as noted above, respondent contends that the hearing judge's 18 months' actual suspension is excessive and that only one year's actual suspension is warranted.

In determining the appropriate level of discipline, we first look to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d at p. 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (See also *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

When two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards, the discipline imposed should be the most severe of the different applicable sanctions. (Std. 1.6(a).) In the present case, the most severe applicable sanction is found in standard 2.3, which provides that an attorney's culpability of an act of moral turpitude shall result in actual suspension or disbarment depending upon the extent of harm, the magnitude of the act, and the degree to which it relates to the attorney's practice of law. As well as applying standard 2.3 in this proceeding, we also consider standard 1.7(a), which provides that, when a respondent has a prior record of discipline, the discipline imposed should be greater than that imposed in the prior proceeding.

[9a] In the present proceeding, the magnitude of the misconduct is substantial. Respondent is culpable of ten disciplinable acts of moral turpitude. He committed six acts of moral turpitude by misrepresenting to six of the automobile accident victims he solicited that he was referred to them by one of their friends or that one of their friends had asked respondent to telephone them. In a seventh act of moral turpitude, respondent misrepresented to a fee arbitration panel that the Otoyas were former clients. In an eighth act of moral turpitude, respondent improperly retained for his own benefit $217.18 out of Kaiser's $651.54 lien reduction in the Abary matter. And, in a ninth act of moral turpitude, respondent attempted to obtain a greater fee than that to which he was entitled in the Otoya matter when he failed to disclose $196 in costs he recovered from the insurance company to Ms. Otoya. In a tenth act of moral turpitude, respondent improperly "charged" and retained $562.81 out of Ms. Otoya's medical expenses. Each of these ten acts of moral turpitude were directly related to respondent's practice of law.

[9b] Respondent is culpable of eight instances of improper solicitation of accident victims by telephone, as well as two instances of personal solicitation. Moreover, respondent is culpable of two counts of failure to properly account to the client (the Abary and Otoya matters), and there are substantial aggravating, but no mitigating circumstances.

[9c] We note that respondent has a prior record of discipline arising from at least two acts involving moral turpitude, another involving a corrupt motive as well as other acts causing harm to clients. The

Supreme Court placed respondent on three years' probation in 1987, including nine months of actual suspension. Respondent's probation expired in 1990. Within three years of the expiration of this probation, respondent commenced acts involving moral turpitude in solicitation of clients that continued until 1995.

It is in light of this misconduct, the aggravating circumstances, and standard 2.3 that we next look to decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As we noted in *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 190, the Supreme Court has imposed discipline ranging from a minimum of six months' actual suspension for isolated acts of solicitation via cappers to disbarment imposed in a few aggravated cases.

In our view, the solicitation cases of *In re Arnoff* (1971) 22 Cal.3d 740 and *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 are instructive. The hearing judge relied upon *Scapa* in making her discipline recommendation.

In *Scapa* the two respondents hired non-attorney cappers to solicit clients, divided legal fees with those cappers, and attempted to enforce an unconscionable provision in their contingent fee agreements requiring the clients to pay a minimum fee if they discharged the respondents.

The solicitation in that case, however, occurred over a period of six months while the solicitation in the present case occurred over a period of one and one-half years. Another difference is that, in the present case, respondent made misrepresentations in six of his improper solicitations, while neither attorney personally made any misrepresentations in *Scapa* (they used cappers to solicit). Moreover, there was substantial mitigation in *Scapa*, but none in the present case. The discipline imposed in *Scapa* was thirty months' stayed suspension, four years' probation, and eighteen months' actual suspension. We conclude that respondent's misconduct warrants more actual suspension than that imposed in *Scapa*, in part because of the longer duration of the misconduct in the present case, in part because of respondent's repeated misrepresentations involving moral turpitude, and in part because of his past disciplinary record involving moral turpitude.

We note with great concern that respondent's conduct in the present case involves moral turpitude in his relations with clients, as did the discipline ordered by the Supreme Court some ten years ago in respondent's prior involvement with the discipline system. While there was no improper solicitation in the prior matter, there was overreaching in relation to clients, not unlike that noted in the present matter. From this we can only conclude that respondent, even now, fails to understand his fiduciary obligations to clients.

We conclude that an appropriate level of actual suspension is greater than that imposed by the Supreme Court in either *Scapa* or *Arnoff*.

In *Arnoff* the respondent was actually suspended for two years. He was found culpable of conspiracy to commit capping, fee sharing with a non-attorney, and abdication of control of his practice to the non-attorney. The respondent in *Arnoff* received approximately 500 cases over a two-year period. We realize that the solicitation in *Arnoff* was greater than in the present case. However, in *Arnoff* there was substantial mitigation, which is lacking in the present case. Arnoff had no prior record in more than 20 years, suffered from family and health problems at the time of his misconduct, sought professional help with his problems, was cooperative and remorseful, and established good character. On the other hand, respondent has a prior record of misconduct involving moral turpitude.

[9d] We recommend a three-year period of actual suspension and until respondent establishes his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii). Like the hearing judge, we also recommend that respondent be ordered to comply with rule 955 of the California Rules of Court, take a professional responsibility examination, and pay costs.

IV. DISCIPLINE RECOMMENDATION

We recommend that respondent be suspended from the practice of law for a period of five years, that suspension be stayed, and that respondent be placed on probation for a period of five years on each of the following conditions:

1. Respondent shall be actually suspended from the practice of law in the State of California during the first three years of this probation and until respondent: (1) makes restitution to Margaret Abary, or the Client Security Fund if it has paid, in the sum of $217.18 plus interest thereon at the rate of 10% per annum from July 6, 1994,, until paid; (2) provides satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles; and (3) shows proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the terms and conditions of this probation.

3. Respondent must report, in writing, to the State Bar's Probation Unit in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

4. Subject to the assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit and any assigned probation monitor that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the terms and conditions of this probation.

5. In addition to maintaining an official address for State Bar purposes with the State Bar's Membership Records Office as required by section 6002.1 of the Business and Professions Code, respondent must maintain that official address with the State Bar's Probation Unit in Los Angeles and any assigned probation monitor. In addition, respondent must maintain with the Probation Unit in Los Angeles and any assigned probation monitor, a current office address and telephone number or, if respondent does not have an office, a current home address and telephone number. Respondent must promptly, but in no event later than 10 days after a change, report any changes in this information to the Membership Records Office, the Probation Unit, and any assigned probation monitor.

6. Within three years after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE)

requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, title III, General Provisions, rule 3201.)

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of respondent's actual suspension and to provide satisfactory proof of passage of the examination to the State Bar's Probation Unit in Los Angeles within said period of actual suspension.

VI. RULE 955

We further recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in rule 955(a) and then file the proof of compliance affidavit provided for in rule 955(c) within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court Order in this matter.

VII. COSTS

Finally, we recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code (as amended effective January 1, 1997).

We concur:

NORIAN, J.
STOVITZ, J.

State Bar Court
Review Department

In the Matter of

Respondent Y

A Member of the State Bar

No. 95-O-15585

Filed May 5, 1998

Summary

The hearing judge found respondent not culpable of failing to report to the State Bar a superior court order imposing sanctions of $1000 pursuant to Business and Professions Code section 6068(o)(3). Respondent was found culpable of failing to pay the sanctions, however, as respondent had almost two years to do so since the order imposing them became final. The hearing judge imposed a private reproval and added two conditions to the reproval. Both parties sought summary review. The State Bar averred that the hearing judge erred in dismissing the section 6068(o)(3) charge because respondent's duty to report the sanctions commenced from the time he knew the sanctions were ordered, regardless of the pendency of any appeal. Respondent contended that the hearing judge erred in finding him culpable of failing to pay the sanctions in the absence of proof by the State Bar of his ability to pay. Respondent also asserted that the culpability finding was erroneous because it was the type of conduct the State Bar admitted during discovery was reasonable if the sanctions were paid within one year and because it denied respondent his constitutional rights of due process and equal protection of the laws. (Hon. Eugene E. Brott, Hearing Judge.)

The review department concluded that respondent was required by the State Bar Act to report the sanctions order imposed upon him notwithstanding his pursuit of an appeal. The hearing judge's conclusion that respondent wilfully violated section 6103 by not paying the sanctions order was upheld. The review department adopted the discipline of private reproval imposed by the hearing judge and added a condition that respondent pay the court-ordered sanctions.

Counsel for Parties

For State Bar: Diane J. Meyers, Allen L. Blumenthal

For Respondent: Respondent Y, 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] **214.50 Section 6068(o) (comply with reporting requirements)**
Despite the silence of the statutory text, the time for reporting judicial sanctions pursuant to section 6068(o)(3) of the Business and Professions Code runs from the time the attorney knows the sanctions were ordered, regardless of the pendency of any appeal.

[2 a, b] **214.50 Section 6068(o) (comply with reporting requirements)**
The purpose of section 6068(o)(3) of the Business and Professions Code is to inform the State Bar promptly of events which could warrant disciplinary investigation. Depending on the facts, any such investigation might not focus primarily on the judicial sanction itself, but on the conduct preceding or surrounding a sanctions order.

[3] **194 Statutes Outside State Bar Act**
214.50 Section 6068(o) (comply with reporting requirements)
Code of Civil Procedure 916 does not stay either execution of a judicial sanctions order or respondent's duty to report it to the State Bar.

[4] **204.10 Culpability–Wilfulness Requirement**
214.50 Section 6068(o) (comply with reporting requirements)
The wilful violation of Business and Professions Code section 6068(0)(3)'s reporting requirement does not require a bad purpose or an evil intent. All that is required for a wilful violation of section 6068(o)(3) is a general purpose of willingness to commit the act or omission.

[5 a, b] **220.00 State Bar Act–Section 6103, clause 1**
Since respondent clearly knew about the judicial sanctions order, the only issue pending before the court regarding a violation of Business and Professions Code section 6103 was whether respondent had a reasonable time to comply with the order. Whatever a reasonable amount of time would have been for respondent to have paid the sanctions, much more than a year had elapsed from the time of the order during which he failed to comply. Respondent's failure to comply with the sanctions order in more than one year from the time of the order constituted a wilful violation of section 6103.

[6 a, b] **220.00 State Bar Act–Section 6103, clause 1**
Respondent's inability to pay court-ordered sanctions is not a defense to the charged violation of section 6103 where there is no evidence that respondent ever sought relief from the sanctions order in the civil courts because of an inability to pay.

[7] **192 Due Process/Procedural Rights**
193 Constitutional Issues
220.00 State Bar Act–Section 6103, clause 1
Cases which hold that constitutional due process rights would be violated if a father delinquent in child support were held in a later criminal contempt proceeding to a statutory presumption of ability to pay the support order, in the face of the prosecutor's burden to prove criminal contempt beyond a reasonable doubt, are distinguishable as State Bar proceedings have long been defined by our Supreme Court as unique, and not as criminal proceedings. Moreover, even if respondent lacked the ability to pay, respondent would not be disciplined for failing to pay the sanction, but for failing to pay the sanction without first attempting to be relieved of the order in whole or in part in the superior court or Court of Appeal on the basis of ability to pay.

[8] **865.20 Standards–Standard 2.6–Declined to Apply**
865.40 Standards–Standard 2.6–Declined to Apply
A private reproval is reasonable for failing to report and to pay a judicial sanctions order given respondent's lack of prior discipline and the narrow violations involved.

[9] **171 Discipline–Restitution**
220.00 State Bar Act–Section 6103, clause 1
A condition attached to respondent's private reproval requiring respondent to pay the $1000 sanctions ordered by the superior court was necessary. To conclude otherwise would terminate respondent's professional obligation under Business and Professions Code section 6103 to obey the order and pay the sanctions. Such a result would be inconsistent with the purposes of attorney discipline.

ADDITIONAL ANALYSIS

Culpability
- Found
  - 214.51 Section 6068(o)
  - 220.01 Section 6103, clause 1

Aggravation
- Declined to Find
  - 545 Bad Faith, Dishonesty

Mitigation
- Found
  - 710.10 No Prior Record

Discipline
- Probation Conditions
  - 1024 Ethics Exam/School
  - 1029 Other Probation Conditions
  - 1051 Private Reproval–With Conditions

OPINION

STOVITZ, J.:

This review raises two issues: 1) Does the State Bar Act require that a superior court order of sanctions against an attorney be reported to the State Bar while an appeal of the sanctions order is pending? 2) Was it error for the State Bar Court hearing judge to deny respondent's motion to dismiss the charge that he failed to pay the sanctions?

On stipulated facts, the hearing judge found respondent Y[1] not culpable of failing to report to the State Bar a superior court order imposing sanctions of $1,000. (See Bus. & Prof. Code, § 6068, subd. (o)(3).)[2] However, under section 6103 the judge found respondent culpable of failing to pay the sanctions as respondent had almost two years to do so since the order imposing them became final. The hearing judge imposed a private reproval and added two duties to the reproval. (Cal. Rules of Court, rule 956.)

Both the Office of Chief Trial Counsel (State Bar) and the respondent seek our summary review, under rule 308, Rules of Procedure of the State Bar, title II, State Bar Court Proceedings.[3] The State Bar contends that the judge erred in dismissing the charge alleging that respondent violated section 6068, subdivision (o)(3) and that the judge correctly held respondent culpable of failing to pay the sanctions. Respondent supports the hearing judge's dismissal of the failure-to-report sanctions charge and contends that the hearing judge erred by finding him culpable of failing to pay the sanctions in the absence of proof by the State Bar of his ability to pay. He also contends that the culpability finding was erroneous because it was the type of conduct the State Bar admitted during discovery was reasonable if the sanctions were paid within a year and because it denied respondent his constitutional rights of due process and equal protection of the laws.

Independently reviewing the record, we hold that respondent was required by the State Bar Act to report the sanctions imposed on him notwithstanding his pursuit of an appeal. We further uphold the hearing judge's conclusion that respondent wilfully violated section 6103 by not paying the sanctions order. We shall adopt the discipline of private reproval recommended by the hearing judge.

I. FACTS

We set forth the undisputed and basic facts that are relevant to this review. In early 1995, while acting as associate counsel for litigants defending an action pending in San Diego County Superior Court, plaintiff's counsel moved that respondent be sanctioned for frivolous actions by respondent and his predecessor counsel. On March 7, 1995, after a hearing on the sanctions motion, the superior court ordered sanctions against respondent in the amount of $1,000 for bad faith tactics and actions. The sanctions were based on Code of Civil Procedure section 128.5.

On March 28, 1995, respondent received notice of the sanctions, and on April 5, 1995, he appealed the sanctions order. On June 8, 1995, the court of appeal dismissed the appeal because of respondent's failure to file a copy of the judgment.

Respondent reported the sanctions to the State Bar on June 29, 1995, 21 days after his appeal was dismissed and 3 months after he learned that sanctions had been ordered. As far as the record shows, respondent has not paid the sanctions.

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1. Since this proceeding did not result in the imposition of any public discipline, we follow our usual practice of not identifying the respondent in this published opinion. (See, e.g., *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn.1.) The proceeding is, however, public.

2. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code. As will be noted, *post*, section 6068, subdivision (o)(3) requires the reporting to the State Bar within 30 days of the attorney's learning of judicial sanctions of $1,000 or more levied against him or her except for discovery sanctions.

3. Unless noted otherwise, all references to rules are to the provisions of the Rules of Procedure of the State Bar, title II, State Bar Court proceedings.

II. PROCEDURAL BACKGROUND

This proceeding started in April 1996, when the State Bar filed a notice of disciplinary charges accusing respondent of five counts of misconduct. The hearing judge denied respondent's motion of June 7, 1996, to dismiss the charges for failure to state a disciplinary offense. However, in December 1996, the hearing judge granted the State Bar's motion to dismiss three of the five charges. The only charges tried were that respondent failed to timely report the imposition of sanctions and that he wilfully failed to pay them. As noted, *ante*, both sides sought our summary review.

III. DISCUSSION

A. Appropriateness of Summary Review

At the outset, we hold that this case is appropriate for summary review under rule 308(a). The culpability facts are undisputed. This appeal concerns the proper interpretation of the statutory and ethical standards applied to those undisputed facts.

B. Duty to Report Imposition of Sanctions

[1a] The hearing judge determined that respondent complied with the duties of section 6068, subdivision (o)(3) even though he did not report the sanctions to the State Bar until after the dismissal of the appeal. The judge based his decision both on a policy argument to let the courts of appeal sort out the significant sanctions orders meriting State Bar attention from the less significant ones as well as on an analogy as to which sanctions orders must be obeyed. As we shall discuss, we have concluded that the hearing judge erred in this analysis of the reporting requirements of sanctions orders.

[1b] Section 6068, subdivision (o)(3) requires that an attorney report to the State Bar, in writing, any judicial sanctions imposed against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than $1,000. In addition, subdivision (o)(3) requires that the attorney report the sanctions to the State Bar in writing and within 30 days after the attorney learns of the sanctions.

[1c] Without dispute, the sanctions order imposed on respondent was required to be reported to the State Bar. The dispute between the parties concerns only the timing of reporting. Respondent contends that although the statutory text is silent on whether or not the reporting duty applies to sanction orders under appeal, the statute must be read to exclude reporting of orders during the pendency of an appeal. The State Bar disagrees with respondent's view and argues that the attorney's duty to report runs from the time the attorney knows the sanctions were ordered, regardless of pendency of any appeal. The State Bar bases its view on several factors: that there are no automatic consequences of an attorney's reporting imposition of sanctions; that the statutory purpose is to alert the State Bar promptly when sanctions have been ordered; and that other, similar, reporting requirements in section 6068 are triggered on the mere filing of certain documents, irrespective of any later events. We agree with the State Bar's interpretation of the plain language of section 6068, subdivision (o)(3) and disagree with respondent's.

[2a] Respondent's insistence that, during the appeal of his sanctions order, it had no effect and could not trigger the reporting requirement distorts the plain language of section 6068, subdivision (o)(3) and misunderstands both its nature and purpose. As the State Bar correctly observes, there is no automatic discipline effect merely because of the entry of a sanctions order. If there were, respondent's argument might conceivably have some merit.

[2b] We hold that the purpose of section 6068, subdivision (o)(3) is to inform the State Bar promptly of events which *could* warrant disciplinary investigation. Depending on the facts, any such investigation might not even focus primarily on the sanction itself, but on the conduct preceding or surrounding a sanctions order. Our holding is also supported by the six other events required to be reported to the State Bar by other parts of section 6068, subdivision (o). These include, as examples, the filing of three or more suits against an attorney in a 12-month period for professional misconduct or malpractice, entry of certain civil judgments against an attorney, and the filing of a felony criminal information or indictment against an attorney. Later events can decisively affect those events, which also trigger reporting to the State Bar.

Yet, the initial events do require reporting within 30 days of the time the attorney has knowledge of them. All of these reporting events are fully consistent with the long-standing authority of the State Bar to investigate on its own initiative and without any citizen complaint any conduct which might be a violation of the State Bar Act (§ 6044; *In re Phillips* (1941) 17 Cal.2d 55, 58).

In addition, as the State Bar points out, the State Bar Act requires courts to report certain events to the State Bar. (§ 6086.7.)

As an example, courts must report only "final" orders of contempt. (§ 6086.7, subd. (a).) However, the courts are required to report the same imposition of sanctions required to be reported by the attorney. (§ 6086.7, subd. (c).) The courts' reporting duty of section 6086.7 is significant because it shows that, when the legislature intends to condition a reporting duty on an event becoming final, it has expressly so stated. (See § 6086.7, subd. (a).) In contrast, no such finality requirement is attached to section 6068, subdivision (o)(3).

Respondent's argument that the State Bar will be burdened excessively if sanctions orders are reported that may ultimately be reversed on appeal speaks to the discretion which is vested in the State Bar upon report of a sanctions order. (Cf. *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18, 22 [the State Bar Court does not have general oversight authority over the investigation of disciplinary complaints].) As noted, the State Bar has no duty to initiate disciplinary proceedings merely upon receipt of a report of sanctions being imposed. Subject to the Supreme Court's inherent authority, it is therefore left to the State Bar in the first instance as to what action, if any, should be taken upon receipt of such a report. The State Bar urges that we do just this. Since this approach is fully consistent with the statutory language, we follow it.

Moreover, respondent did not and cannot point to any authority that his appeal of the sanctions order caused the order to disappear or be expunged. In reality, not only did the sanction order continue to exist during its appeal, it also remained subject to execution during its appeal unless respondent posted a bond to stay execution in the superior court in accordance with Code of Civil Procedure section 917.1 (Cf. *Banks v. Manos*) (1991) 232 Cal. App.3d 123, 127-129.)

Respondent's position is also internally inconsistent. He first contends in his brief that "an attorney does not 'know' of the imposition of sanctions. . . until the duty to pay becomes final." A few lines later, respondent concedes that on about March 28, 1995, he learned of the order that he pay the $1,000, and he concedes that this was a sanctions order.

We reject other of respondent's claims. **[3]** Code of Civil Procedure section 916 does not stay either execution on the sanctions order (*Ibid.*) or respondent's duty to report to the State Bar. **[4]** The wilful violation of section 6068, subdivision (o)(3)'s reporting requirement does not require a bad purpose or an evil intent. Analogizing to related reporting duties of attorneys, for example, rule 955, California Rules of Court, we hold that all that is required for a wilful violation of section 6068, subdivision (o)(3) is a general purpose of willingness to commit the act or omission. (Cf. *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.)

Under the circumstances, respondent wilfully violated section 6068, subdivision (o)(3) by not timely reporting the sanctions order. As misinformed as respondent was concerning this requirement, there is no evidence that his violation was in bad faith or dishonest. Accordingly, we do not deem it appropriate to enhance the discipline solely for this violation. Moreover, if our holding becomes final, we encourage the State Bar to publicize to members of the Bar their duty under section 6068, subdivision (o)(3) to report to the State Bar a specified sanction order irrespective of the pendency of an appeal.

C. Failure to Pay Sanctions

[5a] The hearing judge observed that, since respondent clearly knew of the sanctions order, the only issue before the court under this count was whether respondent had a reasonable time to comply with the order. The judge concluded that respondent had far more than a year to comply with it and that his

failure to do so under the circumstances was a wilful violation of section 6103. As we shall conclude, the hearing judge ruled correctly and also correctly rejected arguments respondent had made below that the sanction order was merely a direction to pay money which could not give rise to a disciplinary duty and that this proceeding deprived respondent of the equal protection of the laws.

On review, respondent repeats his earlier arguments and urges a few more. They are without merit.

[5b] Respondent contends that since the sanction order did not specify a time for payment and since the State Bar asserted during discovery that non-payment of the sanction order within one year was reasonable, there is no basis for the hearing judge's decision since less than a year elapsed between the dismissal of respondent's appeal and the start of formal disciplinary charges. Respondent's argument is unintelligible and a complete distortion of the cited discovery. The key point, recognized by the hearing judge, is that, whatever a reasonable amount of time would have been for respondent to have paid the sanction ordered, much more than a year elapsed during which he failed to comply. From the record, it appears that respondent still has not yet paid the sanctions.

[6a] Respondent next argues that the State Bar failed to prove its case that respondent had the financial ability to pay. Respondent cites no persuasive authority for this proof requirement, and we know of none. Moreover, respondent and the State Bar were content to submit this matter on stipulated facts; and none showed that respondent was without ability to pay the $1,000 sanctions at any reasonable time. However, we need not decide whether the State Bar has the burden to prove that respondent had the financial ability to pay because our opinion in *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403-404 is dispositive.

[6b] In *Boyne*, we held that notwithstanding an attorney's lack of money, he was culpable of misconduct for failure to pay court-ordered attorney fees to the opposing party, where the attorney knew of the order and failed to even seek relief from it. Our *Boyne* decision cited *Papdakis v. Zelis* (1991) 230 Cal. App.3d 1385, 1389, in which the court held that an attorney who sought bankruptcy court relief could not thereby obviate payment of a court sanctions order for filing a frivolous appeal. (See also *Brookman v. State Bar* (1988) 46 Cal. App.3d 1004, 1008). In the present proceeding, there is no evidence that respondent ever sought relief from the order in the civil courts because of an inability to pay. Accordingly, even assuming that respondent lacked the ability to pay, it would not be a "defense" to the charged violation of section 6103 in this case.

Respondent also argues that he cannot be disciplined under section 6103 because the facts do not show that one of the statutory requirements is present: that the sanctions order was "connected with or in the course of his employment." (Cf. *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603-604.) As the record shows, the basis for the motion which led to the sanctions order was respondent's conduct while representing defendants in the civil action then pending in the superior court. Thus, respondent's argument before us is frivolous.

Finally, we reject respondent's claims of denial of due process or equal protection as unsupported by any applicable law.[4]

4. [7] We are aware of *Hicks on Behalf of Feiock v. Feiock* (1988) 485 U.S. 624 in which the Supreme Court held that constitutional due process rights would be violated if a father delinquent in child support were held in a later criminal contempt proceeding to a statutory presumption of ability to pay the support order, in the face of the prosecutor's burden to prove criminal contempt beyond a reasonable doubt. *Hicks* is distinguishable as State Bar proceedings have long been defined by our Supreme Court as unique, and not as criminal proceedings. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 225-226 (and cases there cited).) Moreover, even if respondent lacked the ability to pay, respondent would not be disciplined for failing to pay the sanction, but for failing to pay the sanction without first attempting to be relieved of the order in whole or in part in the superior court or Court of Appeal on the basis of ability to pay.

D. Considerations Regarding Discipline

[8] The State Bar sought a stayed suspension at trial. Before us, it does not seek to change the private reproval recommended by the hearing judge. There is little evidence before us bearing on degree of discipline. We find that the hearing judge's private reproval is reasonable, given respondent's lack of prior discipline and the narrow violations before us. We shall therefore adopt the hearing judge's private reproval and the conditions he attached to it requiring respondent to attend the State Bar's Ethics School and take a professional responsibility examination. However, we shall also attach an additional condition requiring respondent to promptly comply with the sanction order if he has not yet done so.

[9] As respondent notes in his appellant's brief, the hearing judge did not attach, to respondent's private reproval, a condition requiring respondent to pay the $1,000 as ordered by the superior court. Even though the State Bar does not request that we include such a condition, we conclude on independent review that such a condition is necessary (Cf. *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 466; see also *In re Morse* (1995) 11 Cal.4th 184, 210-211). To conclude otherwise would terminate respondent's professional obligation under section 6103 to obey the order and pay the sanctions. Such a result would be inconsistent with the purposes of attorney discipline. Accorddingly, we shall attach a condition to respondent's private reproval requiring him to pay the $1,000 sanction.

IV. PRIVATE REPROVAL

Respondent is hereby privately reproved for his failure to obey the March 7, 1995, order of the California Superior Court for the County of San Diego requiring respondent to pay a $1,000 in sanctions for engaging in bad faith tactics and actions in that court. Furthermore, the following conditions are attached to respondent's reproval.

1. If respondent has not done so, he must promptly obey the March 7, 1995, order of the Superior Court of California for the County of San Diego by paying, within 15 days after the effective date of this reproval,[5] the $1,000 sanctions imposed on him therein together with 10% interest thereon from March 7, 1995, until paid and provide satisfactory proof of such payment to the State Bar's Probation Unit in Los Angeles within the same 15-day time period. If respondent has already paid the $1,000 sanction together with interest thereon from March 7, 1995, until paid, he must provide satisfactory proof of such payment to the State Bar's Probation Unit in Los Angeles within 15 days after the effective date of this reproval.

If respondent contends that he is unable to pay this amount, he must ask, within the first 30 days after the effective date of this reproval, the State Bar's Probation Unit in Los Angeles to assign to him a reproval/probation monitor and must submit to that monitor, within 30 days after being notified of the monitor's assignment, a written plan for the prompt payment of as much of the amount as respondent is able to pay. The submission of any such plan by respondent must include satisfactory proof of respondent's financial condition and the amount he is able to pay. The monitor's approval or rejection of any payment plan proposed by respondent is reviewable de novo on a motion filed in accordance with rule 271 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings.

2. Within one year after the effective date of this reproval, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, title III, General Provisions, rule 3201.)

5. This reproval is effective on the date our opinion in this matter becomes final. (Rule 270(a).)

3. Within one year after the effective date of this reproval, respondent must take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners and provide satisfactory proof of passage of the examination to the State Bar's Probation Unit in Los Angeles.

We find that these conditions will adequately serve to protect the public and will serve the interests of respondent. Respondent's failure to comply with any of these conditions may constitute cause for the imposition of additional discipline in a separate proceeding. (See Cal. Rules of Court, rule 956(b); Rules Prof. Conduct of State Bar, rule 1-110.)

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Michael A. Doran

A Member of the State Bar

Nos. 93-O-14534, 94-O-14813, 95-O-10936, 95-O-12847,
95-O-17260, 95-O-17874, 96-O-00264, 96-O-00601

Filed May 22, 1998

SUMMARY

The State Bar sought review of a hearing judge's recommendation that respondent be placed on stayed suspension for a period of one year conditioned on ninety days actual suspension. The State Bar asserted the hearing judge failed to take into account certain aggravating circumstances and gave undue weight to certain mitigating circumstances. The State Bar also argued that the hearing judge erred in determining that mitigation outweighed aggravation.

The review department adopted each of the hearing judge's determination of culpability, reweighed the evidence in aggravation and mitigation, and modified the recommended discipline to provide that respondent be suspended from the practice of law for a period of eighteen months, that execution of suspension be stayed, and that respondent be placed on probation for three years on condition that he be actually suspended for the first six months of the probationary period and until he satisfactorily completes certain educational courses.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Respondent: Michael A. Doran, in pro. per.
Bridget J. Daniels

HEADNOTES

[1] 280 **Rule 4-100(A) (former 8-101(A))**
Respondent's conduct of depositing personal funds in his client trust accounts and using those accounts for his personal expenses constituted commingling within the meaning of rule 4-100 of the Rules of Professional Conduct, even where there were no clients funds in the trust account.

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

[2] **221.00 State Bar Act–Section 6106**
Respondent repeatedly used his client trust accounts for personal expenses and repeatedly wrote NSF checks. He made no effort to determine his responsibilities relating to his trust account, nor did he exercise any effort to determine the balance in the trust accounts, maintain a ledger, or even determine that, in fact, deposits had been made to the trust account. Such a total abdication of responsibility can be attributed to no less than gross negligence and constitutes moral turpitude in violation of Business and Professions Code section 6106.

[3 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Reliance solely on a clerk's advice regarding a continuance of a motion, without ensuring that an order exists attesting to the continuance, constitutes negligence and might well be reckless on the part of an experienced practitioner. However, as respondent was newly admitted to practice, his practice consisted of appearing before administrative law judges on Social Security matters, and he had little experience in the superior court, the review department concluded that there was not clear and convincing evidence that respondent's conduct was reckless or intentional. Thus, the evidence did not support a culpability determination under rule3-110 of the Rules of Professional Conduct.

[4] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
After determining that he no longer wished to represent his client, respondent remained the attorney of record for approximately one year. His failure to either progress the action to trial or take affirmative steps to be relieved as attorney of record was at least reckless and a violation of rule 3-110 of the Rules of Professional Conduct. The client's failure to cooperate in permitting respondent's withdrawal in no way excused respondent from making the necessary motion to be relieved as counsel of record.

[5 a, b] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Rule 3-700(A)(2), which requires that an attorney not withdraw from employment until the attorney has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, applies to an attorney's taking active steps to prejudice the rights of a client in an effort to withdraw. Respondent, who in his declaration in response to an order to show cause regarding dismissal of his client's action, offered his view that he would not be opposed to sanctions being levied against his client, and that he would personally like to see his client's action dismissed, is culpable of a violation of rule 3-700(A)(2) of the Rules of Professional Conduct.

[6] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Respondent's leaving a client in the midst of a hearing is an abandonment of a client and a violation of rule 3-700(A)(2) of the Rules of Professional Conduct.

[7 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
There is no clear and convincing evidence that respondent's failure to have his client's medical records available at the client's administrative hearing was either intentional or reckless. Thus, while such conduct was negligent, it did not reach the level of a disciplinable offense for failing to perform competently in violation of rule 3-110 of the Rules of Professional Conduct.

[8] **531 Aggravation–Pattern–Found**
Respondent's regular use of his client trust accounts to conduct his personal business affairs over a period approaching three years, combined with his lack of attention to the requirements of maintaining a trust account and his issuance of 28 NSF checks from that account, establishes a pattern of misconduct and is an aggravating circumstances under standard 1.2(b)(ii).

[9 a-c] **824.10 Standards–Commingling/Trust Account–3 Months Minimum**
833.90 Standards–Moral Turpitude–Suspension
844.13 Standards–Failure to Communicate/Perform–No Pattern–Suspension
Respondent's misconduct, which involved the misuse of his client trust accounts, the failure to perform services competently in one matter, and extremely serious violations of his obligation of fidelity to clients (involving abandonment of a client and, in an uncharged incident, of arguing against the interest of his client in seeking to be relieved as attorney of record) warrants a discipline recommendation of 18 months stayed suspension, three years probation, and six months actual suspension and until respondent satisfactorily completes certain educational courses.

[10] **691 Aggravation–Other–Found**
Respondent's placement of his interests above the interests of his client warrants significant additional discipline.

[11] **173 Discipline–Ethics Exam/Ethics School**
174 Discipline–Office Management/Trust Account Auditing
Where the record demonstrated that the conduct of respondent was not venal, but rather totally oblivious to his obligations as a lawyer, the review department had great concern that respondent's lack of understanding of his obligations as an attorney posed a risk to the public. Under these circumstances the review department recommend that respondent not return to practice until such time as he completed certain educational requirements imposed as conditions of probation.

ADDITIONAL ANALYSIS

Culpability
- Not Found
  - 252.25 Rule 1-310 (former 3-103)

Aggravation
  - 560 Other uncharged violations
- Found
  - 521 Multiple Acts

Mitigation
- Found
  - 735.10 Mitigation– Candor– Bar – Found
- Declined to Find
  - 710.53 No Prior Record
  - 740.53 Good Character References
  - 745.52 Remorse/restitution/atonement

Standards
  - 802.30 Purposes of Sanctions

Discipline
  - 1013.07 Stayed Suspension–18 Months
  - 1015.04 Actual Suspension–6 Months
  - 1017.09 Three years (incl. anything between 3 & 4 yrs.)
- Probation Conditions
  - 1024 Ethics exam/ethics school
  - 1026 Trust account auditing
  - 1029 Other Probation Conditions

Other
  - 175 Discipline–Rule 955
  - 178.10 Costs–Imposed

OPINION

OBRIEN, P.J.:

The State Bar seeks review of a recommendation by the hearing judge that respondent Michael A. Doran be placed on stayed suspension for a period of one year conditioned on ninety days actual suspension. The State Bar does not challenge the findings made on the issues of culpability, but does assert the hearing judge failed to take into account certain aggravating circumstances and gave undue weight to certain mitigating circumstances. It further argues that the hearing judge erred in determining that mitigation outweighed aggravation.

Respondent did not seek review but, nonetheless, seeks to challenge the hearing judge's determination of culpability on three of the ten charges considered. In addition, he argues that no actual suspension should be imposed. Following a series of motions by the State Bar we granted respondent additional time to file a supplemental brief that identifies from the record the factual statements contained in his brief. Respondent failed to file that supplemental brief; and on February 11, 1998, we ordered struck from his brief all factual references not supported by references to the record, and any factual arguments based thereon.

We adopt each of the hearing judge's determinations of culpability, reweigh the evidence in aggravation and mitigation, and modify the recommended discipline to provide that respondent be suspended from the practice of law for a period of eighteen months, that execution of that suspension be stayed, and that respondent be placed on probation for a period of three years on condition that respondent be actually suspended for the first six months of the probationary period.

I. STIPULATED FACTS AND PROCEDURAL BACKGROUND

Case number 93-O-14534 was filed containing six counts of alleged misconduct. Counts one and five involve charges of commingling funds in respondent's first client trust account (CTA1) in violation of rule 4-100(A),[1] while counts two and six are charges of moral turpitude in violation of section 6106[2] from writing seventeen inadequately funded (NSF) checks on his trust account as charged in count two, and one NSF check as charged in count six.

Count three charged respondent with forming a partnership with a non-lawyer in violation of rule 1-310. The hearing judge determined there was an absence of clear and convincing evidence of that respondent had formed a partnership with a non-lawyer. We agree, and do not further consider count three.

Count four charged respondent with failure to act competently under rule 3-110 in connection with his handling of a dental malpractice case, with his response to an order to show cause regarding the dismissal of that action for failure to prosecute a client's action, and with his motion to be relieved as attorney of record in connection with that action.

In five uncharged cases, the parties stipulated to the facts, and further stipulated to a waiver of issuance of a notice of disciplinary charges and that the court could consider the stipulated facts as if charged for all purposes, including the finding of one or more violations of rule 4-100(A)(2) and one or more violations of section 6106. In four of the uncharged cases, the checks were written on respondent's second client trust account (CTA2); each was written for personal or business purposes; and each of the checks was dishonored on presentation for lack of sufficient funds in the account.

These five uncharged cases include case number 95-O-12847. In that case, between December 7, 1994, and January 12, 1995, respondent issued no fewer than five checks. In case number 95-O-17260, on or about August 8, 1995, respondent issued a check. In case number 95-O-17874, between April 21, 1995, and April 28, 1995, respondent issued no

1. Unless otherwise indicated, all future reference to "rule" is to the Rules of Professional Conduct.

2. Unless otherwise noted, all references to "section" are to the Business and Professions Code.

fewer than three checks. In case number 96-O-00264, on or about August 17, 1995, respondent issued a check.

In the final uncharged matter, case number 96-O-00601, respondent represented Janet Reavely in a claim for Social Security benefits. At the time of hearing before an administrative law judge respondent requested that the hearing be kept open for an additional 15 days in order to permit the introduction of essential medical records that had been ordered but not yet received. The administrative law judge denied the request on the grounds that respondent had been representing Reavely for over a year and had ample opportunity to obtain the records. Without arguing the merits of his request for an extension, respondent sought and obtained a five-minute recess. During the recess and after informing a clerk in the Office of Hearings and Appeals, respondent did not return to the hearing room, but left the premises. Respondent did not tell the administrative law judge or his client he was leaving, nor did he give her any instructions as to how to conduct the hearing. Reavely's claim for Social Security benefits was denied.

II. DISCUSSION OF CULPABILITY

A. Counts Involving Respondent's Trust Accounts

Counts one, two, five, six, and uncharged cases numbered 95-O-12847, 95-O-17260, 95-O-17874, and 95-O-00264 each involved the use of respondent's client trust accounts for his personal business and the consequences of respondent's writing NSF checks for personal expenses from one of his two client trust accounts.

Shortly after commencing practice as an attorney, and no later than September 1992, respondent opened CTA1. As charged in count one, between September 1992 and June 1993 respondent wrote 17 NSF checks against that account, each for personal matters, none involving clients. Respondent knew of the State Bar's investigation of his trust account not later than January 1993.[3] Of the 17 checks charged in count one, 8 were written after respondent learned of the investigation.

The record shows that respondent deposited earned fees received from clients in CTA1 and, at least in part, used that account to pay office and personal expenses. There is no clear and convincing evidence that any client funds were deposited into that account. Respondent maintained no ledger for that account, listed the checks written only on the cardboard back of the check book, and attempted to keep the balance in his head, but did not otherwise make an effort to know the balance in the account. He did not reconcile the monthly statements from the bank or make any other effort to record deposits and withdrawal of funds in CTA1. Even after being informed by the State Bar that he was being investigated for trust account violations, he continued to write personal NSF checks on CTA1.

He testified that he opened the account only because he understood that the State Bar required him to do so. He further testified that he had no understanding of the purpose of a trust account, nor did he understand the concept of commingling. While all of the 17 checks were returned at least once for lack of sufficient funds, respondent eventually saw that each of the payees received the funds due them. Respondent's explanation for the frequent issuance of NSF checks against CTA1 included his reliance on the frequent checks of a client issued to respondent that were returned for insufficient funds. However, in spite of the frequent dishonoring of these checks, respondent never made an effort to determine whether the client's checks to him had cleared before issuing checks against those assumed funds.

In about October 1994, long after respondent was aware of the State Bar's investigation of his trust account practices, respondent opened CTA2. Between October 1994 and August 1995 respondent issued no less than 10 NSF checks against CTA2. This activity by respondent is the basis for counts five and four of the five uncharged matters.

3. Exhibit 1, in which respondent acknowledged the investigation, is dated January 1992. The parties have stipulated that the correct date of the letter is January 1993.

Again, in handling CTA2, respondent admitted that he did not keep a ledger showing the balance in the account, and that in spite of his knowledge of the investigation of CTA1, he did not understand the concept of commingling or the purpose of the trust account. Respondent further acknowledged that there may have been a "couple of instances" where he deposited his fees in CTA2 before receiving the required prior approval of the Social Security Administration.

Respondent testified that at the time of issuance of the NSF checks the maintenance of the trust account was not important to him because of the many concerns he had associated with opening his fledgling law practice.

He had clients in remote areas who received Social Security benefits as the result of hearings in which he appeared. From those awarded benefits respondent was entitled to fees. Rather than have the clients write him a check or obtain a money order payable to him, he instructed the clients to deposit his fees to CTA2 by making a deposit in the client's local branch of the Bank of America. Following the client's statement that they would do so, respondent issued checks on CTA2 without confirming that, in fact, the deposits by the clients had been made.

In counts one and five and in four of the five uncharged counts, respondent is charged with a violation of rule 4-100, requiring all funds held for the benefit of clients be held in a trust account, and further providing, in effect, that no funds belonging to the attorney shall be deposited or retained in that account except funds reasonably necessary to pay bank charges or funds over which there is a dispute with a client. There is clear and convincing evidence that respondent regularly used CTA1, and after its closure, CTA2 for deposit and expenditure of his personal funds. He issued a total of 28 NSF checks during the period from September 1992 through August 1995.

Commencing in January 1993 respondent corresponded with the State Bar, initially explaining he had merely made a deposit in the wrong account leading to the overdraft. This was followed by a letter to the State Bar written in July 1993 in which he outlined an explanation for each of 20 dishonored checks. That letter concluded: "I am humbled by this situation and I am striving to take steps to prevent the same problems from occurring again. I now do not write checks until a deposit has cleared and verified as such." Nonetheless, between December 1994 and August 1995 respondent issued at least 10 personal NSF checks from CTA2. At no time did respondent make any effort to educate himself as to the rules of professional conduct pertaining to the use and maintenance of a client trust account.

[1] The evidence is clear and convincing that respondent is culpable of repeated violations of rule 4-100. From September 1992 through August 1995 he deposited personal funds in CTA1 and CTA2 and used those accounts for his personal expenses. Such conduct constituted commingling within the meaning of rule 4-100 even where there were no client funds in the trust account. (*Arm v. State Bar* (1990) 50 Cal.3d 763, 776-777; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 625.) In doing so, he is culpable of a violation of rule 4-100 in counts one and five and in four of the five uncharged counts.

[2] In counts two and six and the first four uncharged matters, respondent is charged with moral turpitude in violation of section 6106 for the repeated use of his CTA's for personal expenses, and repeatedly writing NSF checks. There is clear and convincing evidence that throughout the period from September 1992 through August 1995 respondent was guilty of gross negligence in his conduct. He made no effort to determine his responsibilities relating to his trust account, nor did he exercise any effort to determine the balance in the trust accounts, maintain a ledger, or even determine that, in fact, deposits had been made to the trust account. Such a total abdication of responsibility can be attributed to no less than gross negligence and constitutes moral turpitude in violation of section 6106. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 475; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.) We agree with the hearing judge that respondent is culpable of moral turpitude as charged in counts two and six and the first four uncharged matters included by stipulation.

B. CHARGE OF FAILURE TO ACT COMPETENTLY

Respondent and John Dierking became close friends during law school. Respondent graduated from law school and passed the bar several years before Dierking. At the time respondent opened an office for the practice of law, he and Dierking discussed the formation of partnership upon Dierking's becoming eligible to practice. In the meantime respondent employed Dierking as a paralegal for assistance in conducting his practice.

In about April 1991 respondent filed an action for dental malpractice on behalf of Dierking in the superior court. Respondent participated in some discovery in that case. By October 1993 Dierking had ceased working in respondent's office, and there had been a falling out between the former friends. No action had been taken on the malpractice suit after early 1993, and about that time respondent returned the file to Dierking.

On March 22, 1994, respondent was served with an order to show cause from the superior court as to why sanctions, including dismissal, should not be imposed for failure to prosecute the dental malpractice case. The hearing on the order to show cause was set for June 1. On April 15, 1994, respondent wrote Dierking advising him that if he did not hear from him by April 26, 1994, he would dismiss the case. He also enclosed a signed substitution of attorney form. That letter did not mention the impending order to show cause threatening dismissal. Dierking would not consent to respondent's withdrawal. By this time Dierking had been admitted to practice.

On April 28, 1994, respondent filed his declaration in opposition to the order to show cause in the superior court. On May 6, 1994, respondent filed a motion to be relieved as attorney of record, which motion was set for hearing on June 15. On the strength of advice from a superior court clerk respondent gave notice to Dierking and others that the hearing on the order to show cause had been continued to June 15, 1994. Relying on advice from a court clerk to give notice of the continuance, respondent did not make a motion to continue the June 1 hearing on the order to show cause threatening dismissal.

When respondent arrived for the hearing on June 15, 1994, he learned for the first time that the action had been dismissed on June 1, and that his motion to be relieved as attorney of record was off calendar as moot. He immediately called and advised Dierking of the dismissal. Neither Dierking nor respondent took any action seeking to have the dismissal set aside.

[3a] The factors we weigh in determining culpability under rule 3-110 are whether respondent's failure either to bring the dental malpractice action to trial or to withdraw as attorney of record prior to the action becoming subject to dismissal, or his reliance on the court clerk's information that he need only give notice of the continuance of the order to show cause, constitutes intentional, reckless, or repeated failure to perform legal services with competence. That such conduct constitutes negligence is clear.

[3b] Reliance solely on a clerk's advice regarding a continuance of a motion without ensuring that an order exists attesting to the continuance might well be reckless on the part of an experienced practitioner. However, here, respondent was newly admitted to practice, his practice consisted of appearing before administrative law judges on Social Security benefits matters, and he had little experience in the superior court. Under such circumstances, we conclude there is not clear and convincing evidence that respondent's conduct was reckless or intentional. He clearly thought the order to show cause had been continued, as evidenced by his having filed a declaration in relation to the order to show cause followed by his surprise to learn the matter had been dismissed on appearing on June 15.

[4] On the other hand, respondent remained the attorney of record for approximately one year after determining that he no longer wished to represent Dierking. His failure to either progress the action to trial or take affirmative steps to be relieved as attorney of record was at least reckless and a violation of rule 3-110. (See *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1084; *In the Matter of Koehler, supra* 1 Cal. State Bar Ct. Rptr. at p. 626.) Dierking's failure to cooperate in permitting respondent's withdrawal in no way excused respondent from making the necessary motion to be relieved as counsel of record.

[5a] In respondent's declaration in response to the order to show cause regarding dismissal, after reciting his relation with Dierking and in support of his argument that sanctions not be levied against respondent, he stated, "I would not be personally opposed to sanctions levied against [Dierking] for failure to prosecute." This was followed by: "However, much as I would personally like to dismiss this matter, I am forced to make a motion to withdraw as attorney of record . . .."

[5b] Although not charged, rule 3-700(A)(2) requires that an attoruey not withdraw from employment until the attorney has taken reasonable steps to avoid foreseeable prejudice to the rights of the client. Such a rule applies, a fortiori, to an attorney's taking active steps to prejudice the rights of a client in an effort to withdraw. Here, respondent offered his view that he would not be opposed to sanctions being levied against his client, and that he would personally like to see his client's action dismissed. Respondent misses understanding his fiduciary obligation to his client by such a margin as to require no further comment. We find respondent culpable of a violation of rule 3-700(A)(2). We shall use this uncharged misconduct as aggravation.

C. CHARGE OF ABANDONING A CLIENT

It was agreed between the parties and approved by the court that stipulated facts and other evidence could be considered as though charged in uncharged case number 96-O-00601 in determining if there was a violation of rule 3-110(A) (failure to perform competently) and rule 3-700(A)(2) (improper withdrawal from employment).

It was stipulated that respondent was appointed to represent Janet Reavely in February 1994 in regard to a claim for social security benefits filed with the Social Security Administration. On April 19, 1995, notice was given of a May 16, 1995, hearing date in that matter, before an administrative law judge. On the hearing date respondent appeared with his client Reavely. Following the swearing of Reavely as a witness, but before any testimony was taken, respondent requested that the hearing record be kept open for 15 days to permit the introduction of medical records that had been ordered but not yet received. This request was denied.

Immediately following the denial of his request, respondent sought and obtained a five-minute recess. Respondent informed an "office automation clerk" that he would not be returning to the hearing because he was "too upset." Respondent then left the premises and did not return to the hearing room. The hearing continued without respondent. Reavely's request for benefits was denied.

Respondent's testimony disclosed that respondent had prior appearances before the administrative law judge hearing this matter, that respondent felt that judge was unfair to claimants in general and was biased against respondent in particular. Respondent had not notified Reavely of his intended withdrawal, nor did he tell her he was leaving. He left her with no instructions as to how to present her matter, and claimed that without the excluded medical records the case was lost.

Following his departure he talked by telephone with the chief judge's assistant and wrote the chief judge complaining about the conduct of the judge in question and stating in that letter that he "refuse[d] to bend over and be anyone's whipping boy." Thereafter, he talked at length with his client and "helped her with appeals counsel."

[6] We need not belabor the point that respondent's leaving a client in the midst of a hearing is an abandonment of a client and a violation of rule 3-700(A)(2) of the most fundamental sort. That rule requires that a member shall not withdraw from employment without taking reasonable steps to avoid reasonably foreseeable harm to the client. It is hard to visualize a situation in which the harm is more obvious than an attorney walking out on a client in the midst of a hearing.

[7a] In this count, the State Bar further seeks a finding of culpability for violation of rule 3-110, failure to perform competently. The hearing judge found a violation of this section on the basis that respondent had failed to have the records available at the hearing, reciting that respondent had experience in this type of proceeding; either knew or should have known of the setting schedule for this type of proceeding; and should have ordered the medical records in a timely manner.

[7b] The record shows that in matters before the administrative law judge in question the time of setting for hearing was generally longer than before other administrative law judges, that there was a risk of not having up-to-date records if they were ordered too early, and that in any event it was standard practice to hold the record open for later-filed medical records. We conclude that there is not clear and convincing evidence in the record that respondent's failure to provide for timely delivery of the medical records was either intentional or reckless. It was clearly negligence, but that conduct alone does not appear to us to reach the level of a disciplinable offence.

It is clear that respondent's departure from the hearing was an intentional failure to act competently and thus comply with rule 3-110(A). We have found this exact conduct to constitute a violation of rule 3-700(A)(2), and thus dismiss the charge under 3-110(A) as duplicative.

II. DISCUSSION OF DISCIPLINE

A. Factors in Mitigation

Respondent was cooperative throughout the proceedings, entered into appropriate stipulations, was candid during these proceedings and is entitled to some mitigation for those actions. (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(e)(v).)

Respondent has no prior record of discipline. Absence of a prior record of discipline over many years of practice may be a mitigating circumstance. (Std. 1.2(e)(i).) Here, respondent's misconduct began approximately two years following his admission to practice. He thus lacks "many years of practice" as required. (See *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473 [four years of practice prior to misconduct insufficient for mitigation].)

Respondent presented two witnesses that testified to his honesty and trustworthiness, one an attorney with whom he worked as a law clerk for approximately four years prior to his admission to practice, the other a law clerk that worked for respondent from November 1994 to May 1995 when she graduated from law school. For mitigating credit one must present an extraordinary demonstration of good character of the attorney attested to by a wide range of references. (Std. 1.2(e)(vi).) The testimony presented falls far short of the requirements of standard 1.2(e)(vi), and thus is not given mitigating credit.

The hearing judge gave respondent some mitigating credit for steps taken by respondent to avoid further problems with the handling of his trust account, relying on standard 1.2(e)(vii). The only step taken by respondent was to cease using either of his CTA's. Standard 1.2(e)(vii) requires that objective steps be promptly taken spontaneously demonstrating recognition of wrongdoing. Since the last charged NSF check drawn on respondent's CTA2 in August 1995 there have been no further overdrafts on that account. However, respondent has had subsequent overdrafts on his business account. We conclude that this conduct does not rise to the level of a mitigating circumstance under standard 1.2(e)(vii).

B. Factors in Aggravation

[8] Respondent's regular use of his CTA's to conduct his personal business affairs over a period approaching three years, combined with his lack of attention to the requirements of maintaining a trust account and his issuance of 28 NSF checks from that account, establishes a pattern of misconduct. This is an aggravating circumstance under standard 1.2(b)(ii).

In addition, respondent is culpable of multiple acts of misconduct. In addition to his pattern of misconduct involving his trust accounts in violation of rule 4-100, respondent has been found culpable of a reckless violation of rule 3-110 in failing to act competently in neither withdrawing in the Dierking case nor causing it to be brought to trial. Further, respondent has been found culpable of violation of rule 3-700(A)(2) in abandoning his client Reavely at the commencement of her hearing before an administrative law judge. These multiple acts of misconduct constitute an aggravating factor under standard 1.2(b)(ii).

Also, we treat as an aggravating circumstance our finding of respondent arguing against the interest of his client Dierking in his motion to withdraw in

that case, all in an uncharged violation of rule 3-700(A)(2). (Std. 1.2(b)(iii).)

C. Discipline

[9a] Following a detailed discussion of cases dealing with the misuse of CTA's the hearing judge recommended an actual suspension of 90 days as a condition of a 2-year period of probation. Were the trust account violations the only matters before us we would concur in that result. We adopt that discussion as it pertains to the discipline for only the trust account misconduct. We note that in the discipline discussion neither the parties nor the hearing judge addressed the issues of respondent's failure to perform or abandonment of a client.

[9b] In addition to respondent's misconduct involving his trust accounts, we have extremely serious violations of perhaps a lawyer's most profound obligation, fidelity to one's client. In one charged incident respondent abandoned his client at the commencement of her hearing without so much as saying good-bye. In an uncharged incident, in seeking to be relieved as attorney of record respondent argued against the interest of his client, far beyond that which may have been required to justify his relief as attorney of record. **[10]** In both of these cases, it is apparent that respondent placed his interests above the interests of his client. In the former case, he placed his fear of reprimand over the interest of his client in the outcome of the proceedings. In the later case, he argued in favor of sanctioning the client and in favor of dismissal of his client's case in lieu of sanctions against respondent. In our view such conduct warrants significant additional discipline.

The State Bar argues for not less than one year of actual suspension, while respondent argues that no actual discipline is warranted.

Under standard 1.3, the primary purposes of discipline are to protect the public, courts, and legal profession; to maintain high professional standards by attorneys; and preserve public confidence in the legal profession.

We have found respondent culpable of multiple counts of moral turpitude. Standard 2.3 provides that such conduct shall result in actual suspension or disbarment, depending, in part, upon the magnitude of the act of misconduct and the degree to which it relates to acts within the practice of law.

While the matter before us does not rise to the level of a pattern of failure to perform, it does involve two instances of that misconduct. One was charged as a failure to perform, while the other was charged as an improper withdrawal from employment. Standard 2.4(b) addresses a failure to perform demonstrating less than a pattern, and suggests reproval or suspension depending on the extent of the misconduct.

In *Middleton v. State Bar* (1990) 51 Cal.3d 548, the attorney abandoned two clients. There was, however, additional serious misconduct involving threats to file suit against abandoned clients who sought a refund of advanced fees and misrepresentations to the State Bar. That conduct gave rise to a serious threat of a reoccurrence of similar misconduct in the future. We see that case as far more serious than that before us. Middleton was given an actual suspension for two years and until she proved her rehabilitation, fitness to practice, and learning and ability in the general law.

In *Lister v. State Bar* (1990) 51 Cal.3d 1117, Lister abandoned two clients, did not timely return a client's file upon demand and, did not cooperate with the State Bar in its investigation of his misconduct, wilfully continued to represent clients when he knew or should have known that he was not competent to handle their matter, and failed to use his best judgment and learning in accomplishing a settlement with reasonable speed. Lister's prior record of discipline was minor and remote in time.

In the matter before us, we find respondent's misconduct to be less serious than was Lister's. Respondent did communicate with his client Reavely following his abandonment of her, and did not withhold information from his client Dierking. However, the nature of his abandonment of Reavely is shocking, as is his advancement of arguments adverse to his client Dierking. In addition, respondent was culpable of serious additional charges in the handling of his trust accounts.

[11] Based on the entire record we do not find the conduct of respondent to be venal, but rather totally oblivious to his obligations as a lawyer. We have also noted respondent's position that he had no understanding of the requirements of an attorney trust account and consider that in our recommended discipline. We have great concern that respondent's lack of understanding of his obligations as an attorney poses risks to the public. Under these circumstances we recommend that respondent not return to practice until such time as he has completed certain educational requirements imposed as conditions of probation.

We are mindful of *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, footnote 8, allowing one year for the passage of a professional responsibility examination. We do not recommend the passage of such an examination within the period of actual suspension, because of the possibility that the examination schedule would imposed unreasonable or impossible time constraints on respondent. (*Ibid.*) But we do recommend that respondent have at least exposure to learning his obligations during his period of actual suspension.

[9c] We recommend that respondent be suspended from practice for a period of eighteen months, that suspension be stayed, and that he be placed on probation for a period of three years on condition that he be suspended for the first six months and until he satisfactorily completes certain educational courses as outlined below.

III. RECOMMENDED DISCIPLINE

We recommend that respondent be suspended from the practice of law for a period of eighteen months, that execution of that suspension be stayed and that respondent be placed on probation for a period of three years on each of the following conditions:

1. Respondent shall be actually suspended from the practice of law in the State of California during the first six-month period of this probation and until he complies with conditions 7 and 8 of probation;

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the terms and conditions of this probation;

3. Respondent must report, in writing, to the State Bar's Probation Unit in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California;

4. Subject to the assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit and any assigned probation monitor that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the terms and conditions of this probation;

5. In addition to maintaining an official address for State Bar purposes with the State Bar's Membership Records Office as required by section 6002.1 of the Business and Professions Code, respondent must maintain that official address with the State Bar's Probation Unit in Los Angeles and any assigned probation monitor. In addition, respondent must maintain with the Probation Unit in Los Angeles and any assigned probation monitor, a current office address and telephone address or, if respondent does not have an office, a current home address and telephone number. Respondent must promptly, but in no event later than 10 days after a change, report any changes in this information to the Membership Records Office, the Probation Unit, and any assigned probation monitor;

6. During each calendar quarter in which respondent receives, possesses, or otherwise handles client funds or property in any manner, respondent must submit, with the probation report for that quarter to the State Bar's Probation Unit in Los Angeles, a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) whether respondent has kept and maintained such books or other permanent accounting records in connection with respondent's 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; and

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

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

c) whether 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; and

(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; and

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

7. Within six months after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, title III, General Provisions, rule 3201.); and

8. Within six months after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Client Trust Accounting and Record Keeping Course and provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's MCLE requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (*Ibid.*)

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one

year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of passage of the examination to the State Bar's Probation Unit in Los Angeles within that one-year period.

We further recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in rule 955(a) and then file the proof of compliance affidavit provided for in rule 955(c) within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code (as amended effective January 1, 1997).

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOSE ANGEL RODRIGUEZ

A Member of the State Bar

No. 96-O-01784

Filed June 15, 1998

SUMMARY

Respondent was charged with violating his duty under Business and Professions Code section 6068(k) to comply with disciplinary probation conditions. The hearing judge found respondent culpable and recommended that he be suspended from the practice of law for one year, execution of suspension be stayed, and he be placed on probation for two years subject to various conditions, including a thirty day period of actual suspension. (Hon. Eugene E. Brott, Hearing Judge.)

The State Bar sought review, contending the hearing judge's discipline recommendation was insufficient. The review department determined that the record was incomplete and remanded the matter to the hearing department for a new trial at which an adequate record was made.

COUNSEL FOR PARTIES

For State Bar: Millicent Lynn Rolon

For Respondent: Jose Angel Rodriguez, in pro per

HEADNOTES

[1] **120 Procedure—Conduct of Trial**
135.30 Division III, Pleadings/Motions/Stipulations (rules 100-135)
151 Evidence—Stipulations
Absent the court granting a set aside, a partial stipulation to facts remains binding on the parties, and the facts recited in the stipulation are deemed established.

[2 a-d] **120 Procedure—Conduct of Trial**
130 Procedure—Procedure on Review
159 Evidence—Miscellaneous
165 Adequacy of Hearing Decision

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

Without, at least, a factual stipulation establishing aggravation and mitigation, neither the review department nor the Supreme Court have a complete record upon which to evaluate the appropriate discipline for the misconduct that occurred. Where the record consisted of the parties' partial stipulation to facts which did not address any aggravating or mitigating circumstances and two character letters proffered by respondent, the review department determined that the sparse record precluded it from fulfilling its duty to independently review the record and remanded the case for a trial de novo at which an adequate record was made.

Additional Analysis

None

OPINION

NORIAN, J.:

The State Bar, through its Office of the Chief Trial Counsel (OCTC), seeks review of a hearing judge's decision recommending that respondent Jose Angel Rodriguez[1] be suspended from the practice of law for one year, that execution of the one-year suspension be stayed, and that he be placed on probation for two years subject to various conditions, including a thirty-day period of actual suspension.

In this original disciplinary proceeding, respondent was charged with a single count of misconduct. Under that single count, the hearing judge held that respondent was culpable of violating his duty, under Business and Professions Code section 6068, subdivision (k),[2] to comply with the disciplinary probation conditions that the Supreme Court imposed on him in its July 1995 order in case number S046596 (State Bar Court case number 92-O-20852) (*Rodriguez I*). More specifically, the hearing judge held that respondent failed to comply with the probation condition requiring him to submit quarterly probation reports to the State Bar's Probation Department by not timely filing his first three quarterly reports.

OCTC's primary contention is that the hearing judge's discipline recommendation is insufficient. We conclude that the record in this matter is incomplete and remand the matter to the hearing department for a new trial.

I. PROCEDURAL HISTORY

In *Rodriguez I* the Supreme Court placed respondent on one year's stayed suspension and three years' probation on conditions. No actual suspension was imposed. That discipline, including each of the conditions attached to respondent's probation, was imposed on respondent in accordance with a stipulation of facts and disposition that he and OCTC filed in *Rodriguez I.* Even though respondent stipulated to the discipline in *Rodriguez I*, he failed to timely submit his first three quarterly probation reports, which were due in October 1995, January 1996, and April 1996. Accordingly, OCTC filed the present disciplinary proceeding against respondent. Shortly thereafter, respondent submitted those three probation reports.

[1] Ten days before the trial date in the present proceeding, the parties filed a partial stipulation of facts. Because the parties' stipulation has not been set aside, it remains binding on the parties, and the facts recited in the stipulation are deemed established for purposes of this proceeding. (See Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 131(b) [inadmissibility of evidence to prove or disprove a stipulated fact].)

[2a] On the trial date, the parties met with the hearing judge in chambers before the case was called to trial (the in-chambers conference). The in-chambers conference was not recorded. After the in-chambers conference, the parties agreed to submit the matter "on the papers," and the hearing judge held a brief hearing on the record. That hearing is best characterized as a submission hearing.

[2b] No testimony was taken at the submission hearing. Respondent did, however, proffer two attorney declarations attesting to his good character. The hearing judge admitted both of the letters into evidence as exhibits A and B and then outlined his tentative discipline recommendation. OCTC proffered no exhibits.[3]

Thereafter, the hearing judge filed his decision, and OCTC sought review.

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1. Respondent was admitted to the practice of law in this state on December 20, 1974, and has been a member of the State Bar since that time.

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

3. The hearing judge states in his decision that the three documents filed in connection with OCTC's pretrial statement were received into evidence as exhibits 1 through 3. However, the record does not contain any documents marked as exhibit 1, 2 or 3.

II. DISCUSSION

According to OCTC, the appropriate level of discipline for respondent's failure to timely file three quarterly probation reports is two years' stayed suspension, four years' probation, and nine months' actual suspension. Respondent disagrees and contends that the hearing judge's recommended one year's stayed suspension, two years' probation, and thirty days' actual suspension is sufficient.

The hearing judge recites in his decision that the parties "agreed to submit the matter for decision upon the pleadings and documents that had previously been filed with the Court." However, he did not identify which "pleadings and documents" he relied on in making his discipline recommendation. Accordingly, we can only presume that he considered the parties' partial stipulation of facts and respondent's two good character letter exhibits.

[2c] The parties' stipulation establishes only respondent's culpability for not timely filing his first three probation reports. It does not address any aggravating or mitigating circumstances. Thus, the only aggravation or mitigation evidence is respondent's two good character letter exhibits.

Unlike factual findings resolving issues pertaining to credibility of witnesses, we are not required to give great deference to a hearing judge's discipline recommendation. In fact, we are required to review the discipline recommendation independently. (*In re Morse* (1995) 11 Cal.4th 184, 207; *In the Matter of Harris* (Review Dept. 1992) 2 Cal.State Bar Ct. Rptr. 219, 229.) This is appropriate in light of the fact that the Supreme Court has historically accorded the review department's discipline recommendation with great weight. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221, fn. 5, and cases there cited).

[2d] Without, at least, a factual stipulation establishing aggravation and mitigation, neither we nor the Supreme Court have a complete record upon which to evaluate the appropriate discipline for the misconduct that occurred. In sum, the sparse record before us in this proceeding precludes us from fulfilling our duty to independently review the record.

III. ORDER OF REMAND

This matter is remanded to the hearing department for a trial de novo at which an adequate record is to be made. (See Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a).)

We concur:

OBRIEN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Fletcher Foney Bouyer

A Member of the State Bar

No. 95-C-12204

Filed June 25, 1998; as modified, July 30, 1998

SUMMARY

Respondent was convicted of one count of violating Unemployment Insurance Code section 2106 (failing to file employment taxes reports with the Employment Development Department), a misdemeanor. The hearing judge found that the facts and circumstances surrounding the conviction involved other misconduct warranting discipline but not moral turpitude. After considering respondent's three prior instances of discipline as well as favorable character evidence, the judge recommended that respondent be suspended for 18 months, stayed on conditions of probation including six months actual suspension. (Hon. Michael D. Marcus, Hearing Judge.)

On review, respondent averred that the discipline recommendation was excessive in light of comparable cases, that the hearing judge weighed too heavily his prior discipline and failed to recognize all of the mitigating circumstances. The State Bar contended that the six-month actual suspension recommended was within the hearing judge's discretion. The review department determined, among other things, that the hearing judge's discipline recommendation was excessive and recommended a suspension stayed on conditions including a 90-day actual suspension.

COUNSEL FOR PARTIES

For State Bar: Elena G. Bardellini, Victoria Molloy

For Respondent: David A. Clare

HEADNOTES

[1] **735.30 Candor and Cooperation with Bar (1.2(e)(v))**
Respondent's cooperation with the State Bar in, for example, stipulating to the facts and circumstances surrounding his conviction, is a mitigating circumstance. However, it is entitled to only nominal weight where the stipulated facts were easily provable.

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] 103 Procedure–Disqualification/Bias of Judge
120 Procedure–Conduct of Trial
139 Procedure–Miscellaneous
161 Duty to Present Evidence
162.90 Quantum of Proof–Miscellaneous

The hearing judge's appropriate role is to decide the issues on the evidence presented. If that process leads the hearing judge to conclude that the party bearing the burden of proof had not prevailed, then the judge's duty is to find against the particular party on that issue or to recommend that only that degree of discipline, if any, which is warranted by the evidence presented. The party failing in its burden runs the very risk that the judge will so act. Absent extraordinary circumstances, a hearing judge is not authorized to require the production of added evidence beyond which the parties have chosen to present. If parties or witnesses testify, the hearing judge is at liberty to ask questions of a type consistent with the judicial function of supervising or regulating the trial. Moreover, allegations against other attorneys can be referred to the State Bar for new investigation.

ADDITIONAL ANALYSIS

Aggravation
- Found
  - 511 Prior Record

Mitigation
- Found
  - 730.50 Candor and cooperation with victim (1.2(e)(v))
  - 765.10 Substantial pro bono work
- Declined to Find
  - 740.39 Good character references (1.2(e)(v))

Standards
- 802.30 Purposes of Sanctions
- 806.52 Disbarment After Two Priors
- 806.59 Disbarment After Two Priors

Discipline
- 1613.07 Stayed Suspension–18 Months
- 1615.03 Actual Suspension–3 Months
- 1617.08 Probation–2 Years

Other
- 173 Discipline–Ethics Exam/Ethics School
- 175 Discipline–Rule 955
- 178.10 Costs–Imposed
- 1516 Conviction Matters–Nature of Conviction–Tax Laws
- 1527 Conviction Matters–Moral Turpitude–Not Found
- 1531 Conviction Matters–Other Misconduct Warranting Discipline–Found

OPINION

STOVITZ, J.:

In this attorney discipline review, respondent Fletcher Bouyer asks us to decide just one issue: whether the six-month actual suspension recommended by the State Bar Court hearing judge is excessive for the facts and circumstances of his misdemeanor conviction of failing to file reports of his employment taxes with the State of California. (See Unemp. Ins. Code, § 2106.)

The parties do not dispute that portion of the hearing judge's decision finding that the facts and circumstances surrounding respondent's misdemeanor conviction involved misconduct warranting discipline but not moral turpitude. (See *In re Morales* (1983) 35 Cal.3d 1 [Rev. & Tax. Code, § 19409; Unemp. Ins. Code, §§ 2108, 2110, 2110.5].) After considering that respondent had been disciplined three times before and also weighing favorable character evidence, the hearing judge recommended that respondent be suspended from practice for 18 months, stayed on conditions of probation including actual suspension for 6 months. Respondent urges that this recommendation is clearly excessive when compared to the facts of comparable cases. He also contends that the hearing judge weighed too heavily respondent's prior record of discipline and failed to recognize all of the mitigating circumstances in this case. Respondent submits that any actual suspension recommended should not exceed 30 days. The State Bar's Office of Chief Trial Counsel (State Bar) points out that while it recommended only a 90-day actual suspension at trial, the greater suspension recommended was within the hearing judge's discretion.

Upon our independent review of the record, we determine that the hearing judge's recommendation of discipline is excessive and that a suspension stayed on conditions of a 90-day actual suspension is warranted.

I. THE FACTS

The parties stipulated to the facts which we summarize: Since July 1982, respondent operated his law practice as a sole proprietorship. He had the legal duty to withhold unemployment insurance levies from his employee's wages and to pay them to the California Employment Development Department (EDD), accompanied by required reports. (See *In re Brown* (1995) 12 Cal.4th 205, 209.) For the quarter ending September 1993, respondent failed to timely file with the EDD contribution returns and wage reports for his employee. In November 1993, respondent filed with the EDD a proposal for payment of about $2,250 along with all returns for the payment periods. About $1,635 of the $2,250 was owed for back taxes and the rest represented costs, fines, and penalties. Respondent did not fully or timely comply with his payment proposal, but he completed payments before criminal charges were filed.

II. CRIMINAL COURT AND STATE BAR COURT PROCEEDINGS

In February 1995 respondent was charged in Municipal Court, Los Angeles Judicial District with several violations of the Unemployment Insurance Code. In April 1995, respondent pled nolo contendere to one count of violation of Unemployment Insurance Code, section 2106 (failing to file with the EDD reports of his employment taxes). The municipal court placed respondent on summary probation for two years. Included in his probation conditions was a fine of $300 and payment of $1,585 in employment taxes, plus interest on the unpaid balance. The remaining charges against respondent were dismissed. Upon our receipt of the record of respondent's conviction, we referred to the hearing department of our court the question of whether this conviction involved moral turpitude or other misconduct warranting discipline and, if so, the degree of discipline to recommend.

At the first hearing below, On October 22, 1996, the parties introduced evidence in mitigation and aggravation which we summarize, *post*. On December 12, 1996, the hearing judge issued an order in which he recited that "more information is needed . . . [and] [t]he nature of the offense by itself is not sufficient." The judge directed that further evidence be presented to permit him to ascertain whether moral turpitude or other misconduct warranting discipline was involved and to assist him to make a

recommendation as to degree of discipline. A further hearing was held in April 1997 and two exhibits were received.

III. EVIDENCE IN MITIGATION AND AGGRAVATION

Respondent testified that his conviction arose because of inadvertent failure by one of his employees to follow through on duties to the EDD. The hearing judge concluded that respondent did not deserve mitigating weight on account of this claim as it appeared to conflict with the text of respondent's offer of settlement with the EDD suggesting that respondent's failure to make EDD payments occurred over more than one quarter. We do not agree that the brief, cryptic notations on respondent's offer of settlement with the EDD justify depreciating the mitigating evidence respondent produced. However, to the extent that the hearing judge did not find respondent's "inadvertent failure" testimony credible, we must give his determination great weight. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a).) Moreover, we note that respondent's conviction of a crime is conclusive evidence of guilt. (Bus. & Prof. Code, § 6101, subd. (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1095.)

Respondent introduced eight character reference letters. The hearing judge summarized these letters, but did not draw any express conclusions from them as to their weight in mitigation, except, near the end of his decision, he observed that respondent's character evidence did not offset the extensive evidence in aggravation. We conclude that, while the character evidence is favorable to respondent, it does not warrant heavy weight in view of respondent's extensive record of prior discipline, discussed *post*.

As found by the hearing judge, respondent also introduced evidence of pro bono work he had done. We agree with the hearing judge that this is a mitigating factor.

[1] Respondent correctly argues that his cooperation with the State Bar in, for example, stipulating to the facts and circumstances surrounding his conviction, is a mitigating circumstance. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 39.) However, it is entitled to only nominal weight as the stipulated facts were easily provable. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567.) Moreover, we do not agree with respondent that his cooperation with the EDD deserves mitigating weight since he admittedly failed to timely comply with his offer of payment.

Neither side disputes the summary of respondent's prior discipline as found by the hearing judge. We outline it briefly.

In 1991 the Supreme Court suspended respondent for two years which it stayed on conditions including actual suspension for six months and the making of restitution to five clients. Respondent's misconduct occurred between 1985 and 1986 and involved grossly negligent office practices. Respondent settled three clients' cases without their knowledge. His clients' names were placed on settlement drafts without authority, their shares of the settlements were paid late, and balances in respondent's trust account representing clients' shares fell below the required amounts.

In 1993 the Supreme Court suspended respondent for three years which it also stayed on conditions which included no actual suspension. The misconduct yielding this discipline occurred between 1988 and 1991 and showed that in three separate matters, respondent had failed to pay liens in favor of clients' medical care providers. Respondent's trust account balance fell below required amounts in two of the three cases.

In 1995, the Supreme Court suspended respondent for 18 months which it stayed on conditions which included no actual suspension. In one matter in a civil case for which he had been hired in 1985, respondent failed to ensure that his client had agreed to dismissal of the civil suit; and the dismissal occurred because of his failure to adequately move the matter forward.

The hearing judge also deemed an aggravating circumstance that respondent was on disciplinary probation when he violated the criminal provisions of the Unemployment Insurance Code. We agree.

IV. DISCUSSION

[2a] Before turning to the issue of degree of discipline, we discuss briefly the reopening of the hearing, at the hearing judge's initiative, for additional evidence of the facts and circumstances surrounding respondent's crime. Neither side directly urges that that decision was erroneous, and we appreciate the challenge facing a hearing judge charged by us or the Supreme Court with making adequate findings on a referral order. Yet we are concerned that the added proceedings here unnecessarily consumed time and expense and possibly risked creating an appearance that the hearing judge had changed his role from adjudicator of the evidence presented to that of instigator of evidence production. Although the parties' stipulation did not preclude added evidence production on facts not specifically agreed to, their stipulation appeared to be comprehensive as to the facts and circumstances surrounding the offense, and the evidence at trial was consistent with the scope of the stipulation.

[2b] In our view, the judge's appropriate role in such a case arising under article 6 of the State Bar Act, regarding attorney criminal convictions, is to decide the issues on the evidence presented. If that process leads the hearing judge to conclude that the party bearing the burden of proof had not prevailed, then the judge's duty is to find against the particular party on that issue or to recommend only that degree of discipline, if any, which is warranted by the evidence presented. The party failing in its burden runs the very risk that the judge will so act.

[2c] We also appreciate that a "hornbook" purpose of attorney regulation is the protection of the public. (Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards).) Yet, absent extraordinary circumstances, we do not view this purpose as authorizing a hearing judge to require the production of added evidence beyond which the parties have chosen to present. If parties or witnesses testify, the hearing judge is at liberty to ask the witnesses clarifying questions of a type consistent with the judicial function of supervising or regulating the trial. (E.g., *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 41-42; see also *People v. Corrigan* (1953) 48 Cal.2d 551, 555, 559.) Moreover, allegations against other attorneys can be referred to the State Bar for new investigation. (E.g., rule 218, Rules Proc. of State Bar, title II, State Bar Court Proceedings.)

Turning to the issue of appropriate discipline, the cases involving convictions most related to the one before us are *In re Brown, supra,* 12 Cal.4th 205 and *In re Morales, supra,* 35 Cal.3d 1. They were considered extensively below. However, this case involves substantive misconduct clearly less serious than either *Brown* or *Morales*. This record does not show that respondent deducted the EDD levies from his employee's wages and then failed to pay over the taxes as was shown in *Brown* and *Morales*. The State Bar candidly stated that respondent's misconduct here was "so minor." We agree with the State Bar's assessment, but do not minimize the clear violation of respondent's duties to report and promptly pay over to the EDD the taxes he was obligated to withhold from his employee. The case is made difficult because of respondent's extensive record of prior discipline. No prior discipline was involved in *Brown*, and only a private reproval was involved in *Morales*.

Brown was convicted of one count of failing over more than a two-year period to pay about $36,000 in wages he withheld from employees including himself. Although Brown presented evidence of significant mitigation, he also avoided fulfilling several promises he had made to the EDD to settle, until pressed with threat of criminal proceedings. Brown was suspended for two years, stayed on conditions of probation with sixty days of actual suspension. Morales was convicted of 27 misdemeanor convictions involving failure to pay payroll and unemployment insurance levies over five quarters in 1976 and 1977. He also had a prior private reproval. He was suspended for 18 months, stayed on conditions of probation with no actual suspension.

Unquestionably, respondent's prior record of discipline is a serious aggravating factor, as the hearing judge correctly found, and, under standard 1.7(b), ordinarily would require disbarment unless the most compelling mitigating circumstances clearly predominate. At the same time, we note that respondent's second and third priors did not result in

any actual suspension. Collectively, all of respondent's three priors differ from the offense involved here.

This case is somewhat comparable to the situation analyzed by the Supreme Court in *Arm v. State Bar* (1990) 50 Cal.3d 763. In that case, Arm had also been previously disciplined on three occasions. The Supreme Court concluded that the prior discipline, while inherently aggravating, did not show such a pattern that the most severe discipline was called for based on the record.

We also note that respondent's offense was far less serious than the offenses shown in *Morales* or *Brown*.

We reach a disciplinary recommendation not from a fixed formula but from a balanced consideration of all relevant factors. (E.g., *Cannon v. State Bar* (1990) 51 Cal.3d 1101, 1114-1115.) We conclude that the degree of discipline suggested at trial by the State Bar, specifically a 90-day period of actual suspension, is sufficient to protect the public and maintain public confidence in the profession, and we shall so recommend.

V. RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent Fletcher Foney Bouyer be suspended from the practice of law in California for a period of 18 months, that execution of such suspension be stayed, and that respondent be placed on probation for a period of 2 years on the conditions recommended by the hearing judge in his decision filed May 23, 1997, except that in condition 1 of the hearing judge's decision, the period of actual suspension shall be 90 days rather than 6 months.

We further recommend that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We also recommend, in view of prior discipline orders, that respondent need not again be ordered to take and pass a professional responsibility examination. Finally, we recommend that the State Bar be awarded costs in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code, as amended effective January 1, 1997.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JONATHAN BASS AINSWORTH

Petitioner for Reinstatement

No. 95-R-17414

Filed July 1, 1998

SUMMARY

Between 1979 and 1984, petitioner committed serious misconduct in eight matters. In October 1988, petitioner was disbarred from the practice of law. In 1995, he sought reinstatement, and the hearing judge recommended denial of his petition, finding he had shown the present moral qualifications, but not the necessary rehabilitation or present learning and ability in the general law. (Hon. Nancy Roberts Lonsdale, Hearing Judge.)

Both parties sought review. Petitioner contended he had met all the requirements for reinstatement, and the deputy trial counsel disputed the judge's finding regarding petitioner's present moral qualifications. The review department found that petitioner had met none of the requirements for readmission, except for the passage of the professional responsibility examination.

COUNSEL FOR PARTIES

For State Bar: Allen J. Blumenthal, Diane J. Meyers

For Respondent: Jonathan Bass Ainsworth, in pro per

HEADNOTES

[1] **2509 Reinstatement—Procedural Issues**
2590 Reinstatement—Miscellaneous
In reinstatement cases, the well-established practice is to begin the analysis by reviewing the petitioner's showing in light of the moral shortcomings which led to his disbarment.

[2] **135.87 Procedure—Revised Rules of Procedure—Division VIII—Reinstatement**
2504 Reinstatement—Burden of Proof
Reinstatement requires the passage of a professional responsibility examination and a showing of rehabilitation, present moral qualifications for readmission, and present ability and learning in the general law. (Cal. Rules of Court, rule 951(f); Rules Proc. of State Bar, rule 665(a), (b).)

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[3] 139 **Procedure—Miscellaneous**
159 **Evidence—Miscellaneous**
161 **Duty to Present Evidence**
169 **Standard of Proof or Review—Miscellaneous**
2504 **Reinstatement—Burden of Proof**
2509 **Reinstatement—Procedural Issues**
2590 **Reinstatement—Miscellaneous**

A petitioner for reinstatement must show by clear and convincing evidence that he or she has met the requirements for readmission. OCTC need not rebut a petitioner's showing of rehabilitation, present moral fitness, or present learning and ability in the law with clear and convincing adverse evidence. Instead, OCTC need only proffer sufficient adverse evidence to lower the persuasiveness of a petitioner's evidence so that he or she does not meet the burden to prove his or her case by clear and convincing evidence. Nor is a petitioner entitled to the benefit of the doubt if equally reasonable inferences may be drawn from a proven fact.

[4 a, b] 2504 **Reinstatement—Burden of Proof**
2551 **Reinstatement Not Granted—Rehabilitation**

A lack of rehabilitation was found where petitioner mischaracterized his prior misconduct as mere mistakes and continued to attack the findings of misconduct by filing numerous petitions for writs and supplemental pleadings challenging the disbarment decision. Rehabilitation often requires a lengthy period of exemplary conduct. An erring attorney who seeks readmission must understand his or her professional responsibilities and must show a proper attitude toward his or her misconduct. The review department affirmed the finding that petitioner had not shown rehabilitation.

[5 a-c] 159 **Evidence—Miscellaneous**
2504 **Reinstatement—Burden of Proof**
2552 **Reinstatement Not Granted—Fitness to Practice**

The basis of the hearing judge's finding of present moral fitness was character evidence and petitioner's testimony about his volunteer work and his assistance to relatives. However, in determining present moral qualifications, testimony by character witnesses and letters of reference are not conclusive. Similarly, volunteer work and care of relatives are factors to be considered, but are not dispositive. The review department reversed the finding of present moral fitness, finding that by minimizing and denying his serious misconduct, petitioner revealed a failure to appreciate the responsibilities of an attorney and the gravity of his ethical violations. This failure undermined his attempt to prove his present moral qualifications for readmission, as well as his attempt to show rehabilitation.

[6] 135.87 **Procedure—Revised Rules of Procedure—Division VIII—Reinstatement**
2504 **Reinstatement—Burden of Proof**
2509 **Reinstatement—Procedural Issues**
2590 **Reinstatement—Miscellaneous**

Although rule 665(b) of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, enumerates moral qualifications for reinstatement as an item separate from rehabilitation, rule 951(f) of the California Rules of Court combines them as a single item. The Supreme Court has often considered rehabilitation and moral qualifications for readmission together.

[7 a-f] 159 **Evidence—Miscellaneous**
2553 **Reinstatement Not Granted—Learning in Law**

A petitioner's submissions in a reinstatement proceeding can form the basis for a finding of a lack

of present ability and learning in the law. Petitioner failed to demonstrate present learning and ability in the law, despite having taken many bar review and continuing education classes and having increased his knowledge of the law, when he filed review briefs that used facts from exhibits that were never admitted into evidence; attempted to use exhibits, admitted for a limited purpose, to assert the truth of the matters therein; misstated the long established burden of proof in reinstatement proceedings; misread the findings of the judge, and unreasonably exaggerated.

[8] **2504 Reinstatement—Burden of Proof**
2509 Reinstatement—Procedural Issues
It is a basic principle of reinstatement proceedings that a petitioner continues to bear the burden of proof, even on review.

Additional Analysis

None

OPINION

STOVITZ, J.:

We review the decision by a hearing judge of the State Bar Court (judge) to deny reinstatement to Jonathan Bass Ainsworth (petitioner). The parties stipulated that petitioner had met the requirement to pass a professional responsibility examination. The judge determined that petitioner had shown the present moral qualifications required for readmission, but not the necessary rehabilitation or present ability and learning in the general law.

Petitioner sought review. He argues that he has met all the requirements for reinstatement.

The State Bar's Office of the Chief Trial Counsel (OCTC) also requested review. OCTC disputes the judge's determination regarding petitioner's present moral qualifications, but otherwise supports the judge's decision.

Upon independent review of the record, we conclude that petitioner has met none of the requirements for readmission except for the passage of a professional responsibility examination.

I. PROCEDURAL HISTORY

The Supreme Court disbarred petitioner in October 1988. In late 1995, he filed the present petition for reinstatement. Throughout this proceeding, petitioner has represented himself.

The judge held three days of hearings in June 1997. The following month, she filed a decision denying the petition. The record is voluminous.

Both parties requested review. Petitioner filed an 86-page opening brief, 70-page response brief, and 85-page rebuttal brief, as well as lengthy exhibits. OCTC filed a 15-page opening brief, 40-page responsive brief, and 9-page reply brief, as well as copies of three cases from other states.

In February 1998, petitioner filed a motion to strike OCTC's appeal and to enter judgment in his favor. This motion was denied for failure to show good cause.

In March 1998, petitioner filed a request to recommend his reinstatement nunc pro tunc as of October 1988. We deny this request for failure to show good cause.

Oral argument occurred in April 1998. OCTC appeared. Petitioner did not appear because of a medical emergency.

II. DISCUSSION

We need not, and do not, address the myriad of collateral contentions in the 305 pages of review briefs. Instead, we focus only on the essential issues and arguments necessary to resolve this proceeding.

A. Prior Misconduct

[1] In reinstatement cases, the well-established practice is to begin the analysis by reviewing the petitioner's showing in light of the moral shortcomings which led to his disbarment. (*In re Menna* (1995) 11 Cal.4th 975, 979-981; (1989) 49 Cal.3d 1084, 1088-1089; *Tardiff v. State Bar* (1980) 27 Cal.3d 395, 398; *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 428; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 313-314.) Accordingly, we outline petitioner's prior misconduct.

The Supreme Court found that petitioner committed serious misconduct in eight matters between 1979 and 1984. (*Ainsworth v. State Bar* (1988) 46 Cal.3d 1218, 1222.) In reaching a disbarment determination, the Supreme Court stressed petitioner's "intentionally misleading a judicial officer, failing to communicate properly with clients about their cases, breaching fiduciary obligations to clients, and harassing a client for his own gain." (*Id.* at p. 1234.) In brief, the Supreme Court's findings and conclusions were as follows:

1. Haschemi matter

Hassan Haschemi retained petitioner, but later discharged him and hired new counsel. Petitioner violated his oath and duties as an attorney by disobeying a court order regarding the substitution of the new counsel, by delaying Haschemi's action with

a view to his own gain, by prosecuting an appeal solely for the purpose of delay, and by committing acts of deceit with the intent to deceive Haschemi. He also committed acts involving moral turpitude, dishonesty, and corruption and failed to preserve the confidences and secrets of Haschemi. (*Id.* at pp. 1223-1224.)

2. Ghasemloo matter

Petitioner unlawfully agreed to split attorney's fees with Farid Ghasemloo, who was not a licensed attorney. (*Id.* at p. 1224.)

3. Wetherford matter

Petitioner filed an action on behalf of Mr. and Mrs. Wetherford. He relied upon a decision in which a rehearing had been granted; but he did not inform the court about the rehearing. He committed acts with an intent to mislead the Wetherfords and the court by misrepresenting the status of the decision and sought to deceive the court with a false statement of law. Also, he failed to notify the Wetherfords of a change in his office address and telephone number. (*Id.* at pp. 1224-1225.)

4. Archuleta matter

Petitioner represented Jacob Archuleta, a minor, in a personal injury case. He settled the case and had a fee paid to him without court approval. In so doing, he collected an illegal fee and committed an act with the intent to deceive the court. (*Id.* at pp. 1225-1226.)

5. Practice of law while suspended

Petitioner filed actions during periods of 1981 and 1983 when he was suspended for failure to pay his State Bar dues. (*Id.* at p. 1226.)

6. Tendering of checks with insufficient funds

Petitioner tendered checks with insufficient funds three times during 1983 and 1984. (*Ibid.*)

7. Karen U. matter

Karen U. asked petitioner to file a wrongful death action relating to her husband and to handle the probate of his estate. Petitioner soon withdrew from representing Karen U. In later actions, petitioner accused Karen U. of murdering her husband, forging her husband's will, stealing her husband's estate, operating an illegal pyramid scheme, and stealing petitioner's car. Petitioner violated his oath and duties as an attorney; failed to maintain only such actions as appeared legal or just; failed to abstain from "offensive personality" and advanced facts prejudicial to the honor or reputation of Karen U., although such conduct was not required by the justice of the cause;[1] encouraged the commencement of an action against Karen U. from a corrupt motive; failed to employ only such means as were consistent with truth; and failed to maintain the confidences and secrets of Karen U. (*Id.* at pp. 1226-1227.)

8. Phyillaier matter

Petitioner represented Michael Phyillaier and acquired an adverse interest in Phyillaier's property without advising Phyillaier to seek the advice of independent counsel. (*Id.* at p. 1228.)

B. Requirements for Reinstatement

[2] Reinstatement requires the passage of a professional responsibility examination and a showing of rehabilitation, present moral qualifications for readmission, and present ability and learning in the general law. (Cal. Rules of Court, rule 951(f); Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 665(a),(b).) The parties stipulated that petitioner had passed a professional responsibility

1. Petitioner was held culpable of violating Business and Professions Code section 6068, subdivision (f), which requires abstention from "offensive personality . . . ." The Ninth Circuit Court of Appeals has since declared this requirement unconstitutionally vague. (*U.S. v. Wunsch* (9th Cir. 1996) 84 Fed.3d 1110, 1119; see *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 786-787.)

examination. They disagree as to whether he has met the other requirements. As discussed *post*, we conclude that he has met none of the other requirements.

C. Petitioner's Burden of Proof

[3] A petitioner for reinstatement must show by clear and convincing evidence that he or she has met the requirements for readmission. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 665(b).) OCTC "need not rebut a petitioner's showing of rehabilitation, present moral fitness, or present learning and ability in the law with clear and convincing adverse evidence to prevail. Instead, [OCTC] need only proffer sufficient evidence to lower the persuasiveness of the petitioner's evidence so that he does not meet his burden to prove his case by clear and convincing evidence. [Citation.]" (*In the Matter of Kirwan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636.) Nor is a petitioner "entitled to the benefit of the doubt if 'equally reasonable inferences may be drawn from a proven fact.' [Citation.]" (*In re Menna, supra,* 11 Cal.4th at p. 986.)

D. Rehabilitation

[4a] The judge found that petitioner mischaracterized his prior misconduct as mere mistakes and petitioner has attacked and continues to attack the findings of misconduct. Also, the judge observed that petitioner had filed numerous petitions for writs and supplemental pleadings challenging the disbarment decision with the United States Supreme Court and the California Supreme Court. Stressing petitioner's lack of insight into the reasons for his disbarment, the judge concluded that he had not shown rehabilitation. OCTC supports this conclusion. On review, petitioner continues to describe his ethical violations as mistakes and to deny the findings of misconduct.

[4b] Rehabilitation requires a lengthy period of exemplary conduct. (*Id.* at p. 989.) An erring attorney who seeks readmission "must understand his or her professional responsibilities [citations] and must show a proper attitude toward his or her misconduct. [Citations.]" (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 317.) As already discussed, the Supreme Court stressed that petitioner intentionally misled a judicial officer, failed to communicate properly with clients about their cases, breached fiduciary obligations to clients, and harassed a client for his own gain. Petitioner has not established that he understands his professional duties and appreciates the gravity of his misconduct. He has continued to minimize and deny his serious wrongdoing for years in numerous writs and special pleadings, as well as throughout the current reinstatement proceeding. Thus, he has not shown rehabilitation.

E. Present Moral Qualifications

[5a] The judge determined that petitioner appears to be of present good moral character. She based this determination on favorable testimony by six character witnesses and on testimony by petitioner about his voluntarily helping the homeless, participating in church and community activities, and caring for elderly, sick, and disabled relatives. The character witnesses included two Louisiana appellate judges; two California attorneys, one of whom has served as a superior court judge pro tempore; a certified public accountant; and a property manager for a state redevelopment agency. Petitioner supports the judge's favorable determination regarding his present moral character.

OCTC denies that petitioner has established present moral qualifications for readmission. Among other contentions, OCTC argues that his lack of rehabilitation demonstrates his lack of present moral qualifications.

[5b] We agree that petitioner's character evidence is laudatory. Yet "[t]estimony by character witnesses and letters of reference are not conclusive. [Citations.]" (*Ibid.*) Similarly, petitioner's volunteer work and care for relatives are factors to be considered in determining whether he possesses the present moral qualifications for reinstatement, but they are not dispositive.

[6] Although rule 665(b) of the Rules of Procedure of the State Bar of California enumerates present moral qualifications for reinstatement as an item separate from rehabilitation, rule 951(f) of the California Rules of Court combines them as a single item. Further, the Supreme Court has often considered

them together. (E.g., *In re Menna, supra*, 11 Cal.4th at p. 986; *Tardiff v. State Bar, supra*, 27 Cal.3d at pp. 404-405; *Resner v. State Bar* (1967) 67 Cal.2d 799, 806-811; *Feinstein v. State Bar* (1952) 39 Cal.2d 541, 546-547.)

[5c] Rehabilitation and present moral qualifications for readmission are closely connected. By minimizing and denying his serious misconduct, petitioner reveals a failure to appreciate the responsibilities of an attorney and the gravity of his ethical violations. This failure undermines his attempt to prove his present moral qualifications for readmission, as well as his attempt to show rehabilitation. We therefore reverse the judge's determination that petitioner has shown present moral fitness for reinstatement.

F. Present Ability and Learning in the General Law

[7a] The judge found that petitioner lacked present ability and learning in the general law. Although she recognized that he had taken many bar review and continuing education classes over the last several years and had increased his knowledge of the law, she determined that he did not understand the nature of proper litigation. She noted that he had filed numerous petitions for writs and special pleadings attacking his disbarment, including a writ petition filed after his application for reinstatement. She asserted that this writ petition, like his other papers, "is repetitive, exaggerated, replete with falsehoods, convoluted and illogical, and contains charges of criminal conduct, such as perjury, fraud, forgery, murder, by virtually all involved [in petitioner's disbarment], including former clients, witnesses, prosecutor, referee, and courts." Attached to the writ petition as an exhibit is a copy of the Supreme Court's disbarment opinion, which the judge described as "so overwritten with [p]etitioner's typed comments as to be utterly illegible." She concluded, "No one who considers this an appropriate document to submit to the United States Supreme Court is qualified to practice law."

The judge further stated that petitioner's "submissions in this [reinstatement] proceeding have been repetitive, redundant, improper under the rules of this court and insulting to the court. They undercut any argument he has made that he has learning and knowledge in the law . . . ."

OCTC supports the judge's conclusion. Also, OCTC points out errors in pleadings filed by petitioner during the years since his disbarment and argues that these errors show a lack of basic legal skills.

Petitioner urges us to focus on his present legal ability and learning, not on prior mistakes. Further, according to petitioner, the First Amendment protects the rhetoric and accusations in his pleadings. (See *Standing Committee v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438-1440; *In the Matter of Anderson, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 781-783.)

We need not, and do not, reach the judge's criticisms of petitioner's most recent writ pleading and submissions at trial, OCTC's discussion of the errors in petitioner's pleadings during the years since his disbarment, or petitioner's claim of First Amendment protection. The review briefs prepared and signed by petitioner in propria persona in this case, alone, adequately undermine his position regarding his present legal ability and learning.

Nor is it necessary to provide a comprehensive analysis of the difficulties in the 241 pages of petitioner's review briefs. We need only to address problems which sufficiently reflect his failure to establish the required present legal ability and learning by clear and convincing evidence.

[7b] First, petitioner uses facts from exhibits that were never admitted into evidence to support his claims. Apparently, he fails to realize that such use is improper and that he must file a motion to augment the record if he wants excluded evidence to be considered on review. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 306.)

[7c] Second, Petitioner tortures logic and ignores facts. OCTC introduced as exhibits various pleadings prepared by petitioner in challenging his disbarment. The judge admitted these exhibits for the issue of rehabilitation. According to petitioner, his disbarment must be reversed on the grounds that

OCTC did "not oppose" its own exhibits and therefore conceded the issues raised in the documents. The pleadings were neither introduced nor admitted for the truth of the matters asserted in them; they were introduced to show petitioner's lack of rehabilitation. Petitioner apparently loses sight of the fact that this is a proceeding not to reverse his disbarment, but to determine his fitness for readmission.

[7d] Third, petitioner contends that OCTC must prove on review that he is immoral. He claims that the burden of proof regarding his present moral qualifications has shifted because OCTC has appealed the favorable decision of the judge on that issue. We rejected a similar contention five years ago. (*In the Matter of Miller, supra*, 2 Cal. State Bar Ct. Rptr. at p. 429.) **[8]** It is a *basic* principle of reinstatement proceedings that a petitioner continues to bear the burden of proof, even on review. (*In the Matter of Kirwan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 636; *In the Matter of Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 315.)

[7e] Fourth, petitioner unreasonably misreads findings. The judge found that petitioner had taken numerous law classes and increased his knowledge of the law. Based on this finding, petitioner states: "In other words, this petitioner has taken sufficient courses . . . . Petitioner should be readmitted." The finding neither states nor implies that petitioner has done sufficient course work and should be reinstated. Petitioner must prove not only that he knows the law, but also that he is able in it. He has not sustained his burden.

[7f] Fifth, Petitioner unreasonably exaggerates. OCTC asserted that petitioner had established a reputation among his friends for good moral character, but that favorable character testimony does not alone establish the required or present moral qualifications for readmission. (Cf. *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.) Petitioner implausibly alleges that this assertion impugns the integrity of the judges who testified on his behalf. OCTC's assertion does not even remotely support his allegation.

III. CONCLUSION

Petitioner has failed to prove rehabilitation, present moral qualifications for readmission, present ability and learning in the general law by clear and convincing evidence. We thus affirm the judge's denial of his reinstatement petition.

We concur:

OBRIEN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Barry Lee Silver

A Member of the State Bar

No. 95-O-12059

Filed July 8, 1998

SUMMARY

Respondent misappropriated client trust funds, failed to properly pay out client funds, failed to perform competently, and engaged in acts of moral turpitude. The hearing judge recommended that respondent be suspended for two years, that execution of the suspension be stayed and that he be placed on probation for two years on conditions including a six-month actual suspension. (Hon. Madge Watai, Hearing Judge.)

Respondent sought review contending that the recommended six-month actual suspension was excessive in light of the relevant case law and because the hearing judge erred in not permitting respondent to present evidence of his willingness to settle the case by stipulating to the misconduct and a reasonable level of discipline and of the State Bar's unwillingness to present a settlement offer that contained what he considered to be a reasonable level of discipline. In the published portion of the opinion, the review department agreed with the exclusion of respondent's evidence regarding settlement negotiations.

COUNSEL FOR PARTIES

For State Bar: Janice Oehrle

For Respondent: R. Gerald Markle

HEADNOTES

[1 a-e] **120 Procedure—Conduct of Trial**
141 Evidence—Relevance
151 Evidence—Stipulations
159 Evidence—Miscellaneous
735.10 Mitigation– Candor– Bar – Found

The hearing judge did not err in prohibiting respondent from presenting evidence of his willingness to settle the case by stipulating to the misconduct and a reasonable level of discipline and of the State Bar's unwillingness to present a settlement offer that contained what he considered to be a

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reasonable level of discipline. Respondent is afforded substantial mitigation for cooperation because, in addition to other instances of cooperation throughout the investigation of the matter, he stipulated to the facts underlying the misconduct and because the stipulated facts were not easily provable. Substantial mitigation is given without regard to the fact that the parties were unable to stipulate to an appropriate level of discipline. Not doing so would "punish" respondent merely for seeking his day in court as to the level of discipline. Not being able to reach a stipulated discipline does not have any effect on the court's analysis of the degree of mitigation awarded for respondent's overall cooperation in helping resolve the charged misconduct.

ADDITIONAL ANALYSIS

None

OPINION[1]

NORIAN, J.:

Respondent Barry Lee Silver[2] seeks review of a hearing judge's decision recommending that he be suspended from the practice of law for two years, that execution of the suspension be stayed, and that he be placed on probation for two years subject to various conditions, including a six-month period of actual suspension.

In this proceeding respondent is charged with four counts of misconduct in a single client matter. Specifically, respondent is charged with misappropriating $4,800 in client trust funds, failing to properly pay out client trust funds, failing to perform competently, and engaging in acts of moral turpitude. The hearing judge held respondent culpable under each of the four counts.

On review, respondent does not challenge any of the hearing judge's findings of fact or conclusions of law; he contends only that her recommended six-month period of actual suspension is excessive. To support his single contention, respondent makes two primary arguments. First, respondent argues that the hearing judge erred in not letting him present evidence of: (1) his willingness to settle this case by stipulating to the misconduct and a reasonable level of discipline and (2) the unwillingness of the State Bar's Office of the Chief Trial Counsel (OCTC) to present a settlement offer to him that contained what he considered to be a reasonable level of discipline. According to respondent, the excluded evidence would have established significant mitigation, which would have justified a much shorter period of actual suspension than the six months recommended by the hearing judge.

Second, respondent argues that, even if the hearing judge did not err in excluding respondent's evidence relating to the parties' settlement negotiations, her recommended six-month period of actual suspension is excessive in light of the relevant case law.

OCTC disagrees with each of respondent's arguments and urges us to adopt the hearing judge's culpability determinations and discipline recommendation.

We disagree with respondent's argument that the hearing judge erred in excluding respondent's evidence relating to the parties' settlement negotiations, but agree with respondent's argument that the recommended six months' actual suspension is excessive and, therefore, recommended only 90 days' actual suspension.

In addition, we hold that the hearing judge's determination that respondent failed to perform competently as charged under count three is, in part, duplicative of her determination that respondent failed to properly pay out client trust funds as charged under count two. As to the portion of count three that is not duplicative of count two, there is insufficient evidence to support the hearing judge's culpability determination. Accordingly, we reverse the hearing judge's determination that respondent failed to perform competently and dismiss count three with prejudice.[3] We adopt the hearing judge's remaining three culpability determinations, but find fewer aggravating circumstances and more mitigating circumstances.

We find that the hearing judge's recommended six months' actual suspension is excessive. Our recommendation is for a 90-day actual suspension. We also conclude that the two years' stayed suspen-

1. In accordance with State Bar Court Rules of Practice, rules 1340 and 1341, this opinion is designated for publication with the exception of parts II, III, IV, V, VI(B), VII, VIII, IX, and X.

2. Respondent was admitted to the practice of law in this state on December 16, 1980, and has been a member of the State Bar since that time.

3. Even though respondent does not challenge the sufficiency of the hearing judge's culpability determination under count three, we are obligated to review the record and exercise our independent judgement on questions of culpability, particularly when they bear on the ultimate choice of discipline. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); cf. *Martin v. State Bar* (1991) 52 Cal.3d 1055, 1063; *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 902.)

sion and two years' probation recommended by the hearing judge are insufficient. Instead, we recommend three years' stayed suspension and three years' probation in addition to the ninety days' actual suspension mentioned above.

I. PROCEDURAL HISTORY

OCTC filed the notice of disciplinary charges in this matter in October 1995. Thereafter, in July 1996, the parties filed a partial stipulation as to facts and conclusions of law as permitted under rule 132 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings (Rules of Procedure for State Bar Court Proceedings). In their stipulation, the parties agreed to the underlying facts and respondent's culpability of the misconduct charged in counts one through three. The stipulation does not address count number four.

Rule 135(a) of the Rules of Procedure for State Bar Court Proceedings explicitly states, among other things, that court approval is required for stipulations filed in accordance with rule 132. However, the record in this proceeding does not contain an order approving the parties' stipulation. In addition, the conclusions of law in the hearing judge's decision differ from those contained in the parties' stipulation. Accordingly, we deem the parties' stipulation to have been implicitly rejected by the hearing judge. Nonetheless, because the stipulation contains a provision that the parties intend to be bound by the factual stipulations even if the stipulation itself is rejected by the court (Rules Proc. for State Bar Court Proceedings, rule 132(b)(8)), the parties remain bound as to the stipulation's factual findings. (*Id.*, rule 135(c).)

After the parties waived a hearing on culpability, a hearing on discipline was held in September 1996. Only the issues of aggravating and mitigating circumstances were litigated at the hearing on discipline. However, at the beginning of the discipline hearing, respondent admitted, on the record, to limited culpability under count four.

Because the parties waived a hearing on culpability, the evidentiary record on culpability is limited to the factual recitals in the parties' stipulation as to counts one through three and respondent's oral admission of culpability under count four. We do not consider the evidence presented during the hearing on discipline for purposes of reviewing the hearing judge's culpability determinations. We consider the evidence presented at the discipline hearing only for purposes of determining aggravation and mitigation. (State Bar Court Rules of Practice, rule 1250 [evidence as to aggravating and mitigating circumstances is not considered in determining culpability]; *In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, 114, fn. 7; but see *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 887-888 [for a discussion of the contrary civil rule, which provides that evidence introduced at one stage of a bifurcated trial is available to establish any issue in the case unless the court limits its scope on the request of a party].)

After the hearing judge filed her decision, respondent filed an extensive motion for reconsideration regarding the recommended level of discipline. The hearing judge denied respondent's motion, and the present appeal followed.

VI. RESPONDENT'S POINT OF ERROR AND LEVEL OF DISCIPLINE

As noted above, respondent makes two primary arguments in support of his single point of error contending that the hearing judge's discipline recommendation is too harsh.[4]

A. No Error in Excluding Evidence

[1a] First, respondent argues that the hearing judge erred in refusing to allow him to present evidence regarding (1) his willingness to stipulate with the prosecution to a reasonable level of discipline and (2) OCTC's unwillingness to make a settlement offer that included what respondent considered to be a reasonable level of discipline.

4. Any argument not addressed in this opinion has been considered and rejected.

Respondent claims that the evidence is relevant to the appropriate level of discipline because, according to respondent, it would have established significant good faith mitigation under standard 1.2(e)(ii) and cooperation mitigation under standard 1.2(e)(v). We disagree.

[1b] In this proceeding, the parties stipulated to the facts underlying respondent's misconduct, but not as to the appropriate level of discipline for that misconduct. According to respondent, he was willing to stipulate to an appropriate level of discipline and affirmatively attempted to do so, but was precluded from doing so because OCTC never made him an offer that he considered reasonable.

[1c] Respondent asserts that, when an attorney is able to reach an agreement with OCTC to stipulate both to the charged misconduct and the appropriate level of discipline, he receives a lower level of discipline than he would have received had he gone to trial. In short, respondent argues that when an attorney is able to enter into a settlement agreement with OCTC that includes the discipline sanction, he is rewarded for this additional cooperation by receiving a lower level of discipline. According to respondent, this effectively gives OCTC the discretion to selectively punish an attorney by refusing to make the attorney a settlement offer that contains what the attorney considers to be a reasonable level of discipline. Respondent argues that the punishment includes not only the cost involved in taking the matter to trial, but also a sterner level of discipline.

[1d] Respondent's arguments are not convincing. We give respondent substantial mitigation for his cooperation because, in addition to other instances of cooperation throughout the investigation of the matter, he stipulated to the facts underlying the charged misconduct. (Std. 1.2(e)(v) [spontaneous candor and cooperation].) Moreover, the stipulated facts were not easily provable.[5] We afford respondent substantial mitigation without regard to the fact that the parties were unable to stipulate to an appropriate level of discipline. Not doing so would "punish" respondent merely for seeking his day in court on the level of discipline.

[1e] In our view, even if an attorney who reaches a stipulation with OCTC as to the appropriate level of discipline is rewarded with a lower level of discipline, the substantial mitigation we afford respondent for stipulating to the underlying facts in this proceeding places him on the same footing as such an attorney. Said another way, not being able to reach a stipulated discipline does not have any effect on this court's analysis of the degree of mitigation awarded for respondent's overall cooperation in helping resolve the charged misconduct.

We concur:

OBRIEN, P.J.
STOVITZ, J.

5. Stipulating to easily provable facts is not always a mitigating circumstance. (See, e.g., *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Ronald E. Lais

A Member of the State Bar

No. 91-O-08572

Filed July 10, 1998

SUMMARY

The hearing judge recommended a two-year stayed suspension and three-year probation on condition of 30 days actual suspension and payment of restitution within 90 days. Respondent was found culpable in four client matters of nine ethical violations including appearing without a client's authority; failing to promptly return unearned fees and client papers, to communicate properly with a client, to intentionally provide competent legal services, to promptly pay out settlement proceeds upon request, to deposit funds received for the benefit of a client in a trust account; and withdrawing from employment without obtaining the required permission of a court and without taking reasonable steps to protect the client's rights. The judge found aggravating circumstances consisting of multiple acts of wrongdoing and failing to demonstrate atonement by paying restitution to the client. In mitigation, the judge found that respondent had no prior disciplinary record; possessed general honesty and integrity as attested to by seven character witnesses; conducted extensive volunteer work; and implemented reforms to correct problems in his practice. The State Bar sought review. (Hon. David S. Wesley, Hearing Judge.)

The review department found respondent culpable of 12 ethical violations in five client matters. In two matters, respondent was found culpable of committing acts of moral turpitude by inducing two clients to withdraw disciplinary complaints. Respondent was not found culpable of appearing wilfully and without authority for a client after the termination of his employment. The amount of the unearned fee which respondent should have returned was clarified. He also was found culpable of another instance of promptly failing to return an unearned fee and of failing to communicate properly with a client. Respondent's failure to provide competent legal services was determined to be reckless and repeated rather than intentional. Additional aggravating factors adjudged were respondent's failure to pay full restitution to a client and attempted interference with the disciplinary investigation in one matter. Respondent's overall showing of mitigation was entitled to significant weight. The review department recommended, among other things, a two-year stayed suspension and three-year probation on condition of 90 days actual suspension and until payment of restitution.

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COUNSEL FOR PARTIES

For State Bar: Victoria R. Molloy, Terry R. Vaccaro

For Respondent: David A. Clare

HEADNOTES

[1] **204.90 Culpability—General Substantive Issues**
A client's acceptance of respondent's offer to advance costs and to pursue a complaint established an attorney-client relationship between them if such a relationship did not already exist.

[2 a-e] **220.30 State Bar Act—Section 6104**
Well-established definitions of "appearing" apply to the construction of section 6104 of the Business and Professions Code. For the purposes of jurisdiction, a defendant appears by answering or demurring to a complaint, by filing a notice of a motion to strike or transfer or by giving a plaintiff written notice of appearance. Also, an appearance occurs if the defendant or defendant's attorney participates in a trial or in a hearing on a motion or an order to show cause. Respondent's firm performed the following legal services for the client after respondent reviewed the letter terminating his services: review motion to compel, preparation of a letter to the client, telephone conversations with the client and with opposing counsel, research, preparation of a response to the motion to compel, preparation of a letter to the client about a status conference, and the preparation and filing of a substitution of attorney. There was not clear and convincing evidence that the preceding services amounted to "appearing" within the meaning of section 6104. Section 6104 does not prohibit legal services related to a possible appearance. It prohibits an actual appearance which is wilful or corrupt and without authority.

[3] **213.90 State Bar Act—Section 6068(i)**
560 Other uncharged violations (1.2(b)(iii))
Section 6068, subdivision(i), of the Business and Professions Code requires an attorney to cooperate in any disciplinary investigation or proceeding. By offering to pay a client for the withdrawal of the client's State Bar complaint against respondent, respondent was attempting to interfere with the State Bar's investigation and thus committed an uncharged violation of section 6068, subdivision (i).

[4] **214.30 State Bar Act—Section 6068(m)**
A client's efforts to communicate with respondent about a refund of fees and advanced costs were reasonable status inquiries for purposes of section 6068(m), of the Business and Professions Code. These efforts constituted status inquiries because they implicated the nature and conditions of respondent's representation. The efforts were reasonable because the clients quickly changed their mind about pursuing the matter for which respondent had been retained and deserved clarification about their financial arrangement with respondent.

[5] **221.00 State Bar Act—Section 6106**
Respondent wilfully violated section 6106 of the Business and Professions Code by conditioning repayment of fees on the withdrawal of a client's State Bar complaint against him. The withdrawal of the complaint would not have prevented the State Bar from pursuing a disciplinary proceeding against respondent and there was not clear and convincing evidence that respondent knew the clients were entitled to a refund. However, in response to respondent's letter explaining the

agreement with the client, a State Bar investigator warned him that attempting to induce the withdrawal of a State Bar complaint involved moral turpitude. Despite the warning, respondent refunded the fees and advanced costs, but the letter accompanying the refund did not inform the client of the investigator's warning or mention any change in the agreement between respondent and the client. After receiving the refunds, the clients withdrew their petition with a local bar association to arbitrate their fee dispute with respondent. Under these circumstances, respondent's attempt to thwart the disciplinary process involved moral turpitude.

[6 a-e] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**

A retainer agreement's characterization of a fee as a "non-refundable retaining fee" is not determinative in ascertaining whether the fee was a true retainer and whether respondent's failure to refund it promptly upon the termination of his employment violated rule 3-700(D)(2) of the Rules of Professional Conduct. A true retainer is paid to secure the availability of an attorney over a given period of time and is earned when paid regardless of whether the attorney actually performs services for the clients. Where the fee was intended to cover the initial 10 hours of respondent's work, the clients understood the fee to be an advanced payment for services, the bills sent to the client showed the fee as a credit for services to be rendered, the retainer agreement did not specify a period of time for which respondent was to be available to the clients and the record did not show that respondent set aside a particular period of time to devote to the clients' matter, the fee was not a true retainer and respondent had to comply with the requirement of rule 3-700(D)(2) to refund any unearned part of an advanced fee promptly upon termination.

ADDITIONAL ANALYSIS

Culpability
- Found
  - 213.91 Section 6068(i)
  - 214.31 Section 6068(m)
  - 221.19 Section 6106—Other Factual Basis
  - 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
  - 277.11 Rule 3-700(A)(1) [former 2-111(A)(1)]
  - 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
  - 277.31 Rule 3-700(B) [former 2-111(B)]
  - 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)]
- Not Found
  - 220.35 Section 6104
  - 277.35 Rule 3-700(B) [former 2-111(B)]

Aggravation
- Found
  - 521 Multiple Acts
  - 561 Uncharged Violations
  - 591 Indifference
- Declined to Find
  - 615 Lack of Candor—Bar

Mitigation
- Found
  - 710.10 No Prior Record

740.10 Mitigation– Good Character– Found
765.10 Substantial pro bono work
791 Other
Found but Discounted
793 Other
Standards
801.20 Purpose
802.30 Purposes of Sanctions
802.40 Sanctions Available
833.40 Moral Turpitude—Suspension
835.90 Moral Turpitude—Declined to Apply
844.13 Failure to Communicate/Perform
844.14 Failure to Communicate/Perform
863.30 Standard 2.6—Suspension
901.30 Miscellaneous Violations—Suspension
Discipline
1013.08 Stayed Suspension—2 Years
1015.03 Actual Suspension—3 Months
1017.09 Probation—3 Years
Probation Conditions
1021 Restitution
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)
Other
175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

STOVITZ, Acting P.J.:

Ronald E. Lais (respondent) committed serious misconduct. We recommend his actual suspension for 90 days and until he pays restitution.

A hearing judge of the State Bar Court (judge) determined that respondent was culpable of nine ethical violations in four client matters. The judge concluded, in the first matter, that respondent appeared wilfully and without authority for a client after the termination of his employment and failed to return an unearned fee promptly; in the second matter, that he failed to communicate properly with a client, failed intentionally to provide competent legal services, withdrew from employment without obtaining the required permission of a court and without taking reasonable steps to protect the client's rights, and failed to return a client's papers promptly upon request; in the third matter, that he failed to pay settlement proceeds promptly upon request; and in the fourth matter, that he improperly failed to deposit funds received for the benefit of a client in a trust account. In aggravation, the judge found that respondent engaged in multiple acts of wrongdoing and failed to demonstrate atonement for misconduct in the first matter by paying restitution to the client. In mitigation, the judge found an absence of any prior disciplinary record, general honesty and integrity as attested to by seven character witnesses, extensive volunteer work by respondent, and reforms implemented by respondent to correct problems in his practice. Overall, the judge accorded significant weight to respondent's mitigation. The judge recommended a two-year stayed suspension and three-year probation, conditioned on actual suspension for thirty days and payment of restitution within ninety days.

The State Bar's Office of the Chief Trial Counsel (OCTC) sought review. According to OCTC, the judge should have reached additional conclusions of culpability, made more findings in aggravation, and recommended longer actual suspension. OCTC argues that respondent committed acts of moral turpitude by trying to condition benefits to three clients on their withdrawal of disciplinary complaints against him, that he did not properly communicate with a client, and that he did not promptly return unearned fees to the client. OCTC supports the judge's findings in aggravation and contends that respondent demonstrated lack of candor during disciplinary investigation and trial. On review, OCTC contends that the minimum period of actual suspension should be six months and that respondent should remain actually suspended until he pays restitution.

Respondent argues that OCTC's claims have no merit. In a responsive brief, he does not challenge the judge's culpability conclusions or findings in aggravation and mitigation, although he asserts that his misconduct warrants no actual suspension. In a supplemental brief, he disputes two of the judge's culpability conclusions: that he appeared wilfully and without authority for the client in the first matter after the termination of his employment and that he improperly failed to deposit in a trust account certain funds received for the benefit of the client in the fourth matter.

Upon independent review of the record, we alter some of the judge's determinations about culpability. In the first matter, we do not conclude that respondent appeared wilfully and without authority for a client after the termination of his employment. Also in the first matter, we clarify the amount of the unearned fee which respondent should have promptly refunded upon the termination of his employment. In the second matter, we determine that respondent's failure to provide competent legal services was reckless and repeated rather than intentional. In the third matter, we add the conclusions that respondent failed to communicate properly with a client, committed an act of moral turpitude by inducing a client to withdraw a disciplinary complaint, and failed to return an unearned fee promptly to a client. In a fifth matter, we conclude that respondent committed another act of moral turpitude by inducing a client to withdraw a disciplinary complaint. Otherwise, we agree with the judge's culpability determinations and thus conclude that respondent committed 12 ethical violations in 5 matters.

We agree with the judge's finding in aggravation that respondent engaged in multiple acts of wrongdoing. As additional aggravating factors, we

find that respondent failed to pay full restitution to the client in the first matter and tried to interfere with the disciplinary investigation in the first matter.

We agree with the judge's findings in mitigation that respondent established the absence of a prior disciplinary record, his general honesty and integrity, and extensive volunteer work. Although we disagree with the judge's assessment that respondent's office reforms deserve heavy weight in mitigation, we agree with the judge's view that respondent's overall showing of mitigation is entitled to significant weight.

We modify the judge's disciplinary recommendation. We recommend that respondent be actually suspended for 90 days and until he pays restitution of $3,607.00 plus interest. If the period of actual suspension is two years or more, we recommend that he remain actually suspended until he proves rehabilitation, fitness to practice law, and present learning and ability in the general law. We add a recommendation for compliance with rule 955 of the California Rules of Court because of the extended period of actual suspension, and we modify the costs provision because of statutory changes.

I. PROCEDURAL HISTORY

Respondent was admitted to practice law in California in December 1975. OCTC filed a notice to show cause starting this proceeding in April 1994 and amended the notice in July 1995.

The proceeding consisted of seven original disciplinary cases, one of which was severed to avoid recusal of the judge.[1] The trial of the rest of the consolidated proceeding occurred on 16 days between November 1995 and April 1996. The judge filed a decision in May 1996 and an order modifying the decision in June 1996.

As noted *ante*, OCTC sought review. OCTC filed an opening brief; respondent, a responsive brief; and OCTC, a rebuttal brief.

Under our obligation of independent review (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we examined the extensive record before oral argument and identified three issues not raised by the parties: (1) whether respondent appeared wilfully and without authority for the client in the first matter after the termination of employment, (2) whether respondent intentionally or recklessly failed to provide competent legal services for the client in the second matter, and (3) whether respondent failed to demonstrate atonement for misconduct by not paying restitution to the client in the first matter. We alerted the parties to these issues by a letter before oral argument and let them address the issues at oral argument and in supplemental briefs filed after oral argument. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(b).)

II. DISCUSSION

We agree with the judge's conclusions of culpability and findings in aggravation and mitigation except as indicated *post*.[2]

A. Culpability

Respondent committed ethical violations in handling five matters between July 1991 and September 1993.

1. Cox matter

Tom Burns, a friend of respondent, contacted respondent in May 1991 about representing Jessie Cox in a malpractice action against Cox's former attorneys. Respondent discussed the action with

1. The hearing judge who handled the severed case concluded that OCTC did not establish respondent's culpability of any ethical violation. OCTC did not seek review of that case.

2. The hearing judge dismissed some allegations on motions by the State Bar. We agree with these dismissals, which we find no need to discuss in this opinion.

The hearing judge determined that the record did not support other allegations. Except as indicated *post*, we agree with these determinations and do not discuss them.

Burns and Cox and told them that he needed a $10,000 non-refundable retainer before he could start work on the action. Burns offered to help Cox financially if Cox wanted to pursue the action. Cox wanted to do so; and Burns wired the $10,000 to respondent in two payments: $5,000 on June 26, 1991, and $5,000 on July 10, 1991.

The judge determined that the $10,000 which Burns paid constituted an advanced fee for Cox rather than a non-refundable retainer. We agree with this determination, which respondent does not dispute on review.

Cox wanted respondent's office to start work quickly on the malpractice action. After the first payment, Cox sent documents about the case to respondent. Upon receipt of the second payment, respondent instructed his associate, Ian McLean, to prepare and file a complaint on Cox's behalf. Also, Cox telephoned respondent's office to set up an appointment for the next day.

On July 11, 1991, Cox met with McLean for over an hour. At the end of the meeting, McLean gave Cox a written retainer agreement to review and sign. Cox told McLean that Cox was not ready to sign the agreement yet, but would review it and get back to McLean. Cox did not clearly refuse to sign the agreement or to have respondent's firm pursue the case.

McLean did not ask Cox why Cox was not ready to sign the agreement. Nor does the record show that Cox explained his reluctance to sign the agreement to McLean. Cox had concerns about two provisions of the agreement: the requirement to pay for the costs of the action and the purported non-refundability of the $10,000.

Respondent learned of Cox's concern about the costs. He instructed his office manager, Julie Sable, to inform Cox that his office would advance the costs.

[1] On July 12, 1991, Sable relayed this information to Cox and told Cox that respondent's office would pursue the complaint. Cox replied that this arrangement would be fine. Cox's acceptance of respondent's offer to advance costs and pursue the complaint established an attorney-client relationship between them if such a relationship did not already exist.[3] (Cf. *Miller v. Metzinger* ((1979) 91 Cal.App.3d 31, 39-40 [attorney client relationship resulting from the provision of legal advice in the absence of a fee agreement]; see 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 68, p. 101 [attorney-client relationship often informally created by the acts of the parties].)

Cox disliked respondent's delegation of the malpractice action to McLean. On Tuesday, July 16, 1991, Cox sent respondent a letter by certified mail. This letter expressed dissatisfaction with respondent's lack of personal communication to Cox and with what appeared to Cox to be respondent's lack of interest in Cox's case. The letter also requested the return of the $10,000 and Cox's file.

On Wednesday, July 17, 1991, Cox's letter arrived at respondent's office. The record does not establish when respondent or McLean learned about the letter.

On Friday, July 19, 1991, respondent's office filed a complaint on Cox's behalf in Los Angeles County Superior Court. At the time of the filing, respondent had not reviewed Cox's letter of July 16, 1991.

On Monday, July 22, 1991, respondent reviewed the letter. He recognized that Cox no longer wanted to be represented by his firm.

On July 23, 1991, respondent sent Cox a reply which acknowledged his receipt of Cox's letter and informed Cox about the filing of the complaint. The reply described the $10,000 as "basically a non-refundable deposit toward attorney[']s fees" and

3. We disagree with suggestions in the judge's decision that respondent may not have had an attorney-client relationship with Cox.

indicated that a refund, if any, belonged to Burns, who had sent the money, not to Cox. The reply mentioned neither Cox's request for the return of the case file nor Cox's implicit termination of respondent's employment. Instead, the reply concluded with a suggestion that Cox and respondent meet soon "to discuss further progress of the case."

Cox telephoned respondent's office. A recording stated that the office was on vacation. Cox took no further steps at this time to contact the office.

On September 16, 1991, McLean mailed Cox a copy of a set of interrogatories and a request for production of documents propounded by opposing counsel. Cox did not respond.

On October 23, 1991, McLean sent Cox a letter asking for cooperation in answering the interrogatories.

In a telephone conversation with McLean on October 25, 1991, Cox asserted that Cox had not authorized respondent's firm to litigate Cox's case and that Cox wanted the $10,000 to be returned. Cox repeated these assertions in a letter to respondent and McLean on November 5, 1991. At the end of the letter, Cox stated that Cox would complain to the State Bar.

On November 8, 1991, McLean sent Cox a letter asking for cooperation in answering interrogatories to avoid sanctions and prejudice to Cox's case.

On November 12, 1991, McLean again talked with Cox. Because Cox did not want to be represented by respondent's firm, McLean sent Cox a substitution of attorney form and asked Cox to sign and return it. Mclean advised Cox that if Cox did not return the signed substitution, respondent's firm would have to answer a pending motion to compel and file a motion to withdraw as counsel.

Respondent's office continued to work on Cox's matter through February 1992.

On July 27, 1992, respondent mailed Cox a letter asserting that respondent had spoken with the State Bar and that Burns did not object to his dealing directly with Cox to resolve the fee dispute.[4] A six-page billing statement attached to this letter indicated that respondent's firm had earned $5,174.50 in fees for work done from June 1991 through February 1992 (i.e., $1,567.50 for work done through July 23, 1991, when respondent replied to Cox's letter requesting return of the $10,000 payment and the case file, and $3,607.00 for work done thereafter) and that Cox had a credit of $4,825.50 (i.e., $10,000.00 minus $5,174.50). In the letter, respondent offered to send Cox a check for $4,825.50 if Cox withdrew Cox's complaint with the State Bar.

Respondent sent a copy of the letter to Geraldine VonFreymann, an OCTC deputy trial counsel then assigned to the Cox matter. VonFreymann did not advise respondent that it was improper to try to induce Cox to withdraw the complaint.

On August 20, 1992, respondent mailed Cox a letter addressing their disagreement about fees. Respondent asserted that he was forwarding a check for $4,825.50 to Cox in order to make some progress in resolving this disagreement. According to respondent, the sum of $4,825.50 was not in dispute. He added that Cox's not having signed the retainer agreement created "some doubt about whether the fixed, minimum retainer provision would be enforceable." Respondent suggested arbitration of the dispute and sent a copy of the letter to VonFreymann.

Cox did not withdraw the complaint against respondent and did not pursue arbitration of the fee dispute.

4. The record does not clarify when respondent learned that Burns did not object to respondent's dealing with Cox about to resolve the fee dispute.

a. Section 6104

The notice to show cause charged respondent with violating Business and Professions Code section 6104, which provides that wilfully or corruptly appearing without authority as an attorney for a party constitutes a cause for suspension or disbarment.[5] This charge rested on the allegation that respondent acted without authority in filing a complaint for Cox on July 19, 1991. Another basis for the charge may have been the further allegation that respondent did not cease his representation of Cox after Cox asked him to stop.

The judge failed to address the issue of whether Cox violated section 6104 by filing the complaint. As indicated *ante*, we alerted the parties to this issue before oral argument and allowed them to address it at oral argument and in supplemental briefs.

Because the filing of the complaint on Friday, July 19, 1991, was an appearance (*Lyons v. State of California* (1885) 67 Cal. 380, 384), we focus on whether OCTC has proven by clear and convincing evidence that this appearance was without authority and wilful or corrupt. The facts are undisputed: Cox told McLean on July 11, 1991, that Cox was not yet ready to sign a retainer agreement, but would get back to McLean; Cox authorized the pursuit of the case in a conversation with Sable on July 12, 1991; Cox terminated respondent's services in the July 16, 1991, letter, which arrived at respondent's office on Wednesday, July 17, 1991; and respondent did not review Cox's letter until Monday, July 22, 1991. Resolving all reasonable doubts in respondent's favor (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240, and cases there cited), we conclude that the filing of the complaint on Friday, July 19, 1991, did not violate section 6104 because respondent's office was acting under the authority of the conversation on July 12, 1991, and because OCTC did not produce clear and convincing evidence of wilfulness or corruption by respondent with regards to the filing.

In its supplemental brief, OCTC argues that the filing was without authority because respondent knew about Cox's "refusal" to sign the retainer agreement at the end of the meeting with McLean and did not try to discuss with Cox whether Cox wanted respondent to pursue Cox's case. OCTC fails to address Cox's testimony at trial: "[Cox] told [McLean] that [Cox] *would get back* to [McLean], that [Cox] was not ready to sign the agreement *yet*, and [Cox] would have it looked over, and [Cox] *would get back* to [McLean]." (Emphasis added.) This testimony shows that Cox hedged; Cox did not irrevocably refuse to have respondent's firm handle the case. Also, OCTC fails to mention an important fact: on July 12, 1991, Cox told Sable that it would be fine for respondent's office to pursue Cox's case. These facts undermine OCTC's argument.

The judge concluded that respondent violated section 6104 by his "continued representation of Cox after his services were terminated . . . ." The judge did not specify what act or acts by respondent constituted an appearance prohibited by section 6104. Culpability of a section 6104 violation requires clear and convincing evidence of such an appearance.

[2a] Although we have sometimes held attorneys culpable of violating section 6104 (e.g., *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 400 [improper filing of pleadings and going to court]; *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 104-105 [improper start and continuance of litigation]), we have not analyzed what the term "appearing" denotes in section 6104. Nor have the parties in the current proceeding offered such an analysis.

[2b] For the purpose of jurisdiction, a defendant appears by answering or demurring to a complaint, by filing a notice of a motion to strike or transfer, by giving a plaintiff written notice of appearance, or by having an attorney give written notice of appearance. (Code Civ. Proc., § 1014.) Also, an appearance

5. Unless otherwise indicated, all further references to sections denote provisions of the Business and Professions Code.

occurs if the defendant or the defendant's attorney participates in a trial or in a hearing on a motion or an order to show cause. (II Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 205, p. 771; see cases there cited.) We hold that these well-established definitions of "appearing" apply to the construction of section 6104.[6]

[2c] The billing statement attached to respondent's letter to Cox of July 27, 1992, lists the undisputed legal services performed by respondent's firm for Cox after July 22, 1991, when respondent reviewed Cox's letter terminating his services. These services included the review of a motion to compel, the preparation of a letter to Cox, telephone conversations with Cox and with opposing counsel, research, the preparation of a response to the motion to compel, the preparation of a letter to Cox about a status conference, the preparation of a substitution of attorney, and the filing of the substitution.

[2d] We do not find clear and convincing evidence that any of the preceding services amounted to "appearing" within the meaning of section 6104. We also note the assertion in OCTC's supplemental brief that "the only 'appearance' before the [s]uperior [c]ourt made by [r]espondent in the litigation was the filing of the initial complaint . . . ." Thus, we conclude that respondent is not culpable of violating section 6104.

[2e] OCTC argues for culpability on the ground that the legal services performed by respondent's firm for Cox after the filing of the complaint constituted "work . . . ostensibly done in relation to the pending proceeding and in anticipation of future formal appearances." This argument does not persuade us. Section 6104 prohibits an actual appearance which is wilful or corrupt and without authority. Section 6104 does not prohibit legal services related to a possible appearance.

OCTC further claims that respondent's legal services for Cox after July 22, 1991, involved other uncharged ethical violations and thereby constitute an aggravating factor even if respondent did not violate section 6104. According to OCTC, these services amounted to an uncharged violation of section 6106, which provides that the commission of any act involving moral turpitude, dishonesty, or corruption is a cause for suspension or disbarment, and to an uncharged violation of the Rules of Professional Conduct, rule 3-700(B)(2), which requires an attorney to withdraw if the attorney knows or should know that continued employment will result in ethical violations.[7]

Respondent admitted at trial that he knew Cox desired to terminate his employment upon reviewing Cox's letter of July 16, 1991. Respondent should have addressed this desire in his reply of July 23, 1991, but did not do so. Apparently believing that he could salvage a working relationship with Cox, he ended his reply by expressing the hope to meet soon with Cox to discuss progress on Cox's case.

Subsequent interactions between Cox and respondent's firm were limited. After receiving respondent's letter of July 23, 1991, Cox telephoned respondent's office, got a recorded message, and took no further step to communicate. On September 16, October 23, and November 8, 1991, McLean sent letters to Cox about the discovery efforts of opposing counsel. In a telephone conversation with McLean on October 25 and in a confirming letter to respondent and McLean on November 5, 1991, Cox made it clear that he did not want to represented further by respondent's firm. On November 12, 1991, McLean talked with Cox, sent Cox a substitution of attorney, and asked Cox to sign and return it. At this time, a pending motion to compel required response, which McLean prepared. Apparently, a substitution of attorney was filed in early 1992.

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6. In *In the Matter of Snyder* (Review Dept. 1993) 2 Cal.State Bar Ct. Rptr. 593, 599, a hearing judge determined that Snyder violated section 6104 by his unauthorized negotiation with an insurance company for a client, and we adopted that determination. We now overrule *Snyder* insofar as it is inconsistent with our current holding.

7. Unless other wise indicated, all further references to rules denote provisions of the Rules of Professional Conduct.

The record reflects negligence insofar as respondent should have taken prompt steps after July 22, 1991, to communicate with Cox about the implicit termination of respondent's employment and should have made a substitution of attorney available to Cox before November 12, 1991. Yet resolving all reasonable doubts in respondent's favor, we conclude that the record lacks clear and convincing evidence establishing the requirements for a violation of either section 6106 or rule 3-700(B)(2).

b. Section 6106

The notice to show cause charged respondent with violating section 6106 on the grounds that respondent took and held an allegedly unconscionable advanced fee and that he offered to pay $4,825.50 to Cox on July 27, 1992, if Cox withdrew the complaint which Cox had made to the State Bar.

The judge determined that OCTC put forward no evidence showing that the $10,000 advanced fee was illegal or unconscionable. We agree with this determination and with the judge's conclusion that OCTC failed to prove by clear and convincing evidence that respondent engaged in moral turpitude by collecting the $10,000 advanced fee.

The judge further concluded that respondent did not violate section 6106 by offering to pay $4,825.50 to Cox if Cox withdrew Cox's complaint to the State Bar. Apparently, the judge based this conclusion on the finding that the withdrawal of Cox's complaint would not have kept OCTC from pursuing a disciplinary proceeding against respondent and on the finding that OCTC failed to prove that respondent knew Cox was entitled to the $4,825.50.

We agree with these findings. The withdrawal of Cox's complaint would not have prevented a disciplinary proceeding. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 694; see authorities therein cited.) Also, the record suggests that on July 27, 1992, when respondent made the offer, he regarded the $4,825.50 as an unearned credit which he did not have to return. In the initial May 1991 discussion with Cox and Burns, respondent insisted on the payment of $10,000 as a non-refundable retainer before starting work on Cox's malpractice action. Also, respondent's written fee agreement characterized this payment as a non-refundable retainer. Although Cox did not sign the written agreement and later requested the return of the full $10,000, respondent apparently believed in July 1992 that he was entitled to the $10,000 pursuant to their original discussion.[8]

Yet the judge's findings do not preclude culpability under section 6106. A section 6106 violation does not require actual harm (cf. *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147), such as an attorney's effective thwarting of a disciplinary proceeding. Nor does a section 6106 violation require evil intent (*Murray v. State Bar* (1985) 40 Cal.3d 575, 582; *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 331), such as an attorney's deliberate decision not to forward promptly funds which the attorney knows belong to a client.

Any act contrary to honesty and good morals involves moral turpitude. (*Kitsis v. State Bar* (1979) 23 Cal.3d 857, 865; see *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.) According to OCTC, respondent's offer to Cox involved moral turpitude because he was trying to interfere with OCTC's investigation and prosecution of misconduct.

Respondent denies that his offer involved moral turpitude. He stresses that he acted openly, that he sent VonFreymann a copy of the letter offering to pay $4,825.50 to Cox if Cox withdrew Cox's complaint to the State Bar, and that she did not advise him of any impropriety.[9]

8. As discussed *ante*, respondent later changed his view. In a letter dated August 20, 1992, respondent stated that there was "some doubt" about the enforceability of the retainer because Cox had not signed the retainer agreement and that he was forwarding the unearned credit of $4,825.50 to Cox.

9. Respondent also argues against culpability under section 6106 on the basis of two review department cases: *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735 and *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752. These cases fail to support his argument because they examined neither moral turpitude nor culpability under section 6106.

The charged violation of section 6106 requires clear and convincing evidence of misconduct with "some level of guilty knowledge or at least gross negligence.... [Citation.]" (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384.) OCTC did not present such evidence in support of this count. Respondent's offer to pay Cox if Cox withdrew his complaint may have resulted from mere negligence. Respondent apparently lacked awareness of his ethical duty under section 6068, subdivision (i). That he sent VonFreymann a copy of the letter making the offer to Cox suggests such lack of awareness. Resolving all reasonable doubts in respondent's favor, we conclude that the record fails to establish the guilty knowledge or gross negligence required for moral turpitude and thus to support a conclusion of culpability under section 6106.

[3] Respondent nevertheless acted improperly. Section 6068, subdivision (i) requires an attorney to cooperate in any disciplinary investigation or proceeding. By offering to pay Cox for the withdrawal of Cox's complaint, respondent was attempting to interfere with the State Bar's investigation and thus committed an uncharged violation of section 6068, subdivision (i).

OCTC contends that even if respondent is not culpable of violating section 6106, his offer to Cox constitutes aggravation. In a contested disciplinary proceeding, an uncharged ethical violation is an aggravating factor under standard 1.2(b)(iii) of the Rules of Procedure of the State Bar of California, title IV, Standards for Attorney Sanctions for Professional Misconduct (standards). We conclude that respondent's uncharged violation of section 6068, subdivision (i) constitutes aggravation.

c. Rule 3-700(D)(2)

Under rule 3-700(D)(2), an attorney whose employment has been terminated must promptly refund any unearned part of an advanced fee. The judge concluded that respondent wilfully violated rule 3-700(D)(2) by failing to return unearned fees for more than a year after Cox terminated his employment.[10] The judge did not specify the amount which respondent should have paid. Respondent does not dispute the culpability conclusion.

We clarify the amount which respondent should have promptly refunded. The record establishes that respondent was entitled to $1,567.50 for work done through July 23, 1991, when he replied to Cox's letter of July 16, 1991. As respondent acknowledges, Cox's letter terminated his employment. Respondent lacked authorization for the further work done on Cox's matter through February 1992. On the record before us, we conclude that respondent wilfully violated rule 3-700(D)(2) by not promptly refunding $8,432.50 (i.e., $10,000 minus $1,567.50).

2. Bachtel matter

Ann Bachtel hired respondent's office to represent her in a legal malpractice action. McLean, respondent's associate, filed a complaint on her behalf in November 1991 and an amended complaint in December 1991.

Respondent's office had a strained relationship with Bachtel. Difficulties in communication occurred, and she felt that she was not getting his personal attention.

In February 1992, a cross-complaint was filed against Bachtel and was served on McLean at respondent's office. Respondent's office neither informed her of the cross-complaint nor filed an answer to it.

On March 11, 1992, respondent filed a motion to withdraw, which was denied on March 26, 1992. Respondent filed a second motion to withdraw on March 31, 1992.

Respondent did not appear at a properly noticed deposition on April 15, 1992. Bachtel appeared,

10. In his letter to Cox of July 23, 1991, respondent suggested that a refund, if any, belonged to Burns, who had sent the $10,000 advanced fee. As the judge indicated, respondent should have sought clarification if he had doubts about the appropriate person to receive a refund.

learned of the cross-complaint, and fended for herself. After the deposition, she telephoned respondent's office, but he did not return her calls.

Bachtel asked respondent's staff by telephone to return papers related to her case. She repeated this request in letters which she wrote to respondent on April 22 and 29, 1992. He did not send her the papers.

On April 30, 1992, respondent's second motion to withdraw was denied.

On May 18, 1992, a notice of trial was mailed to respondent. The notice informed him that the trial of Bachtel's case was set for July 21, 1992. He did not prepare for the trial and did not appear at it. A default judgment was entered against Bachtel.

a. Section 6068, subdivision (m)

Section 6068, subdivision (m) requires an attorney to keep clients reasonably informed of significant developments in their cases and to respond promptly to reasonable status inquiries from clients. We agree with the judge that respondent wilfully violated section 6068, subdivision (m) by failing to inform Bachtel about the filing of the cross-complaint and by failing to return her telephone calls after her deposition. Respondent does not dispute this culpability conclusion.

b. Rule 3-110(A)

Rule 3-110(A) prohibits the intentional, reckless, or repeated failure to provide competent legal services. The judge determined that respondent wilfully violated rule 3-110(A) by failing to notify Bachtel about the filing of the cross-complaint, to answer the cross-complaint, and to appear at the deposition. According to the judge, these failures constituted an intentional abdication of his obligation to perform the services for which he was hired.

We asked the parties whether respondent intentionally or recklessly failed to provide competent legal services to Bachtel. OCTC supports the judge's conclusion. Respondent concedes that he committed a rule violation without addressing the question posed.

We have examined the parts of the record cited by OCTC, but do not find clear and convincing evidence of intentional failure by respondent to perform legal services competently. We conclude that respondent wilfully violated rule 3-110(A) by his reckless and repeated failures to provide competent legal services. These failures included his not informing Bachtel about the cross-complaint and not answering the cross-complaint.

Respondent does not deny the misconduct underlying the conclusion that he wilfully violated rule 3-110(A). He argues, however, that this conclusion duplicates the conclusions, discussed *post*, that he wilfully violated rules 3-700(A)(1) and 3-700(A)(2). He claims that all the conclusions rest on the same misconduct and that he should not be held culpable of violating rule 3-110(A), as well as rules 3-700(A)(1) and 3-700(A)(2).

We disagree. Respondent withdrew from representing Bachtel in her legal malpractice action after filing an amended complaint in December 1991. The misconduct underlying the violation of rule 3-110(A) occurred before his withdrawal. As discussed *post*, the misconduct underlying the violations of rules 3-700(A)(1) and 3-700(A)(2) occurred afterwards.[11]

c. Rules 3-700(A)(1) and 3-700(A)(2)

The notice to show cause charged respondent with violating rules 3-700(A)(1) and 3-700(A)(2), which the judge addressed together. Under rule 3-700(A)(1), an attorney must not withdraw from

11. The same misconduct may result in more than one ethical violation. (*In the Matter of Kaplan* (Review Dept. 1993) 3 Cal. State Bar Ct. Rptr. 547, 554; *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 504.) Insofar as the facts establishing a violation of any section or rule are the same as the facts showing a violation of another section or rule, we attach no extra weight to such duplication in determining the appropriate discipline. (*In the Matter of Kaplan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 554, fn. 6; *In the Matter of Acuna, supra*, 3 Cal. State Bar Ct. Rptr. at p. 504, fn. 3; see *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose served by duplicative allegations of misconduct].)

employment in a proceeding before a tribunal without the its permission if its rules require such permission for the termination of employment. Under rule 3-700(A)(2), an attorney must not withdraw from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the client's rights. The judge determined that respondent wilfully violated rules 3-700(A)(1) and 3-700(A)(2) by failing to perform the services for which he was hired, including the representation of Bachtel at her deposition and trial.

Upon independent review of the record, we find that respondent withdrew from representing Bachtel in her legal malpractice action after filing an amended complaint in December 1991 and that he did not obtain the necessary court permission for withdrawal. We conclude that he wilfully violated rule 3-700(A)(1) by such withdrawal.

Upon independent review of the record, we also find that respondent failed to give Bachtel due notice of his withdrawal and to take other reasonable steps which would have prevented harm to her rights in the legal malpractice action after December 1991. These other steps should have included the representation of Bachtel at her deposition and trial. We conclude that he wilfully violated rule 3-700(A)(2) by failing to take such steps.

d. Rule 3-700(D)(1)

Under rule 3-700(D)(1), an attorney whose employment has terminated must promptly release to a client, at the client's request, all client papers and property, subject to any protective order or nondisclosure agreement. We agree with the judge's conclusion that respondent wilfully violated rule 3-700(D)(1) by not sending her the papers which she requested in late April 1992.

Respondent claims that this conclusion is inconsistent with the judge's conclusion that Bachtel did not terminate respondent's employment. We find no such conclusion or inconsistency. Rule 3-700(D)(1) applies if an attorney's "employment has terminated . . . ." Rule 3-700(D)(1) encompasses both a client's discharge of an attorney and an attorney's withdrawal from employment. (Cf. *In the Matter of Myrdall*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 374 [addressing the predecessor of rule 3-700(D)(1)].) As discussed *ante*, respondent improperly withdrew after filing the amended complaint. He wilfully violated rule 3-700(D)(1) by later failing to return the requested papers.

3. Gutierrez matter

Frank and Carmella Gutierrez hired respondent on Friday, May 22, 1992, to file an action against their daughter for support of their grandson, of whom they had legal custody. They signed a written retainer agreement with respondent. The document stated: "Client agrees to pay to [respondent] for [his] services a fixed, non-refundable retaining fee of $2,750.00 and a sum equal to $275.00 per hour after the first 10 hours of work. This fixed, non-refundable retaining fee is paid to [respondent] for the purpose of assuring the availability of [respondent] in this matter."

On May 22, 1992, the Gutierrezes gave respondent a check for $2,900. This check covered the fee of $2,750 and advanced costs of $150.

Memorial Day was observed on Monday, May 25, 1992.

On Wednesday, May 27, 1992, Carmella Gutierrez telephoned respondent's office. She wanted to speak with respondent, who was not available. She informed respondent's business manager that she and her husband had changed their minds, that they wanted no work to be done on the child support action, and that they requested a refund of the fee and advanced costs.

The business manager relayed this information to respondent, who did not respond to the Gutierrezes. He had done no work on their case other than meeting with them on May 22, 1992.

On May 29, 1992, Carmella Gutierrez wrote a letter asking respondent to telephone her and refund the $2,900. Respondent's office received this letter on June 4, 1992. He did not respond.

In June 1992, Carmella Gutierrez made a number of telephone calls to respondent's office to try to talk with him about a refund. He did not respond.

On July 3, 1992, the Gutierrezes filed a petition with the Orange County Bar Association to arbitrate their fee dispute with respondent.

Also, Carmella Gutierrez complained to the State Bar. The complaint prompted respondent to negotiate an agreement with her. This agreement provided that he would be substituted out of the guardianship matter, that she would withdraw her complaint to the State Bar, and that he would send her a refund.

On August 7, 1992, respondent faxed a letter to Monica Fleming, an OCTC investigator assigned to the Gutierrez matter. After explaining the agreement, the letter stated: "If you think there is something improper about [the agreement], then please let me know and we will do it the way you recommend." Fleming immediately warned respondent that attempting to induce the withdrawal of a State Bar complaint involved moral turpitude.

On August 7, 1992, respondent's office sent Carmella Gutierrez a $2,750 refund for the fee. The letter accompanying the refund did not inform Gutierrez about Fleming's warning or mention any change in the prior oral agreement between respondent and Gutierrez.

On August 12, 1992, respondent's office sent the Gutierrezes a $150 refund for the advanced costs.

The Gutierrezes got the $2,750 refund on August 10, 1992, and the $150 refund on August 14, 1992. Having received refunds equal to the full amount which they had paid respondent, they withdrew their petition with the Orange County Bar Association to arbitrate their dispute with respondent.

The judge found that after receiving their money, the Gutierrezes requested the dismissal of the State Bar complaint. According to OCTC, respondent carried out his agreement with Carmella Gutierrez despite Fleming's warning that the requirement for Gutierrez to withdraw the State Bar complaint involved moral turpitude. Respondent claims that he eliminated the requirement for Gutierrez to withdraw her State Bar complaint and that the record lacks any evidence of such withdrawal.

We find that respondent disregarded Fleming's warning and pursued his prior agreement with Gutierrez. In making this finding, we rely on the undisputed facts already set forth and on the evidence cited by OCTC. This evidence included a letter which respondent wrote to Fleming on August 7, 1992, and a letter which respondent wrote to Victoria Molloy, a senior trial counsel with OCTC, on March 18, 1994. In the letter to Fleming, he suggested that the requirement for Gutierrez to withdraw the State Bar complaint did not involve moral turpitude because the agreement with Gutierrez was "in the nature of a civil compromise," although it addressed a disciplinary matter. In the letter to Molloy, respondent requested that OCTC close the Gutierrez matter because the Gutierrezes had withdrawn their complaint to the State Bar in return for a complete refund of their money.

a. Section 6068, subdivision (m)

The judge concluded that respondent was not culpable of violating section 6068, subdivision (m) despite his failure to respond to Carmella Gutierrez's telephone call of May 27, 1992; to her letter of May 29, 1992; and to her telephone calls of June 1992. The judge found that the sole purpose of Gutierrez's attempts to communicate with respondent was to obtain a refund. According to the judge, respondent had no ethical obligation to respond "given the fact that he had a fully executed retainer agreement that made the money a nonrefundable retainer."

OCTC disputes the judge's conclusion. According to OCTC, Carmella Gutierrez had a right to discuss the fee and advanced costs in her case with respondent regardless of whether the Gutierrezes were entitled to a refund. OCTC asserts that respondent had a duty under section 6068, subdivision (m) to respond to her inquiries.

Respondent contends that Gutierrez's attempts to contact him were not "reasonable status inquiries" within the scope of section 6068, subdivision (m)

because they did not seek information about her case. Also, he claims that he cannot be held culpable of violating section 6068, subdivision (m) on the basis of failing to respond to Gutierrez's letter and telephone calls because the notice to show cause merely alleged a failure to meet with Gutierrez on June 12, 1992.

Due process requires adequate notice of the factual basis for an alleged ethical violation. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 816; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168-169, and cases there cited.) The notice to show cause stated not only that respondent failed to meet with Gutierrez on June 12, 1992, but also that he "failed to communicate with Gutierrez despite her numerous attempts to contact [him]." The latter statement provided sufficient notice to respondent that he was charged with violating section 6068, subdivision (m) on the basis of failing to respond to Gutierrez's telephone call of May 27, 1992; her letter of May 29, 1992; and her telephone calls of June 1992.

[4] Section 6068, subdivision (m) requires an attorney to respond promptly to "reasonable status inquiries" from clients. The parties agree that respondent ignored Gutierrez's letter and telephone calls. The issue before us is whether her efforts to communicate with him about a refund were reasonable status inquiries. We conclude that these efforts constituted status inquiries because they implicated the nature and conditions of his representation. Also, we conclude that the efforts were reasonable because Gutierrez and her husband had quickly changed their minds about pursuing the child support action and deserved clarification about their financial arrangement with respondent. Thus, respondent wilfully violated section 6068, subdivision (m) by failing to respond promptly to Gutierrez's letter and telephone calls. (Cf. *In the Matter of Kaplan, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 559-560 [culpability under section 6068, subdivision (m) based on failure to reply to requests for the completion of a matter and for an accounting].)

b. Section 6106

Citing "the same reasons" as in the Cox matter, the judge concluded that respondent did not violate section 6106 by conditioning the $2,900 refund on the withdrawal of the State Bar complaint. By "the same reasons," the judge apparently meant a finding that the withdrawal of the Gutierrez complaint did not prevent OCTC from pursuing a disciplinary proceeding against respondent and a finding that OCTC failed to prove that respondent knew the Gutierrezes were entitled to the refund.

Even if such findings are correct, they do not foreclose culpability under section 6106.

[5] We agree with OCTC that respondent wilfully violated section 6106 by completing his agreement with Carmella Gutierrez despite Fleming's warning. This warning clearly placed respondent on notice that conditioning the repayment of fees on the withdrawal of a State Bar complaint constituted moral turpitude. He displayed at least gross negligence by ignoring the warning. Under the circumstances, his attempt to thwart the disciplinary process involved moral turpitude.

Respondent argues that he is not culpable of moral turpitude. He claims that he eliminated the requirement for Gutierrez to withdraw the State Bar complaint and that no evidence indicates the withdrawal of the complaint. As discussed *ante*, the record belies these claims.

c. Rule 3-700(D)(2)

Rule 3-700(D)(2) provides that an attorney whose employment has been terminated must promptly refund any unearned part of an advanced fee. The rule, however, further states that this provision does not apply "to a true retainer fee which is paid solely for the purpose of ensuring the availability of the [attorney] for the matter."

The judge focused on the retainer agreement's characterization of the $2,750 fee as a "fixed, nonrefundable retaining fee" paid "for the purpose of assuring the availability of [respondent] in this matter." The judge concluded that the characterization made the $2,750 a true retainer and thus that respondent's failure to refund the $2,750 promptly upon the termination of his employment did not violate rule 3-700(D)(2).

[6a] We agree with OCTC that these conclusions are incorrect. The characterization of the $2,750 as a "non-refundable retaining fee" is not determinative. (Cf. *Matthew v. State Bar* (1989) 49 Cal.3d 784, 791.)

[6b] In *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4, the Supreme Court distinguished a retainer from an advanced fee. The court stated: "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."

[6c] The description of a retainer in *Baranowski* does not apply to the $2,750 which respondent received from the Gutierrezes on May 22, 1992. The $2,750 was not earned when paid, but was intended to cover the initial 10 hours of respondent's work. According to the retainer agreement, respondent's fees were to consist of the $2,750 plus $275 per hour for his services after the initial 10 hours of work. Carmella Gutierrez testified that she understood the $2,750 to be an advanced payment for services, and the bills which respondent sent to the Gutierrezes showed the $2,750 as a credit for services to be rendered.

[6d] Although *Baranowski* asserts that a client pays a retainer to ensure the availability of an attorney over a given period of time, the retainer agreement signed by the Gutierrezes and respondent did not specify a period of time for which he was to be available to them. Nor does the record show that respondent set aside a particular period of time to devote to the Gutierrez matter.

[6e] Because the $2,750 was not a true retainer fee, respondent had to comply with the requirement of rule 3-700(D)(2) to refund any unearned part of an advanced fee promptly upon the termination of his services. The Gutierrezes ended his services on May 27, 1992; but he failed to send them a refund until August 7, 1992, after they complained to the State Bar. We conclude that this failure constituted a wilful violation of rule 3-700(D)(2).

We also reject respondent's claim that he based his retainer agreement in good faith on the State Bar's own forms. He used forms developed and published not by the State Bar, but by authors for the Continuing Education of the Bar (CEB). As CEB informed readers in a preface to the forms, the interpretations of the authors "obviously are not intended to reflect any position of the State Bar of California . . . ." A disclaimer preceding the forms stated: "Neither the State Bar of California nor its Committee on Mandatory Fee Arbitration makes any representations or warranties of any kind, express or implied, concerning the legal adequacy or enforceability of any of the accompanying forms or any part of them." Further, the first page of each form warned that the "forms are intended [only] to satisfy the basic requirements of [section] 6148" pertaining to a written fee contract and that the "State Bar makes no representation of any kind, express or implied, concerning the use of these forms." In any event, respondent must assume responsibility for his fee agreement with the Gutierrezes.

d. Rule 4-100(B)(4)

Rule 4-100(B)(4) provides that as requested by a client, an attorney must promptly pay funds which are in the attorney's possession and which the client is entitled to receive. When Carmella Gutierrez ended respondent's services on May 22, 1992, she asked for a refund of the $150 in advanced costs. Respondent sent the Gutierrezes a $150 refund for the advanced costs on August 12, 1992. The judge concluded that the delay in sending the $150 refund was a wilful violation of rule 4-100(B)(4). We agree with this conclusion, which respondent does not dispute.

4. Willard matter

In April 1990, Joey Willard retained respondent to represent her in a marital dissolution matter. She paid him $5,500 in advance with the understanding that he would ask for more money when the $5,500 was expended.

Respondent wanted more money in November 1990. He and Willard discussed the possibility of seeking additional fees from funds held in a trust account by Nancy Bunn, her husband's attorney.

Both Willard and her husband wanted funds from the trust account. Respondent negotiated with Bunn, who agreed to distribute $5,000 to each party.

Respondent received a $5,000 check, which represented a distribution of community property and which was made payable to Willard, not to respondent. The check indicated only that it was an advance of community assets. Respondent signed Willard's name on the check, deposited it in his general account as a fee payment, and sent Willard a billing statement indicating what he had done.[12]

Rule 4-100(A) requires an attorney to deposit all funds received for clients in a trust account. Stressing that the $5,000 check distributed community property to Willard and did not indicate any use for fees, the judge concluded that respondent wilfully violated rule 4-100(A) by depositing the check in his general account rather than a trust account. We agree with this conclusion.

5. Jacques matter

On May 20, 1992, Gregory Jacques executed an agreement to retain respondent in a child custody matter and signed a $35,000 promissory note secured by a deed of trust to pay respondent's fees. In September 1992, Jacques filed a complaint with the State Bar about respondent. Apparently, Jacques also hired attorney Donald Carstens to pursue a malpractice action against respondent.

On September 9, 1993, respondent wrote to Carstens. In the letter, he asserted that the malpractice action had no basis and that he was contemplating the filing of an action against Jacques for malicious prosecution, slander, and libel. He also stated: "While I might be disposed to reaching some kind of settlement with Mr. Jacques, I will not do so so long as there is a complaint outstanding with The State Bar. I will leave it to Mr. Jacques to decide what to do about that."

On September 24, 1993, Jacques wrote a letter informing the State Bar that Jacques had decided to drop the complaint against respondent. On October 3, 1993, respondent reconveyed the $35,000 promissory note to Jacques.

The judge concluded that respondent did not violate section 6106 by trying to coerce Jacques into withdrawing the State Bar complaint in exchange for a reconveyance of the promissory note. In support of this conclusion, the judge cited "the same reasons" as in the Cox matter. The judge thus seems to have based the conclusion on a finding that the withdrawal of the Jacques complaint did not prevent OCTC from pursuing a disciplinary proceeding against respondent and on a finding that OCTC failed to prove that respondent knew Jacques was entitled to a reconveyance of the note. Such findings are correct, but do not establish lack of culpability under section 6106.

OCTC argues that respondent wilfully violated section 6106 by trying to induce Jacques not to cooperate with the State Bar. Respondent supports the conclusion of the judge.

We agree with OCTC. On August 7, 1992, investigator Fleming warned respondent in the Gutierrez matter that trying to induce the withdrawal of a State Bar complaint involved moral turpitude. In his letter of September 9, 1993, to Carstens, respondent stated that a settlement with Jacques required the dropping of Jacques's State Bar complaint. This statement amounted to an attempt of the sort against which Fleming had warned him. In disregarding Fleming's warning, he showed at least gross negligence. We conclude that he committed an act of moral turpitude and thus wilfully violated section 6106 by trying to thwart the disciplinary process in the Jacques matter.

12. Willard did not object to respondent's handling of the $5,000 at the time of the distribution. She later disputed his fees and obtained a $7,500 arbitration award, which he paid.

B. Factors Bearing on Discipline

1. Aggravation

The judge noted testimony against respondent's character by attorney Nancy Bunn, who opposed respondent in the Willard matter and in another case. She asserted that he often sent an associate to handle appearances, that he once sent an associate without authority to settle to a settlement conference, and that he was not well prepared for settlement discussions. The judge did not explicitly reject Bunn's personal negative opinion, but did observe that Bunn opposed respondent and may have been biased.

OCTC does not dispute this observation. Nor does OCTC argue on review that Bunn's personal negative opinion amounts to an aggravating factor.

OCTC must establish aggravating factors by clear and convincing evidence. (Std. 1.2(b).) We do not find that Bunn's testimony about her personal opinion constitutes such evidence.

Also, Bunn stated that she had conducted an informal poll of other attorneys, most of whom felt that respondent did not have a good reputation. The judge found that Bunn's testimony about the results of this poll merited no weight because no specific evidence was provided as to the questions asked or the answers received. We agree with this finding, which OCTC does not dispute.

The judge made two explicit findings in aggravation. We agree with the first finding: that respondent's misconduct evidenced multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Respondent does not dispute this finding.

The second finding in aggravation was that respondent failed to demonstrate atonement for his misconduct by not paying restitution of $5,174.50 to Cox. (See std. 1.2(b)(v).) As discussed *ante*, we raised the issue of restitution under our obligation of independent review and allowed the parties to address it at oral argument and in supplemental briefs.

OCTC contends that restitution of $5,174.50 is necessary on the ground that Cox did not authorize respondent to perform any services. We disagree with this contention. As discussed *ante*, Cox authorized the pursuit of the complaint in a conversation with Sable on July 12, 1991.

Respondent claims that the $5,174.50 fee was a reasonable fee under section 6148, subdivision (c), which provides for the collection of a reasonable fee even in the absence of a written fee contract. We disagree with this claim. As discussed *ante*, respondent is entitled only to $1,567.50 for work done through July 23, 1991, when he replied to Cox's letter of July 16, 1991.

Respondent knew that Cox's letter terminated his employment. It was unreasonable for respondent to have his firm continue working on Cox's matter without seeking authorization from Cox. Respondent neither sought nor obtained such authorization.

As discussed *ante*, respondent wilfully violated rule 3-700(D)(2) by not promptly refunding $8,432.50. The record shows that he returned $4,825.50 in August 1992. Thus, he still owes restitution of $3,607.00 (i.e., $8,432.50 minus $4,825.50) plus interest from July 23, 1991.

Respondent has demonstrated indifference toward atonement for the consequences of his misconduct by failing to pay full restitution to Cox. Such failure constitutes aggravation under standard 1.2(b)(v). We find, however, that the sum owed is $3,607.00 plus interest from July 23, 1991, not $5,174.50 plus interest from July 11, 1991.

As discussed *ante*, we agree with OCTC that respondent committed an uncharged violation of section 6068, subdivision (i) in the Cox matter. This violation constitutes an aggravating factor under standard 1.2(b)(iii).

OCTC contends that respondent lacked candor in testifying about a meeting with Bachtel and in dealing with OCTC during the investigation of the Gutierrez matter. Respondent admits that his memory of the meeting with Bachtel may have been faulty, but he denies that he made deliberate misrepresentations at trial. Also, respondent claims that he was understandably confused about Gutierrez's wishes

during the OCTC investigation. The judge, who saw and heard respondent, did not determine that he lacked candor. A trial judge's determinations which resolve issues pertaining to credibility deserve great weight. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a).) We find that the record does not clearly and convincingly establish a lack of candor by respondent.

2. Mitigation

The judge made several mitigation findings, which OCTC does not dispute. We agree with the judge that respondent's lack of a prior record of discipline constitutes a mitigating factor under standard 1.2(e)(i). More than 15 years elapsed between his admission to the bar in December 1975 and the start of his misconduct in July 1991.

We also agree with the judge that respondent established mitigation under standard 1.2(e)(vi) by demonstrating good character attested to by a wide range of references. Among these references were a judge, four attorneys, a city council member, and a long-time friend.

The scope and magnitude of respondent's volunteer work in the legal and general communities impressed the judge. We find his extensive, substantial volunteer work to be a mitigating factor. (See *Porter v. State Bar* (1990) 52 Cal.3d 518, 529; *Rose v. State Bar* (1989) 49 Cal.3d 646, 665-666.)

The judge found that respondent had changed his office practices to prevent the recurrence of misconduct. Respondent has installed voice mail, returns telephone calls personally, tries to resolve billing disputes early, and does not file an action without a signed written retainer agreement. The judge gave heavy weight to respondent's office reforms in determining the recommended period of actual suspension.

An attorney can deserve mitigating credit for reforms designed to prevent a type of misconduct which has occurred. (Cf. *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458 [remedial steps taken upon the discovery of misappropriation resulting from laxity rather than an intent to defraud]; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 797-798 [reform of lax office management practices which had caused misappropriation and commingling of funds].) We find that respondent's reforms merit some consideration insofar as they address his failure to communicate properly with clients. Yet we give his reforms little weight in mitigation because they fail to address most of his ethical violations, especially his acts of moral turpitude in the Gutierrez and Jacques matters.

Overall, the judge found that respondent's mitigation was entitled to significant weight. We agree with this finding, which OCTC does not dispute.

3. Balancing of factors bearing on discipline

The judge recommended a two-year stayed suspension and three-year probation, conditioned on actual suspension for thirty days and the payment of restitution to Cox within ninety days. This recommendation rested on the conclusions that respondent wilfully violated section 6104 and rule 3-700(D)(2) in the Cox matter; section 6068, subdivision (m) and rules 3-110(A), 3-700(A)(1), 3-700(A)(2), and 3-700(D)(2) in the Bachtel matter; rule 4-100(B)(4) in the Gutierrez matter; and rule 4-100(A) in the Willard matter. According to the judge, the only significant aggravation was respondent's failure to pay restitution to Cox. The judge gave significant overall weight to respondent's mitigation. According to the judge, respondent's office reforms constituted a factor weighing heavily in the judge's view that respondent poses no threat to the public and thus that a lengthy period of actual suspension is unnecessary.

OCTC supports the periods of stayed suspension and probation recommended by the judge. At trial, OCTC urged the judge to recommend as a probation condition that respondent be actually suspended for 90 days and until he pays restitution to Cox. On review, OCTC contends that the recommended probation conditions should be changed to increase the minimum period of actual suspension to six months and to require respondent's actual suspension until he pays restitution to Cox. OCTC supports the other probation conditions recommended by the judge. OCTC rests its disciplinary position on the judge's determinations of culpability and on

additional conclusions of culpability under section 6068, subdivision (m); section 6106; and rule 3-700(D)(2). OCTC also supports the judge's findings in aggravation and contends that respondent demonstrated lack of candor during disciplinary investigation and trial. In urging greater actual suspension, OCTC relies on standards 2.2(b), 2.4(b), and 2.6 and on *Lister v. State Bar* (1990) 51 Cal.3d 1117 (actual suspension for nine months), *Middleton v. State Bar* (1990) 51 Cal.3d 548 (actual suspension for two years), and *Cannon v. State Bar* (1990) 51 Cal.3d 1103 (disbarment).

Respondent contends that his "relatively minor misconduct" warrants no actual suspension because of his "extraordinary mitigation" and the lack of danger to the public, courts, and legal profession. He denies any merit in OCTC's arguments and suggests that his wrongdoing was less serious than the misconduct in *Chefsky v. State Bar* (1984) 36 Cal.3d 116 (actual suspension for 30 days). According to respondent, the disciplinary recommendation should include no period of actual suspension.

Our disciplinary recommendation must be consistent with our conclusions of culpability and findings in aggravation and mitigation. As discussed *ante*, we conclude that respondent wilfully violated rule 3-700(D)(2) in the Cox matter; subdivision (m) of section 6068 and rules 3-110(A), 3-700(A)(1), 3-700(A)(2), and 3-700(D)(2) in the Bachtel matter; subdivision (m) of section 6068, section 6106, rule 3-700(D)(2), and rule 4-100(B)(4) in the Gutierrez matter; rule 4-100(A) in the Willard matter; and section 6106 in the Jacques matter. In aggravation, we find that respondent engaged in multiple acts of wrongdoing, failed to pay full restitution to Cox, and committed an uncharged violation of section 6068, subdivision (i) in the Cox matter. We further find that respondent has established significant mitigation, including the absence of a prior disciplinary record, general honesty and integrity, and extensive volunteer work. We give little weight in mitigation to respondent's office reforms because they are not directly connected with most of his misconduct, particularly with his most serious wrongdoing, the violations of section 6106 in the Gutierrez and Jacques matters.

We initially consider the standards. (See *In re Morse, supra*, 11 Cal.4th at p. 206; *Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.) Under standard 1.3, discipline serves several primary purposes: protecting the public, courts, and legal profession; maintaining high professional standards by attorneys; and preserving public confidence in the legal profession. Standard 1.6(a) provides that the most severe sanction is appropriate if an attorney commits ethical violations calling for different sanctions. Of the standards applicable to respondent's ethical violations, standard 2.3 (addressing acts of moral turpitude) and standard 2.6(a) (addressing violations of section 6068) call for the gravest sanction: disbarment or suspension, depending on the gravity and nature of the offense and on the harm to the victim.

The discipline in other proceedings must also receive attention. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) The cases cited by OCTC involved far more serious wrongdoing than the current proceeding, whereas the case cited by respondent involved far less serious wrongdoing.

A recent proceeding which we find instructive is *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639. Mason made a court appearance during a 75-day suspension ordered by the Supreme Court. His improper practice of law violated his duty to support the law and involved moral turpitude. In aggravation, Mason had a prior record of discipline, in which he stipulated to commingling, failing to pay out client funds promptly, failing to provide a prompt accounting, and failing to cooperate with a disciplinary investigation. Also in aggravation, Mason signed and served a trial brief without disclosing to opposing counsel or the court that he was suspended. In mitigation, Mason presented evidence of pro bono work. The review department recommended a three-year stayed suspension and three-year probation, conditioned on a ninety-day actual suspension. The Supreme Court adopted this recommendation.

Like Mason, respondent was culpable of moral turpitude. Although respondent's misconduct was more extensive than Mason's, respondent has much less aggravation and much more mitigation than Mason.

Another instructive proceeding is *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509. The review department found Kaplan culpable of misconduct in nine matters. He failed to sign substitution of attorney forms promptly and/or to forward clients' files promptly in seven matters, failed to communicate properly in five matters, recklessly or repeatedly provided incompetent legal services in three matters, failed to endorse and return a settlement draft in one matter, and failed to pay court-ordered sanctions in one matter. In aggravation, Kaplan committed multiple acts of misconduct and significantly harmed a client. In mitigation, he had no prior record of discipline for nine years, experienced marital difficulties at the time of his misconduct, and corrected the poor law office practices underlying much of his wrongdoing. Stressing that respondent had committed no act of moral turpitude or serious misconduct, had significantly harmed only one client, and had reformed his office, the review department recommended a two-year stayed suspension and two-year probation, conditioned on a three-month actual suspension. The Supreme Court adopted this recommendation.

Unlike Kaplan, respondent engaged in two acts of moral turpitude. Yet respondent committed fewer ethical violations and has greater mitigation than Kaplan.

A disciplinary recommendation must protect the public, maintain high professional standards by attorneys, and preserve public confidence in the legal profession. Given respondent's misconduct, especially his culpability of two acts of moral turpitude, and given our findings in aggravation and mitigation, we conclude that the appropriate period of actual suspension is 90 days.

We agree with the periods of stayed suspension and probation and the probation conditions recommended by the judge, except that we increase the period of actual suspension and modify the restitution requirement for the reasons discussed *ante*. We further require that respondent comply with rule 955 of the California Rules of Court; and because of statutory changes, we alter the costs provisions recommended by the judge.

III. RECOMMENDATION

We recommend that respondent be suspended from the practice of law in the State of California for two years, that execution of the suspension order be stayed, and that respondent be placed on probation for three years. We recommend the following probation conditions: (1) that respondent be actually suspended from the practice of law in California during the first 90 days of the probation period and until he pays restitution to Jesse Cox, or the Client Security Fund if appropriate, in the sum of $3,607.00 plus interest at 10 percent per year from July 23, 1991, until paid and provides satisfactory evidence of such restitution to the Probation Unit, Office of the Chief Trial Counsel, Los Angeles; (2) that, if respondent is actually suspended for two years or more pursuant to condition (1), he remain actually suspended from the practice of law in California until he has provided proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice law, and present learning and ability in the general law pursuant to standard 1.4(c)(ii); and conditions (3) through (13) set forth by the judge in his decision. Like the judge, we recommend that respondent be ordered to pass the Multistate Professional Responsibility Examination and provide satisfactory proof of such passage within one year after the effective date of the Supreme Court's order in this proceeding. We further recommend that respondent 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 rule 955 within 30 days and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. Finally, we recommend that the State Bar be awarded costs under section 6086.10 and that these costs be payable in accordance with section 6140.7 (as amended effective January 1, 1997).

We concur:

NORIAN, J.
LONSDALE, J.[13]

13. Hon. Nancy R. Lonsdale, judge of the State Bar Court, Hearing Department, sitting by designation pursuant to rule 305 (d) of the Rules of Procedure of the State Bar of California, title II, State Bar Court Proceedings.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

John Collier Pyle

A Member of the State Bar

No. 97-H-10744

Filed July 28, 1998

SUMMARY

Respondent was charged with violating two conditions attached to a prior public reproval. In the decision imposing the prior public reproval, the hearing judge had not explicitly recited that the protection of the public and the interests of the attorney would be served by adding such duties to the public reproval, as is prescribed by rule 956 of the California Rules of Court. The hearing judge determined in this proceeding that the findings prescribed by rule 956 must be made if conditions are attached to a reproval and that respondent could not be disciplined for violating duties attached to his reproval because the findings were not made. The hearing judge dismissed the present proceeding. (Hon. Nancy R. Lonsdale, Hearing Judge.)

On summary review, the review department considered the issue of whether the two findings required by rule 956 of the California Rules of Court when adding duties to reprovals are jurisdictional, so that a respondent may collaterally attack the public reproval previously imposed on him. The review department held that the provision of rule 956 prescribing such findings is not jurisdictional and that respondent could not collaterally attack the prior reproval. The review department therefore found that the hearing judge erred by dismissing this proceeding and remanded the case to the hearing department for further proceedings.

COUNSEL FOR PARTIES

For State Bar: Esther Rogers, Lawrence J. Dal Cerro

For Respondent: John Collier Pyle, in pro. per.

HEADNOTES

[1 a-f]
101 Procedure—Jurisdiction
117 Procedure—Dismissal
139 Procedure—Miscellaneous
147 Evidence—Presumptions
161 Duty to Present Evidence

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.

165 Adequacy of Hearing Decision
173 Discipline—Ethics Exam/Ethics School
179 Discipline Conditions—Miscellaneous
194 Statutes Outside State Bar Act

As the reproval imposed on respondent in the prior disciplinary proceeding is final, it and the conditions attached to it are presumed valid and enforceable. The reproval decision is subject to collateral attack only on the grounds that the judge (1) lacked jurisdiction of the subject matter, (2) lacked personal jurisdiction over respondent, or (3) acted in excess of jurisdiction. The burden of proof is on the party who attacks the judgment to show lack of jurisdiction. Furthermore, to succeed on collateral attack, the jurisdictional defect must be proven from the face of the record in the prior proceeding. Respondent's contention that the conditions attached to his prior private reproval are subject to collateral attack because the hearing judge failed to explicitly recite in her decision two findings required by rule 956 of the California Rules of Court, that the reproval conditions would serve to protect the public and to serve respondent's interests, is an allegation that the hearing judge acted in excess of her jurisdiction. Respondent failed to prove from the face of the record in the prior reproval that the conditions attached to it would not serve to protect the public or serve respondent's interest. In any event, the unchallenged factual findings in the hearing judge's decision in the prior case establish that the hearing judge acted within her jurisdiction in attaching the conditions. Without question, the reproval conditions that he take and pass a professional responsibility examination and attend the State Bar's Ethics School will serve to protect the public and serve respondent's interests. The hearing judge's error is not a jurisdictional error that can subject the hearing judge's decision to collateral attack. At most, the error was a procedural defect that respondent waived by failing to appear in the prior proceeding and object to the hearing judge's decision on that ground.

[2] **101 Procedure—Jurisdiction**
105 Procedure—Service of Process

The two requisite elements of personal jurisdiction are (1) that respondent is a member of the State Bar for the duration of the proceeding and (2) that respondent was properly served with a copy of the notice of disciplinary charges.

[3] **101 Procedure—Jurisdiction**

Proper subject matter jurisdiction in the State Bar Court is not limited to the subject of attorney misconduct committed in the course of practicing law.

[4] **101 Procedure—Jurisdiction**
139 Procedure—Miscellaneous
161 Duty to Present Evidence
165 Adequacy of Hearing Decision
173 Discipline—Ethics Exam/Ethics School
179 Discipline Conditions—Miscellaneous
194 Statutes Outside State Bar Act

In the absence of any direct precedent construing rule 956 of the California Rules of Court, the review department held that the purpose of the rule's findings is to aid in ensuring that any duties attached to a reproval are reasonably related to its purposes. Although rule 956 prescribes a salutary requirement, it cannot be said that it is jurisdictional. The findings themselves do not go to the essential fairness of the underlying disciplinary proceeding or even a subsequent enforcement proceeding. If findings are omitted from a reproval decision to which rule 956 applies, the error can be called to the State Bar Court's attention in a timely manner. If not done timely, the objection

is waived, absent a showing that respondent was clearly prejudiced by the omitted findings. No showing of prejudice was made in this proceeding and such a claim would be hard to envision regarding the two duties that respondent was charged with violating in this proceeding: passage of a professional responsibility examination and attendance at the State Bar's Ethics School. These are requirements imposed in almost every disciplinary probation.

Additional Analysis

None

OPINION

STOVITZ, J.:

This summary review raises the issue of whether the two findings required by rule 956 of the California Rules of Court (rule 956) when adding duties to reprovals are jurisdictional so that respondent John Collier Pyle may, in this proceeding, collaterally attack the public reproval previously imposed on him in State Bar Court case number 94-O-12734 (*Pyle I*). We hold that the provision of rule 956 prescribing such findings is not jurisdictional and that respondent cannot collaterally attack the reproval imposed in *Pyle I*. We remand the case to the hearing department for further proceedings consistent with this opinion.

I. STATEMENT OF THE CASE

Since 1983, rule 956 has permitted the attachment of duties or conditions to public or private reprovals, "based upon a finding by the State Bar that protection of the public and the interests of the attorney will be served thereby."

In January 1996, after respondent's default was entered, a hearing judge filed the decision ordering respondent publicly reproved in *Pyle I*. In her decision, the hearing judge ordered respondent to comply with three added duties: make restitution to a former client, pass a professional responsibility examination and attend the State Bar's Ethics School. With respect to those duties, the hearing judge explicitly stated in her decision that the three duties were "imposed pursuant to rule 956, California Rules of Court, upon finality of this decision." The hearing judge, however, did not explicitly recite that the protection of the public and the interests of the attorney would be served by adding the duties. As far as the record shows, the State Bar did not object to the omission; and the order of reproval in *Pyle I* became final on February 2, 1996.

Respondent complied with the duty to make restitution but not the remaining two duties. In February 1997, the State Bar filed this proceeding seeking to discipline respondent for failing to comply with those two duties. (See rule 956(b); former rule 9-101, Rules Prof. Conduct; current rule 1-110.)

In respondent's pre-trial statement, filed in October 1997, he asserted for the first time that the 1996 decision reproving him omitted the two findings prescribed by rule 956. The hearing judge[1] determined that the findings prescribed by rule 956 must be made if conditions are attached to a reproval. She therefore determined respondent could not be disciplined for violating duties attached to his reproval even though he admits his failure to comply with the two duties. The hearing judge dismissed the present proceeding, and the State Bar appeals.

Neither side requested oral argument, and we submitted this matter without argument.

II. DISCUSSION

A. Appropriateness of Summary Review

At the outset, we hold that this case is appropriate for summary review under rule 308. This appeal is limited to the issue of the enforceability of a public reproval order attaching duties which lacks findings prescribed by rule 956. No facts are in dispute.

B. The Merits

The State Bar argues that the hearing judge's reference in her reproval decision to rule 956 was sufficient notwithstanding her failure to make findings and that respondent waived any defect in her reproval decision when he failed to object for more than 18 months. Respondent supports the decision of the hearing judge to dismiss the current enforcement proceeding.

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1. The hearing judge who presided over the proceeding reproving respondent in 1996 was the same hearing judge who presided over this proceeding.

In our analysis of this first-impression question, we believe that the critical issue is whether the omitted findings are jurisdictional. If they are, respondent may collaterally attack the reproval in *Pyle I* and the dismissal ordered by the hearing judge in this proceeding must be affirmed. If they are not, the prior reproval is not subject to attack and the dismissal must be reversed; and the proceeding remanded.

The State Bar argues, by comparing rules of court in other subject areas, that rule 956 does not mandate that the two required findings be expressly made. However, since the law recognizes that the term "jurisdiction" is not synonymous with "mandatory" (*People v. Valdez* (1995) 33 Cal.App.4th 1633, 1639; *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 772), even if the rule 956 findings are mandatory, they would not necessarily be jurisdictional. As *Garamendi* recognizes, the failure to comply with a mandatory procedural rule does not render a judicial ruling void. (20 Cal.App.4th at p. 772.) The term "jurisdiction" has several and broad meanings (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288), often relating to the rights of due process and the essential power of a court to decide a matter before it. (See 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 1, pp. 545-546.) Applying these principles, we are of the opinion that the findings prescribed by rule 956 are not jurisdictional.

[1a] Respondent's contention that he may not be disciplined for failing to comply with the conditions attached to that reproval is a collateral attack on the reproval decision. (Cf. 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §7, p. 515 ["Actions to prevent enforcement of [a] judgment or to defeat rights acquired under it are . . . collateral attacks on the judgment. (Citations.)"].) In that regard, a judgment or order of a California court is presumed valid. (Evid. Code, §666.)[2] That is "the court is presumed to have jurisdiction of the subject matter and the person, and to have acted within its jurisdiction. The judgment need not recite jurisdictional facts and a party relying on it need not plead or prove the jurisdictional facts. The burden of proof is on the party who attacks the judgment to show lack of jurisdiction." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §5, p. 513.)

[1b] Accordingly, because the reproval imposed on respondent in *Pyle I* is final, it and the conditions attached to it are presumed valid and enforceable. (Evid. Code, §666.) Thus, the reproval decision, like all final judgments, is subject to collateral attack only on the grounds that the judge (1) lacked jurisdiction of the subject matter, (2) lacked personal jurisdiction over respondent, or (3) acted in excess of her jurisdiction. (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §6, p. 514.) Furthermore, to succeed on collateral attack, respondent must prove one of those jurisdictional defects from the face of the record in *Pyle I.* (Evid. Code, §§605, 606, 660; 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §11, p. 518.)

1. Personal and Subject Matter Jurisdiction

Respondent has not alleged, much less proved, that the hearing department lacked personal or subject matter jurisdiction in *Pyle I.* **[2]** The unchallenged factual findings recited in the hearing judge's decision in *Pyle I* establish the two requisite elements of personal jurisdiction: (1) that respondent was a member of the State Bar for the duration of the proceeding (see, generally, Bus. & Prof. Code, §§6077, 6078, 6100) and (2) that respondent was properly served with a copy of the notice of disciplinary charges (see, generally, Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 60; *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186).

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2. Formerly, the presumption of validity applied only to the judgments and orders of California's courts of general jurisdiction. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 5, p. 513.) However, the presumption was extended to the judgments and orders of all California courts in 1967 by Evidence Code section 666. (See 2 Witkin, Cal. Procedure (4th ed. 1997) Courts, § 168, pp. 227-228; 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 16, pp. 521-522.)

[1c] Moreover, the unchallenged findings recited in the hearing judge's decision establish jurisdiction of the subject matter. The proper subject matter jurisdiction in *Pyle I* was that respondent committed misconduct during his representation of a client.[3] **[3 - see fn. 3]** (See, generally, Bus. & Prof. Code, §§6077, 6078.)

2. Acts in Excess of Jurisdiction

[1d] Respondent's contention that the conditions attached to his private reproval in *Pyle I* are subject to collateral attack because the hearing judge failed to explicitly recite, in her decision, that the reproval conditions would serve to protect the public and to serve respondent's interests is an allegation that the hearing judge acted in excess of her jurisdiction when she attached the three conditions to respondent's reproval. Thus, respondent has the burden to prove from the face of the record in *Pyle I* that the conditions attached to respondent's reproval will not serve to protect the public or serve respondent's interest. Respondent, however, has not done so.

[1e] In any event, the unchallenged factual findings in the hearing judge's decision in *Pyle I* establish that the hearing judge acted within her jurisdiction in attaching the conditions to respondent's reproval. Without question, the reproval conditions attached to respondent's reproval that he take and pass a professional responsibility examination and attend the State Bar's Ethics School will serve to protect the public and serve respondent's interests.

In *Pyle I*, respondent was found culpable of failing to return an unearned fee in a single client matter in violation of rule 3-700(D)(2) of the Rules of Professional Conduct and of failing to cooperate with the State Bar's investigation of that matter in violation of Business and Professions Code section 6068, subdivision (i). Requiring respondent to pass a professional responsibility examination and attend Ethics School will serve to protect the public and serve respondent's interests by ensuring that respondent knows his professional duties. (See, generally, *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891 ["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"].) In addition, the conditions should cause respondent "to reevaluate and reflect upon the moral standards of the profession, and thereby more deeply appreciate his responsibilities to society as a whole." (*Ibid.*)

[1f] In short, the hearing judge's error in not explicitly reciting that she found that the conditions attached to respondent's reproval would serve to protect the public and serve respondent's interests is not a jurisdictional error that can subject the hearing judge's decision in *Pyle I* to collateral attack in this or any other proceeding. At most, the hearing judge's error was a procedural defect that respondent waived by failing to appear in *Pyle I* and object to the hearing judge's decision on that ground. (See *post*; cf. *Barnum v. State Bar* (1990) 52 Cal.3d 104, 110 [attorney waived evidentiary objections by absenting himself from the State Bar Court proceeding]; see also *In re Brown* (1995) 12 Cal.4th 205, 215 [attorney waived defense of double jeopardy where he raised it for the first time before the Supreme Court].)

Our holding is supported by review of decisions in the area of attorney regulation. We of course acknowledge the indisputable principle that State Bar proceedings are unique. They are neither purely civil, criminal or administrative in nature. (E.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302.) They have as their chief purposes the protection of the public, the maintenance of proper professional standards and the promotion of public confidence in the legal profession. (E.g., *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 198.)

3. [3] Proper subject matter jurisdiction in the State Bar Court is not limited to the subject of attorney misconduct committed in the course of practicing law. (See, e.g., Bus. & Prof. Code, § 6101 [discipline for criminal convictions involving moral turpitude]; *In re Kelley* (1990) 52 Cal.3d 487, 494-497 [discipline for acts of "other misconduct warranting discipline"]; *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [discipline for misconduct pre-dating admission that was unknown to the Committee of Bar Examiners].)

Over the years, the Supreme Court has held that a number of important procedural requirements are not jurisdictional in these proceedings. These include time limits designed to specify when investigations are to be completed, proceedings taken, or decisions filed (e.g., *Mrakich v. State Bar* (1973) 8 Cal.3d 896, 906; *Vaughn v. State Bar* (1973) 9 Cal.3d 698, 702; *Taylor v. State Bar* (1974) 11 Cal.3d 424, 434), or rules barring action after two years of a decision not to institute formal proceedings (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 120-121, fn.3). The Supreme Court has also held that the time period prescribed in rule 951(d), California Rules of Court, to file written objections is not jurisdictional. (*In re Jones* (1971) 5 Cal.3d 390, 394.)

Further, the Supreme Court has ruled that attorneys accused of professional misconduct have waived certain claims of error by failing to timely object to certain procedural defects. (See *Blair v. State Bar* (1980) 27 Cal.3d 407, 412-413 [failure to object to consolidation of proceedings]; *Calvert v. State Bar* (1991) 54 Cal.3d 765, 775-776 [failure to seek disqualification of panel member in manner prescribed by procedural rules]; *Farnham v. State Bar* (1976) 17 Cal.3d 605, 609, fn.4 [failure to object to alleged violation of discovery rules].)

[4] In the absence of any direct precedent construing rule 956,[4] we hold that the purpose of the rule's findings is to aid in ensuring that any duties attached to a reproval are reasonably related to its purposes. We so conclude because duties attached to reprovals are typically identical to conditions of probation. Existing law has long required conditions of probation to be reasonably related to the offense. (See Bus. & Prof. Code, § 6093 (a); see also *People v. Torres* (1997) 52 Cal.App.4th 771, 782 [condition of criminal probation must bear reasonable relation to the offense and offender].) Although rule 956 prescribes a salutary requirement, we cannot say that it is jurisdictional. The findings themselves do not go to the essential fairness of the underlying disciplinary proceeding or even a subsequent enforcement proceeding. If findings are omitted from a reproval decision to which rule 956 applies, the error can be called to the State Bar Court's attention in a timely manner. If not done timely, the objection is waived, absent a showing that respondent was clearly prejudiced by the omitted findings. (Cf. *People v. Valdez, supra*, 33 Cal.App.4th at pp. 1639-1640 [failure of superior court to refer to municipal court defendant's motion to withdraw a guilty plea entered in municipal court was not error requiring reversal if defendant was not prejudiced].) No showing of prejudice is made in this proceeding and such a claim would be hard to envision regarding the two duties that respondent is charged with violating in this proceeding: passage of a professional responsibility examination and attendance at the State Bar's Ethics School. These are requirements imposed in almost every disciplinary probation. (See e.g., *Segretti v. State Bar, supra*, 15 Cal.3d at pp. 890-891 [professional responsibility examination]; rule 290(a), Rules Proc. of State Bar [Ethics School].)

III. CONCLUSION

On this record, the hearing judge erred by dismissing this proceeding solely because of her earlier failure to properly make the findings prescribed by rule 956. This proceeding is remanded to the hearing department for further proceedings consistent with this opinion.

We concur:

OBRIEN, P.J.
NORIAN, J.

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4. We do not mean this opinion to suggest any lack of deference to the Supreme Court by our construing rule 956. Clearly, rule 956 is the Supreme Court's own rule; and that court has inherent control not only over its rules, but also over the entire subject of lawyer discipline and regulation. (E.g., *In re Jones, supra*, 5 Cal.3d at p. 394 [rule 951].)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Cristeta S. Paguirigan

A Member of the State Bar

No. 97-C-15057

Filed December 8, 1998

[Editor's Note: Review Granted (S076968). The State Bar Court Review Department opinion superseded by *In re Paguirigan* (2001) 25 Cal.4th 1. The State Bar Court Review Department opinion previously published at pp. 936 - 941 has been deleted from the *California State Bar Court Reporter*.]

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.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

Clifford R. Weber

A Member of the State Bar

No. 97-C-10652

Filed December 8, 1998

SUMMARY

In this companion case to *In the Matter of Paguirigan*, Respondent was convicted of a felony involving moral turpitude, mail fraud (18 U.S.C., § 1341), and was also convicted of a felony violation of 26 U.S.C. § 7206(2), aiding and assisting the filing of a false tax return, a crime which may or may not involve moral turpitude or other misconduct warranting discipline. The State Bar requested that the review department recommend to the Supreme Court, respondent's summary disbarment. Respondent opposed the State Bar's request.

After reconsidering the analysis for deciding whether to recommend summary disbarment when an attorney stands finally convicted of a felony meeting the legal requirements for that remedy, the review department recommended respondent's summary disbarment pursuant to the provisions of Business and Professions Code section 6102(c). For the reasons set forth in *Paguirigan*, the review department clarified and limited some of the discussion in their earlier decisions of *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71, and *In the Matter of Salameh* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 729.

COUNSEL FOR PARTIES

For State Bar:	Russell G. Weiner
For Respondent:	Diane L. Karpman Joanne Earls Robbins

HEADNOTES

[1] 159 **Evidence—Miscellaneous**
1699 **Conviction Cases—Miscellaneous Issues**
Only as to matters in which a conviction is referred by the review department for a hearing and recommendation as to discipline and thereafter considered by the Supreme Court, will the Supreme Court consider all facts underlying a conviction when deciding on the 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.

[2a-b] **130 Procedure—Procedure on Review**
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1521 Conviction Matters—Moral Turpitude—Per Se
1553.10 Conviction Matters—Standards—Enumerated Felonies—Summary Disbarment
1610 Conviction Matters—Discipline—Disbarment

Past Supreme Court practice in considering automatic or summary disbarment was not found by the review department to entail weighing and balancing issues such as the motive of the attorney in committing the crime, the extent to which harm did or did not occur, whether the offenses were limited or repeated or other issues pertaining to evidence bearing on either mitigating or aggravating circumstances. Therefore, to the extent that language in the review department opinions *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71, and *In the Matter of Salameh* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 729, would require the review department to undertake such an analysis, such language was disapproved. Although respondent denies that his offense was serious enough to warrant disbarment, all the facts are not before us nor are they undisputed. What is undisputed is that respondent stands finally convicted, inter alia, of mail fraud, a felony which unquestionably involves moral turpitude; and, as we observed collectively in *Segall* and *Salameh*, is the type of offense which has often resulted in disbarment. Our reading of the summary disbarment law and past Supreme Court practice, would not warrant any exception to a summary disbarment recommendation based on respondent's claims.

[3] **130 Procedure—Procedure on Review**
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings

With respect the considered views of the federal judge who presided over the criminal proceeding, the review department was bound by Supreme Court precedent rejecting consideration of very similar remarks by a sentencing judge expressing an opinion on an issue within the unique province of the Supreme Court and of the State Bar Court acting as the Supreme Court's arm.

ADDITIONAL ANALYSIS

Discipline
175 Discipline—Rule 955
178.10 Costs—Imposed

OPINION

STOVITZ, J.:

This review is a companion case to *In the Matter of Paguirigan* we also decide today. As in *Paguirigan*, this case causes us to reconsider the analysis for deciding whether to recommend summary disbarment when an attorney stands finally convicted of a felony meeting the legal requirements for that remedy.

Respondent, Clifford R. Weber, was convicted of a felony involving moral turpitude, mail fraud (18 U.S.C., § 1341). Respondent accepted rebates or "kickbacks" from a chiropractor in 1993 and 1994, totaling $5,800 for the referral of client accident victims and concealed that income from the clients and insurers. He was also convicted of a felony violation of 26 U.S.C., § 7206(2), aiding and assisting the filing of a false tax return, a crime which may or may not involve moral turpitude or other misconduct warranting discipline. This tax offense appears to involve respondent's failure to declare as income the fruits of his fraudulent activity. Following prescribed procedure, we ordered respondent interimly suspended. (Bus. & Prof. Code, § 6102 (a).) Respondent's conviction is now final and the State Bar's Office of Chief Trial Counsel (State Bar) has requested that we recommend to the Supreme Court, respondent's summary disbarment. (Bus. & Prof. Code, § 6102 (c).) Respondent opposes the State Bar's request, urging that summary disbarment is not appropriate because summary disbarment is not automatic and mandatory, that the Supreme Court considers all relevant evidence in imposing discipline and that the nature of respondent's offense warrants less than disbarment. The State Bar contends that all of the elements of the summary disbarment statute are met in this case.

Because of the importance of the question, we set this matter for oral argument together with the *Paguirigan* case. Fully considering the record and applicable law, we now recommend respondent's summary disbarment. For the reasons set forth in *Paguirigan*, we clarify and limit some of the discussion in our earlier decisions of *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71, and *In the Matter of Salameh* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 729.

I. STATEMENT OF THE CASE

In January, 1997, respondent pled guilty to one felony count of mail fraud, and one felony count of assisting or aiding in the filing of a false tax return. In May 1997, respondent was fined and placed on three years of probation on each offense, to run concurrently. On March 20, 1998, the State Bar transmitted the complete record of respondent's conviction to us.

On March 25, 1998, we noted that respondent was convicted of a felony involving moral turpitude. Following prescribed procedure in such cases, we ordered respondent suspended from the practice of law until final disposition of this proceeding. On May 20, 1998, the State Bar filed with us evidence that respondent's conviction was final and requested that we recommend that he be summarily disbarred. (Bus. & Prof. Code, § 6102 (c).) We directed respondent to show cause why we should not recommend summary disbarment. Upon consideration of the State Bar's motion and respondent's reply, we set this matter for argument, inviting the parties to brief the matter further, including on the issues of whether the Supreme Court declined to impose automatic disbarment prior to 1955 where the case otherwise met the statutory criteria, the power of our authority under rule 951(a), California Rules of Court and the interpretation of language in *In the Matter of Segall, supra*, 2 Cal. State Bar Ct. Rptr. 71.)

Respondent's lengthy submission includes a letter written to our court by the federal judge who presided over respondent's criminal proceeding and explained why that judge sentenced respondent to probation. That judge wrote, in part, that "The facts presented. . .did not present the usual egregarious [sic] facts found in federal felony convictions. At best, this was a case of a failure to disclose a rebate relationship between the medical provider and attorney. I sincerely believe that Summary Disbarment. . .would be tragic and excessive under the circumstances of the case before me."

II. BACKGROUND AND HISTORY OF SUMMARY DISBARMENT STATUTES

In the companion case of *In the Matter of Paguirigan*, we reviewed the background of summary or automatic disbarment prior to and after 1955. We incorporate that discussion here and will not repeat it.

III. DISCUSSION

Respondent has urged several arguments in opposition to the State Bar's request for his summary disbarment. He first contends that summary disbarment is not automatic and mandatory. As we discussed in the companion case of *In the Matter of Paguirigan*, in every case of an attorney's final conviction of a crime eligible for summary disbarment of which we are aware prior to 1955, the Supreme Court imposed that discipline. Respondent cites our *Segall* decision to support his point, but for the reasons we state in *Paguirigan*, *Segall's* discussion must be limited to reflect Supreme Court practice in considering summary disbarment prior to 1955.

[1] Respondent claims that when deciding on the appropriate discipline, the Supreme Court will consider all facts underlying the conviction. We agree with that point but only as to matters in which a conviction is referred by us for a hearing and recommendation as to discipline and which is then considered by the Supreme Court. Respondent has cited only post-1955 convictions which were not addressable by summary disbarment. His authorities do not support application of his claim to this conviction.

As corollaries to his claim, respondent argues that the extensive character references he has offered, coupled with the very favorable statement of the trial judge, and other mitigating evidence make disbarment inherently unfair as his offense would surely result in, at most, a suspension. Based on the essential analysis we conducted in our companion case of *Paguirigan*, we must reject respondent's arguments.

[2a] *Matter of Segall, supra*, relied on by respondent, was a conviction of mail fraud as is this case. We had clear evidence that the loss far exceeded that in this case. But as we observe today in *Paguirigan*, "We do not understand past Supreme Court practice in considering automatic or summary disbarment to entail weighing and balancing issues such as the motive of the attorney in committing the crime, the extent to which harm did or did not occur, whether the offenses were limited or repeated or other issues pertaining to evidence bearing on either mitigating or aggravating circumstances. To the extent that language in *Segall* and *Salameh* would require us to undertake such an analysis, such language is disapproved."

[2b] Although respondent denies that his offense was serious enough to warrant disbarment, all the facts are not before us nor are they undisputed. What is undisputed is that respondent stands finally convicted, inter alia, of mail fraud, a felony which unquestionably involves moral turpitude; and, as we observed collectively in *Segall* and *Salameh*, is the type of offense which has often resulted in disbarment. Our reading of the summary disbarment law and past Supreme Court practice, would not warrant any exception to a summary disbarment recommendation based on respondent's claims.

[3] We respect the considered views of the federal judge who presided over the criminal proceeding, but we are bound by the Supreme Court's decision in *In re McAllister* (1939) 14 Cal.2d 602, 604, rejecting consideration of very similar remarks by a sentencing judge expressing an opinion on an issue within the unique province of the Supreme Court and of this Court acting as the Supreme Court's arm.

IV. RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Clifford R. Weber, be summarily disbarred pursuant to the provisions of Business and Professions Code section 6102(c) [eff. Jan. 1, 1997]. We do not include a recommendation that respondent comply with the provisions of rule 955, California Rules of Court, as we included such a recommendation in our order of respondent's interim suspension. We further recommend an award of costs to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

OBRIEN, P.J.
NORIAN, J.